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VOLUME XXVIII, 1915.

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762	Shivalingappa Basappa Shinre v. Revappa ...	**29**	717
764	Sheikh Haji Mutasaddi Mian v. Mahomed Idris ...	*To be printed*	
768	Laban Sardar v. Choyen Mallik	**29**	811
772	Tepu Mahammad v. Tefayet Mahammad ...	**29**	216
775	Khagaram Das v. Ram Sankar Das Pramanik ...	**27**	815
782	Khemesh Chandra Rakshit v. Abdul Hamid Sikdar ...	*To be printed.*	
787	Chuah Hooi Gnoh Neoh v. Khaw Sim Bee ...	*To be printed.*	
791	Rup Kishore Lal v. *Musammat* Neman Bibi ...	**29**	935
794	Chullan Singh v. Madho Singh ...	**28**	383
794	Mooralidhar Roy Chowdhury v. Mohini Mohan Kar ...	**30**	510
796	Christian, F. F. v. Tekaitni Narbada Koeri ...	**27**	471
804	Ahed Khondkar v. Mohendra Lall Dey ...	**29**	282
809	Abdul Majid v. Khirode Chandra Pal ...	**29**	843
814	Badranaessa Choudhrani v. Alam Gazi ...	**29**	877
817	Basir Ali v. Hafiz Nazir Ali ...	**30**	406
820	Chait Ram Rambilas v. Bridhi Chand ...	**30**	681
823	Kali Krishna Biswas v. Ram Chandra Baidya ...	**29**	896
825	Durga Mohan Gangopadhya v. Sukumar Das ...	**30**	412
826	Susil Kumar Banerjee v. Apsari Debi ...	**27**	276
835	Sasi Bhusan Mookerjee v. Radha Nath Bose ...	**25**	267
841	Puttu Lal v. *Musammat* Parbati Kunwar ...	**29**	617
849	Bidya Prasad Singh v. Bhupnarain Singh ...	**29**	629
858	Bama Charan Gorai v. Ram Kanai Dubey ...	**28**	374
860	Har Prosad Das v Bakshi Harihar Prosad Singh ...	*To be printed.*	
864	Hira Lal Ray Chaudhuri v. Lokenath Saha ...	**29**	865

(C).—19 CALCUTTA WEEKLY NOTES, 1914-15—contd.

Page of Vol. 19 C. W. N. 1914-15.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.
865	Nilmoni Chaudhuri v. Bashanta Kumar Banerji ...	29	814
867	Romes Chandra Biswas v. Golam Nabi Fakir ...	29	807
870	Sarada Prosad Bhattacharjee v. Rai Monmatha Nath Mitter Bahadur ...	28	371
872	Behary Lal Nandi v. Kedar Nath Nebu ...	29	806
873	Thakur Vasonji Morarji v. *Musammat* Chanda Bibi ...	29	781
880	Sukumari Ghosh v. Gopi Mohan Goswami ...	*To be printed.*	
882	Shyama Charan Baisya v. Prafulla Sundari Gupta ...	30	161
887	Ramjas Agarwalla v. Brajamohan Singh ...	27	244
895	Ganesh Bhagat v. Sarada Proshad Mukerjee ...	30	111
897	Janab Ali Mia v. Nazamaddin Pradhania ...	29	871
899	Sheonandan Lal v. Jaimul Abdin...	29	869
900	Parmeshwari Dassi v. Jagat Chandra Das ...	27	972
903	Peary Lal Das v. Peary Lal Dawn	22	407
905	Grand Trunk Railway Company of Canada v. Albert Nelson Robinson ...	*To be printed.*	
911	Pran Krishna Saha v. Trailakhya Nath Choudhuri ...	27	883
914	Krishna Kanta Ghosh v. Jadu Kasya ...	28	839
916	Ganda Singh v. Chuni Lal Shaha	29	862
919	Ledu Coachman v. Hiralal Bose ..	29	625
923	Emperor of India v. Nagendra Nath Sen Gupta ...	30	128

Table 5

MADRAS HIGH COURT.

(A).—38 I. L. R., MADRAS SERIES, FOR MAY-JUNE, 1915.

Page of Vol. 38 I. L. R., Mad. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.
406	Venkatanarayana Pillai v. Subbammal ...	29	298
414	Ambuja Ammal v. Appadurai Mudali ...	30	402
419	Abdul Khadir v. Ahammad Shaiwa Ravuthar ...	30	423
424	Venkatasubbiah v. Secratary of State ...	30	425
432	Parasuramayya v. Ramachandrudu	21	564
438	Lodd Govindoss Krishnadoss v. Rukmani Bai ...	21	302
442	Venkatasubbaiyer v. Krishnamurthy ...	21	568
445	Korapalu v. Narayana *alias* Naranappaya ...	22	980
450	Kathir v. Maremadissa	20	976
452	J. S. Battie v. G. E. Brown ...	30	413
456	Chairman, Municipal Council, Srirangam v. Subba Pandithar ...	20	956
459	Sri B. B. Sarvarayudu Garu v. Venkataraju ...	21	913
464	Govindan Nair v. Cheral *alias* Krishna Panduval ...	30	432
466	John Howe v. Charlotte Howe ...	21	645
472	U. A. Srinivasa Aiyangar v. Official Assignee of Madras ...	21	77

(A)—38 I. L. R. MADRAS SERIES—*concld.*

Page of Vol. 38 I. L. R., Mad. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 38 I. L. R., Mad. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
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479	Mandru Gadaba, *In re* ...	**30**	451	531	Venkatapathi Nayanivaru v. Mahomed Sahib ...	**30**	430
482	Koneti Naicker v. Gopala Ayyar...	**21**	417	535	Krishnappa Chetty v. Abdul Khader Sahib ...	**25**	11
489	Govinda Chetti v. Perumal Chetti	**30**	453	548	Saminatha Pillai v. Krishna Ayar	**28**	966
491	Phatmabi v. Haji A. Musa Sahib...	**21**	964	550	China Venkadu, *In re* ...	**22**	737
498	Kamakshamma, *In re* ...	**21**	467	551	Rosario Quadros, *In re* ...	**30**	453
500	Navajee v. Administrator-General of Madras ...	**22**	566	552	Sellandi, *In re* ...	**22**	764
509	Venkataranga Row Garu v. Raja K. V. Narasimha Rao Garu ...	**21**	842	553	Annasami Sastrial v. Ramasami Sastrial ...	**22**	39
512	Ganga Reddy v. Samarapathy Mudaly ...	**21**	681	555	Rangasami Pillai, *In re* ...	**30**	455
514	Adityam Iyer v. Rama Krishna Iyer ...	**21**	458	556	Srinivasa Iyengar v. Thiruvengadathaiyangar ...	**23**	264
519	Chidambara Chettiar v. Vaidilinga Padayachi ...	**30**	408	556	Kosa Kumaran, *In re* ...	**30**	450
524	Manager to the Lessees of the Sivaganga Zemindary v. Chidambaram Chetti ..	**21**	556	581	Vijiaraghavalu Pillai v. Theagaroya Chetti ...	**25**	345
				585	Sriramulu v. Veerasalingam ...	**25**	1001

(B).—28 MADRAS LAW JOURNAL, MAY No. 1, 1915.

Page of Vol. 28 M. L. J. 1915.	Names of Parties.	Corresponding Vol. and Page of Ind. Cas.		Page of Vol. 28 M. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
642	Hussan Ammal Bibi v. Ismal Moideen Rowther ...	**29**	976	666	Tanka Gopalan v. Tanka Rattamma	**26**	353
650	Sri Kakarlapudi Lakshminarayana Jagannada Raju Garu v. Sri Rajah Kandukuri Veera Sarabha Varah Lakshmi Narasimha Venkata Jogi ...	**29**	241	669	Patinharkara Vallabhan Chattan Rajah Avergal v. Rama Varma	**24**	519
662	Elichi Ussack v. Ramaswami Iyer	**29**	982	685	Alamelu Ammal v. Balu Ammal...	**26**	455
				690	Natesa Padayachi, *In re* ...	**29**	830
				692	Vellayanambalam v. Solai Servai	**30**	152
				696	South Indian Export Co., Ltd. v. Subbier ...	**29**	957

(C).—(1915) MADRAS WEEKLY NOTES, FOR 2ND MAY.

Page of (1915) M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of (915) M. W. N.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
365	S. Kuppuswami Aiyar v. Emperor	**29**	109	376	Rajammal v. Narayanasamy Naiker	**29**	908
369	Sri Rajah Row Venkata Mahipaty Gangadhara Rama Row Bahadur v Sri Raja Venkata Kumara Mahipathy Surya Rao Bahadur Garu ...	**29**	356				

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NAGPUR JUDICIAL COMMISSIONER'S COURT.

11 NAGPUR LAW REPORTS, FOR MAY-JUNE, 1915.

Page of Vol. 11 N. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 11 N. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
67	Bhargava Commercial Bank, Ltd., at Jubbulpore v. Messrs. Mackinnon and Co., Old Brewery ...	**29**	339	86	Nathu v. *Musammat* Nai Bahu ...	**29**	612
76	Saiyyad Rahim v. Emperor ...	**29**	325	87	Abdul Sattar v. Secretary, Municipal Committee, Nagpur ...	**29**	660
83	Wasudeo v. Dayaram ...	**29**	609	92	Dinaji v. Laxman ...	**29**	589

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(A).—18 OUDH CASES, FOR APRIL, 1915.

Page of Vol. 18 O. C. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 18 O. C. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
95	Raja v. Mahant Santram Das ...	30	193	114	Ram Dhani v. Chaudhri Maqbul Ahmad Khan ...	30	492
104	Gori Bala Debi v. Chandika Singh	30	285	115	Raghunath Bakhsh v. Haji Sheikh Muhammad Bakhsh ...	30	200
105	Muhammad Sher Khan v. Raja Seth Swami Dayal ...	30	377	121	Wasi Ali v. Jang Bahadur Singh	30	497
109	Lachhman Prasad v. Mir Fida Husain ...	30	232	122	Ali Bakhsh v. Ghurai ...	28	180

(B).—2 OUDH LAW JOURNAL, FROM APRIL TO JUNE, 1915.

Page of Vol. 2 O. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 2 O. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
193	F. Burton, Manager, Delhi and London Bank Limited, Lucknow v. A R. Jacobson, Deputy Traffic Manager, Oudh & Rohilkhand Railway ...	30	263	241	Ram Asre v. Raja Muhammad Abdul Hassan Khan ...	30	218
195	*Musammat* Chandra Kuar v. Kuar Raghubar Singh ...	30	198	246	Chandan Singh v. Bhabhuti Singh ...	30	220
198	Sukh Mangal Tewari v. *Musammat* Raunaq Bibi ...	30	199	251	Raghubar v. King-Emperor ...	30	433
200	Raghunath Bakhsh v. Haji Sheikh Muhammad Bakhsh ...	30	200	254	Mir Ahsan Ali v. Nawab Mirza Muhammad Jafar Ali Khan ...	30	86
206	Baij Nath v. Sheo Gobind ...	30	203	255	Ram Prasad v. Dalla ...	30	86
208	Jagannath Bakhsh v. *Musammat* Mendana ...	30	204	257	Mardan Singh v. Sheoraj Narain Singh ...	30	322
212	Nawab Syed Raza Husain v. Gaya Prasad ...	30	205	259	Parmeshri Das v. Girdhari Lal ...	30	240
214	Nisar Husain v. *Musammat* Ashraf-un-nisa ...	30	239	269	Abdul Rahman Khan v. Amir Ali Khan ...	30	249
216	Ali Muhammad v. Ali Khanum ..	30	230	275	Hem Nath v. Baldeo Singh ...	30	257
220	Lachhman Prasad v. Mir Fida Husain ...	30	232	276	Ram Sarup v. Suraj Din ...	30	258
225	Gur Charan Prasad v. *Musammat* Bachni ...	30	238	279	Mahadeo v. Jagannath ...	30	261
228	Raja v. Mahan Sant Rain Das ...	30	193	283	Mankaran Singh v. Baijnath Singh	30	279
237	Narendra Bahadur Singh v. Haji Abdul Haq ...	30	216	285	Mirza Muhammad Ahmad Shah v. Saiyed Muhammad Taqi ...	30	281
				289	Srimati Giribala Devi v. Chandika Singh ...	30	285
				291	Mir Syed Husain v. Bank of Upper India, Limited Lucknow	30	289
				298	Udit Misra v Raja Muhammad Mehdi Ali Khan ...	29	656

(B).—2 OUDH LAW JOURNAL, 1915—concld.

Page of Vol. 2 O. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.		Page of Vol. 2 O. L. J. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
		V.	P.			V.	P.
299	Habib Ullah Shah v. Bakhat Bali Singh ...	30	292	359	Thakurain Sri Ram Kuar v. Hanoman Singh ...	30	373
305	Pandit Sheodat Prasad v. Lala Suraj Bali ...	30	295	361	Rudra Singh v. Jangi Singh ...	30	371
313	*Musammat* Sughra Bibi v. Babu Kamlapat Ram ...	30	269	364	Sarfaraz v. Ram Pande ...	30	375
320	Bhagwat v. Rai Krishna Pal Singh ...	30	276	365	Lekha Singh v. Bodil Singh ...	30	384
321	Abdul Salam v. Abdul Rahman ...	30	209	367	Ganga Din Shukul v. Rai Krishna Prasad Singh ...	30	387
325	Sheo Lal v. *Musammat* Kripala ...	30	211	368	Gajadhar Lal v. *Musammat* Gulaba ...	30	388
327	Kunj Behari Lal v. Ram Sahai ...	30	213	370	Lala Ganesh Prasad v. Sheo Dayal ...	30	392
332	Jawala Prasad v. Bachcha Ram	30	223	371	Muhammad Khan v. Bechan Khan ...	30	374
335	Hirde, *alias* Hardin v. Raja Muhammad Abdul Hasan Khan ...	30	207	372	Muhammad Sher Khan v. Raja Seth Swami Dayal ...	30	377
338	Jangi Ram v. Chaudhri Sheoraj Singh ...	30	234	377	Bechu Singh v. Beni Singh ...	30	380
346	Brijraj Singh v. Ganga Bakhsh Singh ...	28	855	378	Ram Nath v. Mahadeo Prasad ...	30	382
351	Bhairon v. Lala Shankar Sahai ...	30	208	381	Raja Udit Narain Singh v. Ram Bali ...	30	316
352	Bhagwan Dat v. Ram Dhan ...	30	206	383	Raja Bindeshwari Prasad Singh v. Bisheshwar Singh ...	30	499
353	Lotan Goshain v. Ajodhya Estate	30	425				
357	Syed Nazim Husain v. Lala Mahabir Prasad ...	30	224				

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PUNJAB CHIEF COURT.

(A).—16 PUNJAB LAW REPORTER, FOR MAY-JUNE, 1915.

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		V.	P.			V.	P.
91	Ronki v. Crown ...	27	896	98	Muhammad v. Muzaffar ...	26	388
92	Teku v. Buta Singh ...	27	766	99	Gokal Chand v. Lahore Bank, Ltd.	28	431
93	Nur Khan v. Crown ...	28	764	100	Maughi Ram v. Firm of Ram Saran Das-Maman Chand ...	26	415
94	Arura v. Crown ...	27	762	101	*Musammat* Fatima v. *Musammat* Rani ..	28	507
95	Bega Singh v. Crown ...	27	754				
96	Sahib Rai v. Chait Ram ...	28	427				
97	Khair Din v. Hakim Bibi ...	28	421				

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102	Motan Das v. *Musammat* Morni Bai ...	26	450
103	Khubi v. Chottu ...	28	298
104	Murad Ali v. Chiragh Din ...	28	550
105	Thakar Das v. *Musammat* Nandi Bai	28	375
106	Charagh Din v. Ahmad Din ...	26	497
107	Harji Mal v. Municipal Committee, Delhi ...	29	766
108	Khilanda Ram v. Nanda Ram .	29	766
109	Sangat Singh v. Uttam Singh ...	29	769
110	Jagan Nath v. Gopi Chand, Managing Director of the Popular Insurance Company Limited, Rawalpindi	29	770
111	Wadhawa v. *Musammat* Hassi ...	29	778
112	Indar v. Moti Ram ...	29	780
113	Khiali Ram v. Official Liquidator of the People's Bank of India, Ltd. ...	28	600
114	Kanwar Ranzor Singh v. Gayan...	29	785
115	Hira v. *Musammat* Ghathu ...	29	789
116	Ghulam Akbar Khan v. *Musammat* Bakht Bibi ...	29	796
117	Kishen Singh v. Sohna ...	29	799
118	Hazara Singh v. Arur Singh ...	29	801
119	Crown v. Mohan Lal ...	30	157
120	Karm Ilahi v. Nur Mahi ...	27	593
121	Ghaman v. Kanhya Mal ...	26	426
122	Bhim Singh v. Jot Ram ...	26	530
123	Munshi Ram v. Gainda Mal	26	390
124	Thiraj v. Kasim	26	481
125	Fateh Singh v. Sant Singh ...	27	29
126	*Musammat* Umat-ul-Mugni Begum v Salig Ram	29	137
127	Kadir Bakhsh v. Sundar Lal	27	837
128	Maharaj Das v. Gian Singh	27	481
129	Pahlwan v. Crown	27	840
130	Sita Ram v. Crown	27	838
131	Lachhman Das v. Crown ...	27	216
132	Gayan Singh v. Crown	29	94
133	Tirath Singh v. Ram Chand	26	519
134	Abdul Karim v. Emperor ...	26	666
135	Diwan Chand v. Jiwan Mal ...	26	910
136	Khaira *alias* Khair-ud-din v. Jaggu Shah	26	833
137	*Musammat* Ishar Devi v. Bindraban	26	686
138	Ganesha Singh v. Shankar Lal, Official Liquidator, General Trading Company, Kahuta ...	28	142
139	Narpat Rai v. Devi Das ...	29	755
140	Devi Das v. Narpat Rai ...	29	759
141	Mayya v. Nihala ...	28	234
142	Dyal Singh v. Gian Singh ...	27	769
143	Muhammad Hussain v. Qamar-ul-Zaman	28	238
144	Chanda Singh v. Mukand Singh ..	29	761

(B).—50 PUNJAB RECORD, FOR MAY-JUNE, 1915.

No. of Vol. 50 P. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
	Civil.		
32	*Musammat* Sultan Bibi v. Ghulam Haidar Khan ...	24	358
33	Motan Dass v. *Musammat* Morni Bai ...	26	450
34	Ata Muhammad Khan v. *Musammat* Jiwani ...	26	492
35	*Musammat* Radhi v. Punnu ...	29	561
36	Gokal Chand v. Lahore Bank, Limited ...	28	431
	Civil—contd.		
37	Kanshi Ram v. Kishor Chand, Liquidator of the Engineers and Contractors Company, Limited...	29	567
38	Kesar Singh v. *Musammat* Dayali	29	570
39	*Musammat* Bhambul Devi v. Narain Singh ...	29	572
40	Harkishen Lal v. Saraswati Ram	28	286
41	Hadu v. Lala ...	21	951
42	Makhan Lal v. Ganeshi Lal ...	30	84

No. of Vol. 50 P. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1914-15.	
	Civil—concld.	V.	P.
43	Fateh Singh v. Sant Singh ...	**27**	29
44	Shamir Khan v. *Musammat* Ghulam Fatima ...	**29**	655
45	Ahmad Khan v. *Musammat* Bakhtawar ...	**28**	951
46	Tarachand Jerandas v. Official Liquidators, Peoples' Bank of India, Ltd. ...	**29**	265
47	Abdul Ghafur Khan v. *Musammat* Musharraf Bi ...	**29**	7
48	*Musammat* Zohra Jan v. *Musammat* Rajan Bibi ...	**28**	402
49	Rahim Bakhsh v. Umar Din ...	**29**	382
50	Gopal Singh v. Prabh Diyal Singh	**29**	650

No. of Vol. 50 P. R. 1914.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1915.	
	Criminal.	V.	P.
9	Sharfa v. Crown ...	**29**	669
10	Crown v. Sher Singh ...	**29**	821
11	Tara Singh v. Crown ...	**29**	817
12	Natha Singh v. Crown	**29**	823
13	Ladha Singh v. Crown ...	**28**	107
14	Muhammad Sharif v. Crown	**29**	826
15	Ahar Singh v. Crown ...	**29**	827
	Revenue.		
1	Lakhi v. *Malik* Dost Mohammad Khan ...	**29**	498
2	Lakhmi Das v. Hayat ...	**29**	502

(C).—10 PUNJAB WEEKLY REPORTER, FOR MAY-JUNE 6, 1915.

No. of Vol. 10 P. W. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas.	
	Civil.	V.	P.
54	Seth Radhakishen v. The Firm Ladha Mal, Ram Chand ...	**28**	347
55	Dyal Singh v. Gian Singh ...	**27**	769
56	Ganesha Singh v. Shankar Lal, Official Liquidator, General Trading Company, Kahuta ...	**28**	142
57	Muhammad Hussain v. Qamar-ul-zaman ...	**28**	238
58	Mayya v. Nihala ...	**28**	234
59	Narpat Rai v. Devi Das ...	**29**	755
60	Devi Dass v. Narpat Rai ...	**29**	759
61	Chanda Singh v. Mukand Singh...	**29**	761
62	*Musammat* Zohra Jan v. *Musammat* Rajan Bibi	**28**	402
63	Imam-ud-Din v. Khuda Bakhsh	**29**	146
64	Wadhawa v *Musammat* Hassi ...	**29**	778
65	Sangat Singh v. Uttam Singh ...	**29**	76
66	Maya Ram v. Mohan Devi ...	**29**	687
67	Harji Mal v. Municipal Committee, Delhi ...	**29**	766
68	Khilanda Ram v. Nanda Ram ...	**29**	766
69	Mehr Chand v. Amritsar Bank, Ltd.	**28**	975

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	Civil—contd.	V.	P.
70	Niamat Rai v. Kalu Ram ...	**28**	488
71	Doctor Tara Chand, Jeram Das v. Official Liquidators of the Peoples' Bank of India Ltd., Lahore ...	**29**	265
72	Muhammad Bakhsh v. Balkishan	**29**	731
73	Kalu v. Bir Singh ...	**29**	901
74	Thakar Das v. Shah Din ...	**29**	904
75	Indar v. Moti Ram ...	**29**	780
76	Kishen Sarup v. Tara Chand ...	**29**	887
77	Jam Khan v. Devi Ditta ...	**29**	888
78	Ram Labhaya v. Gopal Das ...	**29**	891
79	Milkhi Mal v. Gulab Singh ...	**29**	893
80	Dyal v. Hirde Ram ...	**29**	895
81	Muhammad Subhan v. Abdul Rahman ...	**30**	717
82	Imam Din v. Kamal ...	**29**	700
83	Fakira Mal v. Nabbu ...	**29**	751
84	Ishar Singh v. Harkishen Lal ...	**29**	754
85	Tirath Singh v. Ram Chand	**26**	519
86	Ahmad Khan v. *Musammat* Bakhtawar	**28**	951

Table 9

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9 SIND LAW REPORTER, FOR JANUARY-FEBRUARY, 1915.

Page of Vol. 9 S. L. R. 1915.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. V.	P.
1	Karachi Municipality v. Shamoo Ladha ...	30	13
10	Karachi Municipality v. Shamoo Ladha ...	30	19
11	Ghumanmal Murijmal v. Papurbai	30	24
15	Allahrakhio v. Nanji widow of Tharoo ...	29	928
17	Crown v. Kadirbux ...	30	156
20	Messrs. Forbes, Forbes, Campbell & Co. v. Official Receiver	29	933
23	Hiromal v. Faridkhan ...	29	939
27	Seth Narsoomal v. Tirathmal ...	30	51
32	Karim v. Peoples' Bank of India	30	35
34	Firm of Gopaldas v. Pahlumal Hemanmal ...	30	37
37	Crown v. Dodo ...	30	125
43	Harumal Parmanand v. Crown ...	30	456
48	Sayed Pinial Shah v. Seth Abdulla	30	25

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16 CRIMINAL LAW JOURNAL, FOR JULY-AUGUST, 1915.

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Where the nephews and grand-nephews agreeing to unite and claim property from the daughters and to divide it among themselves, got a decree against the daughters and afterwards the nephews claimed the entire property as against the grand-nephews on the allegation that they were nearest collaterals of the deceased and were thus entitled to inherit his estate in preference to the grand-nephews:

Held, that the nephews were estopped from setting up the claim by virtue of the agreement entered into between them and the grand-nephews, whether that agreement was based on correct or on mistaken recognition of an existing right in the grand-nephews. **O.** SHEOAMAR SINGH *v.* BALBHADRA SINGH, 2 O. L. J. 137; 18 O. C. 61 **357**

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Held, that the Committee had no authority to take any action subsequently under that section.

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In a suit by collaterals for possession of property left by an extinct branch of the family it appeared that one *K*, the father of the last male owner, unsuccessfully resisted in 1882 an application by the predecessor-in-title of the defendants for having his name expunged from the mutation register. The defendants continued in possession since then:

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Appeal—contd.

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——— Companies Act (VI of 1882), ss. 162, 163, 169—Order for examination, when to be made—Discretion of Court **286**

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——— Civil Procedure Code (Act V of 1908), O. IX, r. 8, O. XI, r. 21, O. XVII, r. 2—Plaintiff not present on day he was required to produce account book—Dismissal of suit—Application for restoration rejected—Dismissal of suit, when under O. XI, r. 21 **905**

——— Pleadings—Ground not taken before first Court—Compromise of criminal case—Consideration **550**

——— Pre-emption—Appeal from order passed on application for payment of pre-emptive money—Civil Procedure Code Act (V of 1908), s. 47, O XXII, r. 14 (1) **379**

——— Preliminary decree, nature of—Finding whether a party is or is not an agriculturist, if preliminary decree—Appeal, maintainability of—Decree, form of **589**

——— Civil Procedure Code (Act V of 1908), s. 11—*Res judicata*, preliminary decision as to—Preliminary decree **461**

——— Review by single Judge, appeal from **733**

——— Revisional order of single Judge, appeal from, maintainability of—Right of appeal, how conferred **527**

——— , right of—Arbitration, without intervention of Court—Civil Procedure Code (Act V of 1908), s. 104, sub-s. (1), cl. *(f)*, Sch. II, para. 21 (1)—Order filing award **557**

——— , security for costs of—Suit not vexatious—Appellant having no money, whether bound to give security **598**

——— Suit dismissed for non-production of succession certificate—Succession—Certificate, filing of, in appeal—Usufructuary mortgage and lease with premium, distinction between **383**

——— Suit dismissed on preliminary point **485**

——— Court Fees Act (VII of 1870), s. 7 (*iv*) (*f*)—Suit for rendition of accounts and winding-up of partnership—Preliminary decree—Court-fees to be *ad valorem* **262**

Appeal—concld.

——— filed beyond time—Judicial discretion of Court—Negligence of Barrister in filing appeal, whether sufficient cause—Liability **265**

——— Withdrawal of suit—Appellate Court, power of, to grant permission to withdraw suit with liberty to bring fresh action—Jurisdiction **857**

——— **Criminal,** adjournment of—Application for transfer made to High Court at earliest opportunity after receipt of notice of hearing **100**

———, **second**—Finding of fact—High Court, power of—Practice **245**

——— ——— ——— *Finding of fact without any evidence—Consideration.*

A finding of fact based on no evidence or against express *prima facie* reliable evidence is liable to be set aside in second appeal.

The reversioner of *C* sued for possession of his holding on the ground that he had become a *faqir*. The suit was compromised and the land was left with *C* *for his life only*. Thereafter *C* sold his ancestral house to *T* for Rs. 300. The reversioners again sued to set aside the sale. This case was also settled. The plaintiffs allowed *T* to keep the house on the condition of their getting Rs. 130 out of Rs. 300 and the land in possession of *C*:

Held, that the retaining by *C* of the sum of Rs. 170 was a good consideration for giving up the land. **P.** KHUBI *v.* CHOTTU, 41 P. W. R. 1915 **555**

——— ——— ———, grounds of—Finding of fact based on inadmissible evidence—Appeal—Additional evidence, irregularly admitted **14**

——— ——— ——— Malicious prosecution — False information to Police, whether commencement of prosecution—Suit for damages, whether maintainable—*Quantum* of damages **273**

——— ——— ——— Pleadings — Issue — Evidence, opportunity to produce—Appellate Court, duty of **50**

——— ——— ——— Settlement Officer's decision, whether final—Remand, if necessary **981**

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Appellate Court. *See* APPEAL **428, 857**

——— ——— ——— Court Fees Act (VII of 1870), s. 11—Proceedings for ascertainment of profits—Order directing payment of additional Court-fee within fixed time—Effect of non-payment—Appellate Court, whether can extend time—Civil Procedure Code (Act V of 1908), ss. 148, 149 **890**

——— ——— ———, powers of, to admit additional evidence—Evidence on record otherwise unintelligible **640**

——— ——— ———, power of, to permit withdrawal of suit—Non-joinder of parties, whether sufficient cause—Material irregularity—Revision **484**

Application for leave to sue *in forma pauperis*. *See* CIVIL PROCEDURE CODE, O. XXXIII, R. 5 **448**

Apportionment. *See* LAND ACQUISITION ACT (I OF 1894) **8**

Approver. *See* CRIMINAL PROCEDURE CODE, s. 337 **993**

——— ———, evidence of, value of **738**

Arbitration, *without intervention of Court—Civil Procedure Code (Act V of 1908), s. 104, sub-s. (1) cl. (f), Sch II, para. 21 (1)—Order filing award—Appeal, right of—Submission to arbitration, capacity to make—Parties, capacity of, to contract—Reference to arbitration by executor or administrator—Power to modify provisions of Will—Pure questions of law, whether to be referred to arbitration—Questions, what, to be referred—Submission, whether affects legality of award.*

In an arbitration without the intervention of the Court the fact, that a decree is drawn up on the basis of the judgment which follows the order filing an award cannot take away the right of appeal of the party aggrieved by the order.

Where such an appeal is allowed, the decree will become infructuous, the whole foundation of the decree will disappear, and it will be competent to the Appellate Court to declare that the decree had been vacated, because the order, on which it was based, had been cancelled.

Under clause (*f*) of sub-section (1) of section 104 of the Civil Procedure Code, an appeal lies from an order filing or refusing to file an award in an arbitration without the intervention of the Court.

Capacity to make a submission to arbitration is co-extensive with capacity to contract; every person capable of entering into a contract may be a party to a submission; conversely, he who cannot contract, cannot make a submission; and as a necessary corollary, in the case of persons whose capacity to contract is restricted, the power of making a submission is, in the same manner and to the same extent, limited. Consequently, if parties enter into a submission concerning a subject-matter over which one of them has no authority or only a restricted power of disposition, an award ordering such party to do that which he cannot lawfully do, will be of no legal effect whatever.

An executor or administrator is competent under certain circumstances to make a reference to arbitration; such right cannot be disputed when exercised within the limits of his authority.

But an executor cannot make a reference to arbitration with the avowed purpose that the terms of a Will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator.

Pure questions of law may be referred to the decision of an arbitrator.

As a submission only refers to the arbitrator questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void.

Submission to an arbitration does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter. **C.** SOUDAMINI GHOSE *v.* GOPAL CHANDRA GHOSE, 21 C. L. J. 273; 19 C. W. N. 948 **557**

Arbitration Act (IX of 1899), s. 12—*—Enlargement of time for making award—Discretion of Court, extent of—Interference in revision.*

The discretion given by section 12 of the Arbitration Act is very wide and should be exercised on a consideration of all the circumstances of the case. The Court is bound to consider whether the case is a fit one for granting the indulgence asked for.

The Courts of Law should not lightly interfere with the discretion deliberately exercised by a lower Court. **S.** PAMANMAL HEMANDAS *v.* HOTANBAI, 8 S. L. R. 269 **85**

Arms Act (XI of 1878), ss. 19, 20—Chhavi *concealed in loin-cloth—Attending fair—Conviction under s.* 20.

When at a largely-attended fair, where extra Police are sent on account of the large crowd, a person is found in unlawful possession of any 'arms' which he has taken the trouble to hide or conceal in his waist-band or loin-cloth, he 'has done an act mentioned in clause *(f)*' of section 19 of the Arms Act 'in such a manner as to indicate an intention that such an act may not be known to a public servant' within the meaning and for the purposes of section 20 of the said Act. **P.** KHEM SINGH *v.* EMPEROR, 76 P. L. R. 1915; 8 P. R. 1915; 16 CR. L. J. 412 **796**

——— ——— s. 20 **796**

Arrest of ship—Suit for trespass, if lies—Proof of malice or its equivalent—High Court as a Colonial Court of Admiralty, powers of—Detention—Damages, liability for **463**

Attachment. *See* CIVIL PROCEDURE CODE, O. XXI, R. 46.

——— ———, determination of. *See* CIVIL PROCEDURE CODE, O. XXI, R. 57.

Auction-purchaser. *See* MORTGAGE.

——— ——— ———, suit against. *See* CIVIL PROCEDURE CODE, S. 66.

Award. *See* ARBITRATION ACT; LAND ACQUISITION ACT.

———, *application to file—Suit referred to arbitrators—Suit compromised independently of arbitrators—Compromise signed by parties and arbitrators—No inquiry by arbitrators—Civil Procedure Code (Act V of* 1908), *Sch. II, para.* 20.

The parties after appointing arbitrators settled their differences independently of the arbitrators and drew up a deed in the form of a compromise. It was signed by the parties and the arbitrators:

Held, that the deed could not be treated as an award and an application to file it in Court as an award could not be granted. **P.** KISHEN NARAIN *v.* PURAN CHAND, 48 P. L. R. 1915 **298**

——— ——— *Limitation Act (IX of* 1908), *Sch. I, Art.* 158—*Objections raised more than ten days after award is submitted—Notice of submission necessary—Civil Procedure Code (Act V of* 1908), *Sch. II, para.* 10—*Court not properly disposing of objections to award—Revision.*

Under Article 158 of the first Schedule to Act IX of 1908 the period of ten days is to be computed from the day on which the parties receive notice that the award has been submitted to, and not from the date on which it is actually received by, the Court.

Therefore, where an award was submitted to the Court on 30th September but the parties came to know of its submission on 11th October, the petition of objections to the award presented on 20th October is within time.

An order rejecting objections to an award without adequate inquiry into them, apparently under the impression that these were not raised within time, is liable to be set aside on revision. **P.** SAHIB RAI *v.* CHAIT RAM, 30 P. W. R. 1915; 96 P. L. R. 1915 **427**

Bail. *See* SURETY

Benami transaction. *See* FRAUDULENT TRANSFER.

Bengal Court of Wards Act (IX of 1879), s. 18 **818**

Bengal Land Registration Act (VII of 1876), s. 78—*Suit dismissed for non-production of succession certificate—Appeal—Succession—Certificate, filing of, in appeal—Usufructuary mortgage and lease with premium, distinction between.*

Where a suit failed by reason of the non-production of the succession certificate in the Court of first instance, the succession certificate may be obtained and filed in the Appellate Court on the appellant paying the costs of the previous proceeding.

The term "*zurpeshgidars*" is an ambiguous one. Where it is found that no interest is chargeable and that a premium merely was paid at the inception of the lease in law, it may be considered a lease with premium and not a usufructuary mortgage. **C.** CHULHAN SINGH *v.* MADHO SINGH, 19 C. W. N. 794 **383**

Bengal Land Revenue Sales Act (XI of 1859), ss. 5, 6, 10, 11, 13, 33—*Ijmali or joint share—Separate accounts, existence of—Arrear of revenue, sale for—Proclamation of sale, when sufficient—Specification of property, requisites regarding, if complied with by a general exclusion of 'all other shares'—Gazette notification, object of—Substantial injury.*

Act XI of 1859 being a stringent enactment for the realisation of arrears of revenue, certain safeguards are provided therein for the protection of the interests of the defaulter, so that he may not be unnecessarily prejudiced. Some of those are mentioned in sections 5 and 6 of the Act, *viz.*, the notification of sales specifying the properties to be sold and their due publication in accordance with law. A compliance with the requirements of the said sections is imperative and it is in view of that that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or shares of estates advertised for sale the object of the law and the rules being to enable likely purchasers among the public to know exac ly what was going to be sold and thereby ensure reasonable competition.

There can be no difficulty in specifying an estate advertised for sale but in the case of shares of estates, the work of specification requires care and attention. No hard and fast rule can be laid down with regard to its sufficiency, as it must vary according to the facts of each particular case. What has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale.

The publication of the notice in the *Calcutta Gazette* is prescribed with the object of inviting purchasers from other quarters and not confining the bidding to

Bengal Land Revenue Sales Act— contd.

speculative money-lenders and *Mahkteas* of the neighbourhood.

Where, in the case of a sale for arrears of revenue of an *ijmali* or joint share, being the residue of a *mahal* wherein 148 owners of specific but undivided shares had obtained separation of account, the notification under sections 6 and 13 of the Revenue Sale Law (Act XI of 1859), which was published in the *Calcutta Gazette*, specified the property advertised for sale as the "*ijmali* share which cannot be specified excluding the separate accounts numbers" whose list was given, and wound-up by stating that "all other shares besides that specified are excluded from the sale," and the one affixed in the Collector's Office was similarly worded and an adjournment to postpone the sale being refused, the sale was held and the properties were purchased by the defendant-respondent:

Held, that the object of the law in prescribing the notification had been frustrated, inasmuch as they gave little or no particulars in respect of the property advertised for sale and the intending purchaser was left to gather for himself, by an elaborate process of elimination, what the property which was advertised for sale and which he was expected to bid was, that the absence of such specification of property in the notification vitiated the sale and had resulted in a paucity of genuine or substantial bidders, with the consequence that the property was knocked down for about a third of its real value and the owners of the *ijmali* share had suffered substantial injury and, that, therefore, the sale ought to be annulled. **P. C.** RAVANESHWAR PRASAD SINGH v. BAIJNATH RAM GOENKA, 2 L. W. 355; 19 C. W. N. 481; 17 M. L. T. 321; 21 C. L. J. 412; 13 A. L. J. 501; 28 M. L. J. 583; 17 BOM. L. R. 442 **699**

——— ——— -- **ss. 6, 10, 11, 13, 33** **699**

——— ——— ——— **ss. 33, 34** — *Sale amended—Final decree of a Civil Court, meaning of—Execution—Limitation.*

An estate belonging to the respondents was sold for arrears of revenue under Act XI of 1859 by the Collector on January 2nd, 1900. The proprietors preferred appeals to the Commissioner of Revenue, and he passed orders on March 21st, 1900, setting aside the sale. On the application of the auction-purchasers the Commissioner reviewed his order of March 21st and on June 21st, 1900, cancelled his order setting aside the sale, and instead, affirmed the sale. On June 20th, 1901, the respondents sued the appellant-auction-purchaser for a declaration that the Commissioner's order reviewing his first order was *ultra vires*. The suit went up to the Privy Council where it was held that the order of the 21st of March 1900 was final and conclusive and that the Commissioner had no power to review. The respondent applied for execution:

Held, that the judgment of the Privy Council was not the final decree of a Civil Court annulling a sale made under Act XI of 1859, as it only held that the Commissioner had set aside the sale and that order must stand good.

Section 34 refers to cases brought before the Civil Courts under section 33 of the Act. The two sections must be taken as closely related to each other and the rule of limitation as applying only to suits brought under section 33. **C.** BAIJ NATH GOENKA v. NAND KUMAR SINGH, 19 C. W. N. 464 **876**

——— ——— ——— **s. 34** **876**

Bengal Rent Recovery Act (VIII of 1865), s. 16—*Mokarari right, extinguishment of—Occupancy right, acquisition of.*

Where a *mokarari* right, which a party had obtained, is extinguished by operation of section 16 of Act VIII of 1865, there is nothing in law to prevent him from acquiring and retaining an occupancy right. **C.** BAMA CHARAN GOSAIN v. RAM KANAI DUBEY, 19 C. W. N. 858 **374**

Bengal Tenancy Act (VIII of 1885), s. 10 **173**

——— ——— ——— **ss. 11, 18, 85**—*Under-raiyati holding—Permanent sub-lease, right to grant—Transfer of Property Act (IV of 1882), applicability of, to tenancy.*

Section 85 of the Bengal Tenancy Act has no application to a sub-*raiyat* granting an under-lease.

The Transfer of Property Act has no application to a tenancy under the Bengal Tenancy Act and the transfer contemplated in sections 11 and 18 of that Act are transfers out and out, and not partial transfers by way of sub-lease.

The Bengal Tenancy Act does not prohibit the grant of sub-leases by an under-*raiyat* and, therefore, such sub-leases are valid documents between the grantors and the grantees. **C.** PARUSHULLA SHAIKH v. SITAL CHANDRA DAS **267**

——— ——— ——— **ss. 12, 56 (3)**—*Permanent tenure, transfer of—Landlord, statutory receipt demanded from—Tender, if vitiated—No condition imposed on landlord—Money not to be refused by landlord.*

The transfer of permanent tenure under section 12 of the Bengal Tenancy Act is complete as soon as the document is registered, in other words, a valid transfer under section 12 of the Bengal Tenancy Act operates to discharge the transferor from the liability to pay rent, which thereupon passes to the transferee.

The transferee of a tenure is entirely within his rights when he demands a receipt in the prescribed form under section 56, clause (3) of the Bengal Tenancy Act, with a statement therein that he is the tenant.

A tender is not vitiated because a receipt is asked.

When a transferee tenders money to the landlord with a request for a receipt in the statutory form, he does not seek to impose on the landlord any condition on which he is not entitled to insist and the money validly tendered can only improperly be refused by the landlord. **C** RUP CHAND GHOSE v. NARENDRA KRISHNA, 19 C. W. N. 112 **683**

——— ——— ——— **s. 18** **267**

——— ——— ——— **s. 20 (7)** — *Proof of eleven years' possession before enhancement—Presumption.*

Where possession of a land for eleven years

Bengal Tenancy Act—contd.

prior to the date of enhancement of rent is proved, there is a presumption of possession for 12 years under sub-section (7) of section 20 of the Bengal Tennacy Act. **C.** RASUL MAHMED BEPARI *v.* ABDUL FAZAL CHOWDHURI **380**

——————— **s. 28** **498**

——————— **ss. 30, 52, 28, 36 and 154**—*Excess land, additional rent for—Rent, enhancement of—Distinction—Decree for enhancement of rent, retrospective effect of—Prevailing rate, additional rent at—Measurement, presumption of—No mention of rate in* kabuliat—*Court, reference to—No obligation to pay at higher rate—Suit to recover at higher rate, if maintainable.*

Where on the interpretation of a *kabuliat*, it was plain (1) that the area of the land demised was assumed to be 15 *bighas* without actual measurement; (2) that the rent was assessed at the lump sum of Rs. 15-10 on the assumption that the area was 15 *bighas*; (3) that the landlord reserved his right to have the lands measured and the rent assessed at the prevailing rate:

Held, per *Mookerjee, J.*—that under sections 52 and 30 of the Bengal Tenancy Act, the landlord was entitled to claim additional rent for excess land as also enhancement of rent;

that there is a fundamental distinction between the claim for additional rent and the claim for enhancement of rent;

that a decree for enhancement of rent can never have retrospective operation and back rent cannot be claimed at enhanced rate in the suit in which enhancement is sought;

that the Court is not bound to allow additional rent at the prevailing rate.

Per *Beachcroft, J.*—The mere fact that a rate per *bigha* is not mentioned in the *kabuliat* does not justify the inference that there must have been a measurement before the execution of the *kabuliat*.

Where no provision is made in the *kabuliat* for the machinery by which "the rate of rent for lands paid in adjacent places" is to be ascertained or what would be the position if there are varying rates and if the parties are not agreed, the matter can only be settled by reference to Court.

Where there is no obligation on the tenant to pay a definite higher rate as each instalment of rent falls due, a suit to recover rent on the footing that he ought to have paid at the higher rate is not maintainable. **C.** EJEL MULLICK *v.* FELAI MULLICK, 21 C. L. J. 309 **498**

——————— **ss. 36, 52** **498**

——————— **ss. 52 (b), 179, 188**—*Joint tenants—Suit by a co-sharer-tenant, validity of—Abatement of rent—Diluvion, area reduced by—*Kabuliat, *construction of—*Mourasi mokarari *settlement, nature of.*

Section 188 of the Bengal Tenancy Act has no reference to joint tenants and does not prevent a co-sharer-tenant from bringing a suit authorised by the Act unless his other co-sharers join him as plaintiffs.

In a *Mourasi Mokarari* Settlement the most reasonable construction is that the tenant agreed not to claim reduction on the ground of diluvion.

Bengal Tenancy Act—contd.

The Sundarbans is a permanently settled area and permanent leases have been granted by the Government in respect thereof.

A permanent lease from a person who has made permanent improvement on the property confers permanent rights on the lessee.

Where a covenant is authorised by section 179 of the Bengal Tenancy Act, its validity cannot be impeached. **C.** KHETTERMANI DASI *v.* JIBAN KRISHNA KUNDOO, 19 C. W. N. 546; 21 C. L. J. 315 **510**

——————— **s. 56 (3)** **683**

——————— **s. 85** **267**

——————— **s. 87** **343**

——————— **ss. 103, 105,** *scope of—Rent, fair and equitable, settlement of—Co-sharer landlord, application of, whether maintainable—Landlord's challenging entry, effect of—Superior interest amongst landlord, partition of—Effect—Remedy.*

An application under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent cannot be maintained at the instance of one out of several joint landlords, it must be presented by the entire body of persons who are joint landlords.

There is a fundamental difference between the scope of section 103 and section 105. Section 103 contemplates a record of existing facts, while section 105 contemplates an alteration of existing facts

Where a landlord challenges the entry in the Record of Rights both as regards the status of the defendant and the area of the land comprised in his holding, before the Revenue Officer, who is competent under section 105A, to try and decide such an issue before the settlement of fair and equitable rent under section 105, the proceeding is in essence one under section 105 and not under section 106 of the Bengal Tenancy Act.

The mere circumstance that one of his co-sharers is not willing to join the plaintiff in an application for settlement of fair rent under section 105 does not dissolve the relationship of joint landlords amongst themselves, although it need not be disputed that the relationship can be severed by a partition of the superior interest amongst the landlords or by the creation of independent contractual obligations between each member of the body of landlords on the one hand and the tenant on the other.

The obvious remedy of a co-sharer landlord intending to maintain a proceeding under section 105, Bengal Tenancy Act, when other co-sharers do not join him, is either to effect a partition with his co-sharers or to have a common manager appointed; but till this has been done, he cannot maintain a proceeding under section 105. **C.** BEHARI LAL MALLIK *v.* PRIYA NATH SARDAR, 21 C. L. J. 305 **508**

——————— **s. 105** **508**

——————— **ss. 105, 109**—*Statutory bar—Settling rent—Settlement Officer's decision, finality of—Remand, if necessary—Appeal, second—Tenants of fixed rents, status of.*

It is impossible to get behind the statutory bar raised by section 109 to the rent fixed in proceedings under section 105 so far as the proceedings have been properly conducted.

Bengal Tenancy Act—concld.

Where a Settlement Officer goes wrong in deciding the question under section 106 which does not arise, his decision, so far as it is a decision settling rent, cannot be interfered with and on such a point no second appeal can lie, and also no remand is necessary, the question of rent being finally settled.

The tenants whose rents cannot be enhanced are at liberty to call themselves anything they like, whether settled *raiyats* or *raiyats* at fixed rates or any other class of *raiyats*. **C.** SASHI BHUSAN HAZRA *v.* ASWINI COMAR SAMANTA, 19 C. W. N. 637 **981**

——— ——— ——— ——— **s. 109** **981**

——— ——— ——— ——— **s. 154** **498**

——— ——— ——— ——— **s. 169 (c), Sch. III, Art. 2**—*Arrears of rent for period between institution of suit and confirmation of sale, landlord's claim to—Act. 2, applicability of.*

If the amount claimed by the landlord is any part of the arrears between the institution of the suit and the date of the confirmation of the sale, he is clearly entitled to it under clause (*c*) of section 169 of the Bengal Tenancy Act.

The Legislature could not have meant to apply the limitation provisions of the Schedule III, Article 2, to the express provisions of clause (*c*) of section 169, because the limitation only provides for suits and not applications. **C.** NARENDRA LAL KHAN *v.* NOBIN BEHARI BHATTACHARJYA, 19 C. W. N. 582; 21 C. L. J. 535 **133**

——— ——— ——— ——— **s. 179** **510**

——— ——— ——— ——— **s. 182**—Raiyat—*Under-raiyat—Homestead,* raiyat *holding land under a different landlord—Incidents of tenancy.*

The plaintiff was a *raiyat* and his holding consisted partly of agricultural and partly of homestead land. He let out the homestead portion to the defendants who held certain lands as *raiyats* not under the same landlord but under a different landlord and in a different village contiguous to the homestead land:

Held, that section 182 of the Bengal Tenancy Act applied, and that the provisions of the Act applicable to a *raiyat* would regulate the incidents of the tenancy of the homestead, though the defendants had only the interest of an under-*raiyat* with respect to it. **C.** KRISHNA KANTA GHOSH *v.* JADU KASYA, 21 C. L. J. 475; 19 C. W. N. 914 **839**

——— ——— ——— ——— **s. 188** **510**

——— ——— ——— ——— **Sch. III, Art. 2** **133**

Berar Land Revenue Code, 1896, s. 205—*Antenuptial gift of the interest of a co-occupant in survey number—Transfer, whether amounts to relinquishment—Gift—Pre-emption.*

Where a registered occupant of a survey number transferred his interest in the *khata* by way of antenuptial settlement and the plaintiff brought a suit for pre-emption:

Held, that the transaction did not amount to a sale or relinquishment in favour of a specified person for valuable consideration within the meaning of section 205 of the Berar Land Revenue Code but was in the nature of a gift and, therefore, was not subject to pre-emption by the other co-occupants. **N.** NARAYAN *v.* VITHOBA, 11 N. L. R. 34 **355**

Bill of lading. *See* CONTRACT.

Bombay Bhagdari and Narwadari Act (Bom. Act V of 1862), s. 3 **442**

——— ——— ——— ——— **s. 3**—*Permanent tenant of lands in a* Bhag—*Alienation by tenant of his share, whether permissible—Collector, whether can set aside alienation.*

Where rights are found to have existed before the Bhagdari and Narwadari Act, in persons not themselves *bhagdars* or *narwadars* but the *locus* of whose rights falls within what are called the *Bhags* or shares in the *bhagdari* and *narwadari* village, these rights are not any portion of such *Bhags* or shares of *bhagdari* or *narwadari* village etc., within the meaning of section 3 of the Bhagdari and Narwadari Act and the prohibitions against alienation contained therein do not apply.

Where, therefore, a permanent tenant of lands in a *bhag* before the passing of the Act, sold in 1907 his interest in the lands to the plaintiffs, but the sale was set aside by the Collector who put the defendant (the owner of the entire *bhag*) in possession in a suit to recover possession:

Held, (1) that the alienation by the permanent tenant was not prohibited by section 3 of the Act and was not null and void;

(2) that the Collector was wrong in removing the plaintiffs and putting the defendants in possession. **B.** VENIDAS NARANDAS *v.* BAI HARI, 16 BOM. L. R. 571; 38 B. 679 **127**

Bombay District Municipal Act (Bom. Act III of 1901), s. 76—*Ahmedabad Municipality Rule 84—Goods brought in by postman—Octroi duty—Inspection of account-books.*

Under section 76 of the District Municipal Act (Bom. Act III of 1901) and Rule No. 84 made under the old Act and still in force, goods brought into the walled city of Ahmedabad through the agency of the Post Office are subject to octroi duty.

The terms of section 76 (1) (*b*) do not permit a Municipal officer to claim inspection of the private account-books of merchants. **B.** AHMEDABAD MUNICIPALITY *v.* SAKARCHAND MOHAKAMCHAND, 17 BOM. L. R. 182 **480**

——— ——— ——— ——— **s. 96**—*Using room built as shop for residential purposes—"Conversion of any building," meaning of.*

The words "conversion of any building", in Explanation to section 96 of the District Municipal Act, necessarily imply some change in the building itself and, therefore, they do not cover a case where the building remains absolutely unchanged and the only thing that is changed is the use or occupation to which the building is put. **B.** ADURJI *v.* EMPEROR, 17 BOM. L. R. 212; 16 CR. L. J. 293 **517**

——— ——— ——— ——— **s. 151**—*Essential ingredients of offence—Mere disobedience of notice, whether sufficient for conviction.*

In order to render a person liable to conviction and punishment under section 151 of the Bombay District Municipal Act, it must be proved (*i*) that a notice has been given him under sub-section (1), and (*ii*) that he uses the place in question or permits it to be used in such a manner as to be a nuisance to the neighbourhood or dangerous to life, health or property. The mere fact that notice in due form was

Bombay District Municipal Act —concld.

given regarding the place on a particular date cannot be conclusive evidence that there has been user of the place in such a manner as to be a nuisance after that date. **S.** LURINDARAM *v.* KARACHI MUNICIPALITY, 8 S. L. R. 238; 16 CR. L. J. 255 **111**

Bombay Khoti Settlement Act (Bom. Act I of 1880), ss. 9, 10—*Khoti lands—Tenant resigning occupancy for consideration —Effect of resignation—Consent of* khots *necessary for a valid transfer—Contemporaneous lease—Tenant, whether estopped from showing defect in* khot's *title —Evidence Act (I of* 1872), *s.* 116.

Where the defendant purported to resign his occupancy rights in a *khotki* to the plaintiff (one of the *khots*) for consideration and synchronously with this resignation a lease for a term of five years was executed, the defendant attorning to the plaintiff in respect of these lands, on a suit by the plaintiff to recover possession after the expiry of the term:

Held, (1) that the alleged resignation must be regarded as a transfer which could only be legal under section 9 of the Act provided that the consent of the *khot* was obtained;

(2) that the transaction could not be regarded as a resignation under section 10 of the Act since it was accompanied with consideration;

(3) that as both parties were *in pari delicto*, the plaintiff was not entitled to estop the defendant from showing the illegality of the title so founded.

There is no estoppel against an Act of Legislature. **B.** SHRIDHAR BALKRISHNA VAIDYA *v.* BABAJI MULA AGARYA, 16 BOM. L. R. 586; 38 B. 709 **134**

Bombay Land Revenue Code (Act V of 1879), s. 56, *retrospective effect of—Presumption—Vested right.*

The ordinary presumption against retrospectivity of a Statute operates chiefly when a law prejudicially affects vested rights. **S.** GAGANDAS *v.* YUSIF, 8 S. L. R. 233 **95**

Buddhist Law—*Inheritance—Eldest daughter, her interest during mother's life-time.*

Under the Buddhist Law the eldest daughter during the life-time of her mother has not such an interest in the estate of her deceased father as is contemplated in section 91 of the Transfer of Property Act.

The rule appears to be as follows:—

1. The eldest daughter can only claim one-fourth of the bulk of the estate if her mother dies first and she is capable of re-placing her mother in the house-hold.

2. Sometimes the eldest daughter on marrying and leaving the parental roof is given her share of the estate during the life-time of both parents. In that case she has no further claim on the estate.

3. If this has not happened the eldest daughter on the death of her father is entitled to certain specified property and her mother gets the bulk of the estate.

4. If on the death of the father the mother marries again the eldest daughter is further entitled to one-fourth of her father's wearing apparel and ornaments, but her mother still retains the bulk of the estate. **U. B.** MI THE O *v.* MI SWE, U. B. R. 1914 II, 46 **821**

——— ——— *Inheritance—Eldest daughter—Her rights against mother.*

Buddhist Law—concld.

The texts giving the *orasa* daughter the right to claim a one-fourth share after her father's death do not authorize her to claim one-fourth from her mother, at least where her mother has not married again. **U. B.** MI HLAING *v.* MI THI, U. B. R. 1914 II, 40 **806**

——— ——— *Inheritance—Eldest son — Widow— Widow's power—Creditors of widow.*

Where the Dhammathats give the eldest son a right to one-fourth as against the mother on the death of the father they refer to the *orasa* son, or in other words, the eldest capable son. Hence, where all the sons are minors, there is no *orasa* son, and the right in question does not accrue.

With an *orasa* son, the widow would have full power to dispose of the remaining three-fourths, and on her death without alienating that share it would come down to her heirs. But her creditors proceeding against her estate would be at liberty to attach and sell it. **U. B.** NGA E *v.* NGA AUNG THEIN, U. B. R. 1914 II, 37 **804**

——— ——— *Suit for bare divorce, maintainability of—Partition.*

According to the Buddhist Law of divorce, a suit for bare divorce would not lie.

The Privy Council ruling in *Maung Pe v. Lon Ma Gale*, 11 Ind. Cas. 497; 6 L. B. R. 18; 15 C. W. N. 766; 8 A. L. J. 739; 14 C. L. J. 15; 13 Bom. L. R. 465; 21 M. L. J. 749; 38 C. 629; (1911) 1 M. W. N. 397; 4 Bur. L. T. 153; 10 M. L. T. 479, does not affect the decision in *Nga Chit Nyo v. Mi Myo Tu*, 8 Ind. Cas. 477; U. B. R. (1910) I, 30. **U. B.** MI SAW BWIN *v.* NGA SAN NYUN, U. B. R. 1914 II, 32 **801**

Building improvements—*Co-sharers—Sale of house by some of co-sharers during minority of others—New house erected by vendee—Right of minors on attaining majority—Delay in filing suit.*

By deeds of 8th July 1899 and 10th December 1901, the collaterals of the plaintiffs during their minority sold away the whole of a house in which the plaintiffs were entitled to a quarter share. On 7th July 1911, after attaining majority, the plaintiffs sued for their share in the house which was newly built by the vendees on the site of the old house. On appeal the Divisional Judge awarded the plaintiffs a quarter share in the newly built house as claimed, allowing vendee three months to clear the site:

Held, that in view of their delay in asserting title the plaintiffs were not entitled to demand that the building should be pulled down or that they should be given a share in the newly built house without reasonable compensation to the vendee for the improvements. **P.** CHATTAR SINGH *v.* RALIA RAM, 54 P. L. R. 1915 **350**

Burden of proof—Adverse possession **276**

——— ——— ——— Deed found to be forged **138**

——— ——— ——— Document — Undue influence—Circumstances dominating the will—Inference **438**

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Burden of proof—concld.

——— ——— ———Litigation expenses, liability for—Mortgage **186**

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——— ——— ———Occupancy right, nature of **916**

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——— ——— ———Party cognizant of proceedings for Probate, when can come in for revocation—Sound disposing mind **574**

——— ——— ———Promissory note—Consideration—Presumption **402**

——— ——— ———Remission of rent—Warranty—Rebate by guardian **5**

——— ——— ———Suit for declaration that sale by defendant shall not affect plaintiff's reversionary right **951**

——— ——— ———Want of consideration—Promissory note—Father and son **345**

Calcutta Municipal Act (III B. C. of 1899), ss. 3 (32), 343, 442 **653**

Cause of action. *See* CIVIL PROCEDURE CODE, O. II, R. 2.

——— ——— ——— *accrual of—Declaration that defendant is not proprietor, superior or inferior, suit for—Limitation, starting point of—Jurisdiction of Civil and Revenue Courts—Declaration that defendant is or is not agricultural tenant, suit for, maintainability of—Plaintiff owning half share in village, when entitled to declaratory decree against rights of defendant in village—Decree, declaratory, validity of.*

The cause of action for a suit for a declaration that the defendant is not a proprietor or an under-proprietor, does not necessarily accrue to the plaintiff at the time when the defendant asserts the title implying that he is not liable to ejectment and that assertion finds place in *khewat* entries, until that assertion is put forward as a substantial defence in ejectment proceedings before the Revenue Court.

A Civil Court is entitled to declare that a person is or is not an agricultural tenant, even though the Revenue Court has exclusive jurisdiction to determine the nature of the tenancy and to eject that person.

A decree for a declaration that the principal defendant is neither a superior nor an inferior proprietor in the village, is good, although the plaintiff is owner of only one half of the village, if the mortgagee in possession of the remaining half is impleaded as a defendant in the case. **O.** RAM AUTAR v. ABUL HASAN KHAN, 2 O. L. J. 131 **307**

——— ——— ———*Breach of contract of marriage—Suit for damages—Action founded on conspiracy—Malice—Father's right to breach of daughter's engagement according to Hindu Law.*

In every case founded on conspiracy, malice is essential to the giving of a good cause of action.

Where a man merely knowing of the existence of an unperformed agreement, without malice or the use of unlawful means, obtains the benefit of the agreement for himself, no action can lie against him for the breach of the agreement or procuring such breach, at the instance of the first promisee.

The plaintiff No. 1 betrothed his son, plaintiff No. 2, o one *J*. *J*'s father some time after the betrothal

Cause of action—concld.

married *J* to defendant No. 1. Upon this a suit for damages was brought on the allegation that defendant No. 1 had conspired with his sisters, defendants Nos. 2 and 3, and others wrongfully to procure the breach of contract of marriage:

Held, (1) that inasmuch as defendant No. 1 was not shown to have known of the betrothal before his marriage, no violation of any legal right either by individual procuration or conspiracy was proved and the plaintiffs had no cause of action;

(2) that as under Hindu Law a father may break off his daughter's engagement, should a more suitable bridegroom be available, the plaintiffs under that law never had more than a conditional right to the fulfilment of the contract and that, therefore, the suit was not maintainable. **B.** KHIMJI VASANJI v. NARSI DHANJI, 17 Bom. L. R. 225 **408**

——— ——— ———Fraudulent decree, setting aside of—Decree obtained within jurisdiction of Court other than that in which suit filed—Court, jurisdiction of, to entertain suit—Fraudulent service of summons—Property attached, whether gives cause of action **502**

——— ——— ———Insolvency—Survival—Property vesting in Official Assignee—Insolvent incompetent to defend suit independently of Official Assignee **506**

——— ——— ———Some interest in land **138**

Central Provinces Tenancy Act (XI of 1898), ss. 69 (1), 83—*Settlement Officer, record by—Sir land—Conclusive—Civil Court, decree of.*

An order or entry of a Settlement Officer recording, or omitting or refusing to record, any land as *sir* land under section 69 (1) is final, unless and until it is reversed or modified by the decree of a Civil Court in a suit instituted under section 83 within one year after the Settlement comes into effect. **N.** KESRA v. HIRAJI, 11 N. L. R. 56 **888**

——— ——— ——— **s. 83** **888**

——— ——— ——— **s. 94 (1),** *applicability of—Ejectment by one co-sharer—Limitation—Landlord, meaning of.*

The special period of limitation prescribed by section 94 (1) of the Central Provinces Tenancy Act applies only to cases in which the ejectment is by the whole of the proprietary body or the *lambardar* representing it, and not to cases in which it is made by a fractional co-sharer in the village acting on his own account.

The term landlord is to be interpreted as meaning the whole body of landlords or some one empowered to act on their behalf. **N.** PAIKU KALAR v. JAIRAM GANDLI **250**

Charge. *See* PENAL CODE, s. 182.

———Graver charges failing, smaller ones how far sustainable **1000**

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not specifying date agreed on to commit murder, etc., whether vague **738**

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Childless widow, right of, to share—Shia Law **191**

Civil Procedure Code (Act XIV of 1882), s. 248 493, 898

——— ——— ——— **s. 278**—*Claim petition—Time given to produce evidence—No evidence produced—Order passed, not set aside within one year, whether final and conclusive.*

A dismissal of a claim petition on account of the petitioner's failure to produce evidence on the date fixed for hearing of the petition is an order passed on investigation. Such order is final and conclusive, if not set aside within one year. **M.** KURADA VENKATACHALAPATHI ROW *v.* GUDIVADA PEDAVEERASWAMI, (1915) M. W. N. 188; 17 M. L. T. 223 **244**

——— ——— ——— **s. 283** **367**

——— ——— ——— **s. 283**—*Declaratory suit—Partial interest in property, parting with—Valuable consideration—Vendor's right to continue in occupation—Sale.*

Where in a suit under section 283 of the Civil Procedure Code of 1882, for a declaration that the disputed property belonged to the judgment-debtor, it was found that the vendor (plaintiff's judgment-debtor) did not part with his entire interest in the property and that he had retained a right to continue in occupation inasmuch as the purchaser from the plaintiff's judgment-debtor had paid less than the ordinary market-value of the land:

Held, that the plaintiff was entitled to a declaration that he was entitled, in execution of his decree, to bring to sale the right, title, and interest of the judgment-debtor in the disputed property, namely, the right to remain in occupation thereof. **C.** JAGAT CHANDRA SARMA CHOWDHURY *v.* RADHA NATH CHAKRAVARTI, 21 C. L. J. 302 **576**

——— ——— ——— **s. 313** **898**

——— ——— ——— **s. 375** **879**

——— ——— ——— **s. 591** **367**

Civil Procedure Code (Act V of 1908), ss. 2, 97—*Decree, whether Code contemplates the existence of adjudications which are both decrees and orders or which are neither decrees nor orders—Partnership, suit for accounts of—Illegal direction as to inquiry by Assistant Referee embodied in preliminary decree—Appeal—Whether such direction can be objected to in an appeal against final decree—Contract Act (IX of 1872), s. 254—Partnership, dissolution of—One partner keeping funds and employing them for his own benefit—Interest, liability for, misconduct or fraud, if essential—Direction to pay into Court in a partnership suit, if discretionary and when interfered with in appeal—Party taking the chance of success, if can be permitted to question jurisdiction of Court in case of failure.*

In a suit to have partnership accounts taken, the Trial Judge declared that the partnership was dissolved from a particular date and then ordered and decreed that the Assistant Referee should enquire into and ascertain who the partners were that were entitled to share in the assets and good will of the said partnership business and take an account of the dealings of the parties with the assets of the said partnership business. No appeal was preferred against the said adjudication, the Assistant Referee held the inquiries directed and submitted his report to the Trial Judge, who adopted it after hearing objections thereto. In an appeal against the latter decree the appellant raised the question whether the inquiry as to who the partners were that were entitled to share in the assets and good will of the partnership was rightly included in the adjudication by the Judge or whether the enquiry was not one which ought to have been made by the Judge himself:

Held, that the Code of Civil Procedure made no provision for something which was neither a decree nor an order, nor for anything which was both, neither did it provide that one adjudication by the Court could be resolved into diverse elements, some of which were decrees and some orders; that the adjudication began by settling *in limine* the rights between the parties and declaring that the partnership was dissolved; that the said declaration was the foundation of all subsequent accounts and proceedings which were merely incidental thereto and consequential thereon; that it did not matter whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio*; that the declaration when made became in substance a decree; that it did not cease to be such, because a subordinate part of it, if correctly made, might have been made separately as an order; that it conclusively determined the rights of parties to certain essential matters involved in the suit; that the expression 'matters in controversy' occurring in the definition of 'decree' in section 2 (2) of the Civil Procedure Code could not be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided if any question had arisen and were the foundation of the whole decision; that accordingly section 97 of the Civil Procedure Code applied to the case and that, therefore, the objection was too late.

Where on a dissolution of a firm, one of the partners retains the assets of the firm and applies them in continuing the business for his own benefit he will be ordered to account for these assets with interest thereon, even though there may be no fraud or misconduct amounting to fraud.

An order directing one of the parties in a suit for dissolution of partnership to bring into Court certain sums alleged to be partnership funds, is one purely in the discretion of the Court and will not be interfered with unless exercised on some wrong principle.

It would be deplorable to allow a party to take his chance of success before a Court and then, when he had lost the day, to contend that the matter should not have been adjudicated upon at all. **P. C.** AHMED MUSAJI v. HASHIM EBRAHIM, 19 C. W. N. 449; 17 M. L. T. 312; 2 L. W. 377; 21 C. L. J. 419; 13 A. L. J. 540; 7 Bom L. R. 432; 29 M. L. J. 70 **710**

——— ——— ——— **ss. 2, 97, O. XX**—*Preliminary decree, nature of—Finding whether a party is or is not an agriculturist, if preliminary decree—Appeal, maintainability of—Decree, form of—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13.*

An order that a Court will proceed to hear a suit on the merits is not an order which should be immediately followed by a decree.

Civil Procedure Code—(1908)—contd.

The finding that a party is or is not an agriculturist is not a judgment such as is intended by Order XX of the Civil Procedure Code and therefore, not the proper basis for a decree; and a decree drawn upon the basis of such a finding alone and specifying such a conclusion alone, is not a legal decree at all and cannot be the subject of an appeal.

But where such a finding necessarily involves a direction that an account be taken between the parties in the manner provided by section 13 of the Dekkhan Agriculturists' Relief Act, it amounts to a preliminary decree and is appealable.

The form of decree to be passed in such cases pointed out. **B.** MUNICIPAL COMMITTEE OF NASIK *v.* COLLECTOR OF NASIK, 17 BOM. L. R. 324 **589**

——— ——— ——— **s. 9**—Muhammadan Law—Religious office, suit for possession of—Functions must be recognised by Muhammadan Law—Test **459**

——— ——— ——— **s. 11, Expl. V** **1**

——— ——— ——— **s. 11**—Res judicata *as between defendants* inter se—*Subsequent suit by third party against all defendants, whether barred.*

A decision will operate as *res judicata* between defendants *inter se* only if there was an active controversy between them and a judgment was given defining their rights and obligations *inter se.*

In a suit for possession by partition of certain landed property it appeared that defendant No. 4 instituted on the 14th December 1909 a suit for partition of a house against his uncle, the father of defendants Nos. 1 to 3 and his cousin, the present plaintiffs. The latter filed a separate written statement contending *inter alia* that his rights in the house were equal to those of the other defendant in the case. Subsequently he executed a power-of-attorney on 21st March 1910 in favour of his co-defendant authorising him to conduct the case on his behalf. Ultimately the plaintiff's claim to a share in the house was dismissed:

Held, that the present suit was not barred by *res judicata.* **P.** MUHAMMAD HUSSAIN *v.* QAMAR-UL-ZAMAN, 57 P. W. R. 1915; 143 P. L. R. 1915 **238**

——— ——— ——— **s. 11**—Res judicata, *preliminary decision as to—Preliminary decree—Appeal.*

A decision that a matter is not *res judicata*, and that, therefore, the trial can proceed is not a preliminary decree and no appeal lies from such a decision. **B.** BHARMA SHIDAPPA PUJARI *v.* BHAMAGAVDA SHIVAGAVDA, 17 BOM. L. R. 271 **461**

——— ——— ——— **s. 34**—*Discretion of Court to award interest—Plaintiff not entitled to contract rate as of right.*

A plaintiff is not entitled as of right to interest from the date of suit to the date of decree. The question is one for the discretion of the Court, which should not, however, refuse to allow any interest without assigning any reasons for doing so. **M.** RAJAGOPALA CHETTY *v.* KANDAPPA CHETTY **429**

——— ——— ——— **s. 47, O. XXI, r. 61**—*Execution of decree—Attachment, objection against—Suit by unsuccessful objector, when allowed*—Pro forma *defendant in original suit—Second appeal, grounds of—Finding of fact based on inadmissible evidence—Appeal—Additional evidence, irregularly admitted.*

The plaintiff's suit for a declaration that property attached by the decree-holder was his and did not belong to the judgment-debtor was dismissed as barred under section 47 of the Civil Procedure Code on the ground that the plaintiff being a defendant in the suit in which the decree was passed was not entitled to file the declaratory suit, but his remedy was to appeal against the order disallowing his objection to the attachment of the property. It appeared that in the original suit the present plaintiff had been impleaded as a defendant in the capacity of an heir to the person against whose estate relief was claimed, but the Court found that he was not heir and the suit against him was dismissed:

Held, that the suit was not barred.

Where a Divisional Judge on appeal reversed the finding of a lower Court as to ownership of an attached property, basing his finding chiefly on certain entries relating to cattle enumeration in the village of the parties in the year 1909 after admitting copies of the entries in evidence:

Held, (1) that the entries were not admissible in evidence and that (2) the Divisional Judge was in error in admitting this additional evidence in contravention of the provisions of the Civil Procedure Code and without giving the plaintiff an opportunity of producing rebutting evidence and that, therefore, his findings were of no value. **P.** MUHAMMAD *v.* RAM DIAL, 15 P. L. R. 1915 **14**

——— ——— ——— **s. 47, O. XXI, r. 2**—*Payment out of Court not certified—Suit for declaration that decree has been satisfied and should not be executed, barred.*

A suit for a declaration that a particular decree has been satisfied by payment out of Court and can no longer be executed, is barred by the provisions of section 47 of the Code of Civil Procedure. **L. B.** PALANEPPA CHETTY *v.* SOMASUNDRAM CHETTY, 7 L. B. R. 267 **468**

——— ——— ——— **s. 47, O. XXI, r. 19**—*Transferee of decree, whether entitled to execute decree, determination of—Separate suit, whether maintainable—Judgment-debtor obtaining transfer of decree in his own name, whether entitled to execute.*

Determination of the question whether the transferee of a decree is entitled to obtain execution of the decree constitutes a determination of a matter within section 47 of the Civil Procedure Code, 1908, and no suit will lie for the determination of this question.

Under Order XXI, rule 16, of the Civil Procedure Code, 1908, a joint judgment-debtor obtaining the transfer of the decree in his own name cannot subsequently execute it.

Per *Sankaran Nair, J.*—A separate suit to determine a question for execution will not lie. **M.** ANNABATTULA VENKATARATNAM *v.* ANNABATTULA NAYUDU **906**

——— ——— ——— **s. 48,** *scope of, compared with s. 230 of the old Code—Limitation Act (IX of 1908), Sch. I, Art. 182.*

In 1884 a decree was passed in favour of *N* upon

Civil Procedure Code—(1908)—contd.

a compromise, and according to its terms certain instalments were payable, and upon default, *N* was entitled to claim possession of a share in certain property. Default was made in 1892 and an application for possession was made. In 1898 the judgment-creditor died, and the execution proceedings were carried on thereafter by his brother as his representative. In 1902 that brother died leaving his minor sons, who by their next friend applied to be brought on the record, but their application was rejected and the original application for execution made by *N* was struck off. In 1909 a fresh application to execute the original decree was presented on behalf of the sons, one of them having attained majority:

Held, that the application was barred under section 48 of the Civil Procedure Code of 1908.

The fresh periods which could be obtained under Article 182 of the Limitation Act do not escape the provisions of section 48.

Section 48 is more extensive in its application than the previous section 230 of the old Code, and it is wide enough to cover compromise decrees. **B.** BALARAM VITHALCHAND GUJAR *v.* MARUTI DEVJI DUBAL, 17 BOM. L. R. 178; 39 BOM. 256 **478**

——— ——— ——— **s. 60**—*"Saleable," meaning of—Permanent lease—Tenant, no right of, to transfer—Court sale, no immunity from—Court auction, validity of.*

The word "saleable" in section 60 of the Civil Procedure Code means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties.

Where a landlord does not impose on a holding, under a permanent lease an immunity from Court sales, the tenant has no right to complain if the land is sold by Court. **C.** KESHAB CHANDRA PRAMANIK *v.* AJAHAR ALI BISWAS **837**

——— ——— ——— **s. 66**—*Auction-purchaser, suit against, when maintainable—Presumption—Transfer of title by* benamidar, *how created—Trust, verbal, whether valid.*

A Court auction-purchaser must be treated as the real purchaser for all purposes so long as the suit is brought against him and not by him except in the cases provided for by clause 2 of section 66 of the Civil Procedure Code, 1908.

The mere consent or permission to hold possession given after the Transfer of Property Act came into force, cannot transfer title from a *benamidar* to a real owner.

Where it was alleged that the auction-purchaser was put in possession of the properties as a trustee for the real purchaser but no valid trust deed was produced:

Held, that the suit was barred by section 66 of the Civil Procedure Code, 1908. **M.** KAMURUDEEN *v.* NOOR MAHOMED, 17 M. L. T. 158; 28 M. L. J. 251 (1915) M. W. N. 204 **205**

——— ——— ——— **s. 92** **337**

——— ——— ——— **s. 92**—*Alienee of trust property, whether necessary party to a suit, under s. 92—Decree for possession or declaration, whether should be given as against him.*

An alienee of trust property is not a necessary party to a suit under section 92 of the Code of Civil Procedure and no relief either for declaration or possession should be given as against him. **M.** RANGAYYA NAIDU *v.* CHINNASAMY IYER, 17 M. L. T. 191; 28 M. L. J. 326 **898**

——— ——— ——— **s. 92**—*Power of Court to direct account to be taken from trustee.*

The provisions of section 92 of the Code of Civil Procedure are quite wide enough to entitle the Court to direct an account against a trustee and to make an order upon him to pay the amount found to be due upon the taking of those accounts. **A.** NATHU MAL *v.* KISHORI LAL SINGH **886**

——— ——— ——— **s. 92**—*Suit against trustee—Death of one of two plaintiffs during pendency of suit—Third person, right of, to represent—Fresh sanction, whether necessary.*

Section 92 of the Civil Procedure Code, 1908, is not mandatory but is permissive and directory. A suit under section 92, Civil Procedure Code, brought by two persons is brought by them in their representative capacity as members of the public interested in the trust in question. It is necessary for the continuance of the suit that there should be at least two plaintiffs. If one representative dies it is open to another member of the public interested in the trust to come forward to take his place and thus to prevent the suit abating. He should also obtain the necessary sanction.

Two persons *B* and *C*, with the permission of the Legal Remembrancer, brought a suit of the nature contemplated in section 92 of the Civil Procedure Code against *D*. During the pendency of the suit *B* died. *K* applied to be brought on the record. The Court dismissed the suit as *K* was not the legal representative of *B*:

Held, that the Court ought to have given *K* an opportunity *first* of obtaining sanction from the Legal Remembrancer and *secondly* of showing that he was a person interested in the trust and on proof of these two qualifications the Court ought in the interest of the public to have made *K* a co-plaintiff in the suit. **A.** CHHABILA RAM *v.* DURGA PRASAD, 13 A. L. J. 379; 27 A. 296 **681**

——— ——— ——— **s. 92,** *suit under—Will—Waqf—Private family matter—Administrator and trustee—Scheme under section 92, when to be settled—Accounts, direction for.*

Where a Will makes provision for certain charity out of the income of the estate and also contemplates that one of the testator's descendants should always be the trustee for the time being of the property, a settlement of a scheme for a charitable trust, when possibly there may never be any property to which the scheme can apply, is premature and the Court should pause before interfering under section 92 of the Civil Procedure Code in a matter which on the face of it is more of a private family matter than one of a public nature. A direction for accounts in a suit in which the administrator of the estate is not made party as such administrator must necessarily be fruitless. **L. B.** OFFICIAL ASSIGNEE *v.* ABDUL HUSSEIN **116**

——— ——— ——— **s. 97** **589, 710**

——— ——— ——— **s. 103**—*High Court, power of, to find upon issue of fact.*

Civil Procedure Code—(1908)—contd.

A High Court is entitled under section 103 of the Civil Procedure Code to find upon a question of fact on the evidence on record, even though no finding has been arrived at on that point by the lower Appellate Court. **M.** MOTUPALLI GANGESETTI *v.* PALURI RAMAMURTHI, 1 L. W. 249 **673**

——— ——— ——— **s. 104 (1) (f)** **557**

——— ——— ——— **s. 104 (2)** **270**

——— ——— ——— **s. 109** **260**

——— ——— ——— **s. 109, O. IX, r. 8**—*Decree of dismissal of suit for default, order setting aside, if final under s.* 109.

An order which deprives a party of the benefit of a final decree and the suit as against him is to be tried *de novo* is a final order within the meaning of section 109 of the Civil Procedure Code. **C.** MEGHRAJ *v.* BIDYABATI KOER, 21 C. L. J. 279 **567**

——— ——— ——— ——— **s. 109**—*Final order, meaning of—Fit case for certificate.*

The term 'final order' in section 109 of the Code of Civil Procedure denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties.

The order of the High Court, made in reversal of the order of the Court of first instance, refusing to issue a temporary injunction against the execution of the mortgage decree, is not a final order within the meaning of section 109 of the Code of Civil Procedure.

In a case where leave to appeal to His Majesty in Council is asked for on the ground of the case being a fit one for appeal, no question of an order being a final one arises. **C.** DAMRA COAL CO. *v.* BENARES BANK, 21 C. L. J. 281 **569**

——— ——— ——— ——— **s. 115** **578**

——— ——— ——— ——— **s. 115, O. XLIII, r. 1**—*Decree in partition suit—Order amending judgment and decree pending appeal—Jurisdiction—Appeal—Interference in revision.*

A Court has no jurisdiction to make an order amending its decree after it has been affirmed on appeal.

No appeal lies against an order of amendment but the High Court can set it aside on revision. **M.** KRISHNA UPADYA *v.* GANAPAYE UPADYA **586**

——— ——— ——— ——— **s. 115**—Mere failure to exercise judicial discretion, if can be interfered with in revision **637**

——— ——— ——— ——— **s. 115, O. XLVII, r. 7**—*Review, order granting, when appealable—Grounds stated in r.* 7, *exhaustive—Appeal, entertainment of, without jurisdiction—Revision.*

An order granting a review is not appealable except on the three grounds specified in Order XLVII, rule 7, Civil Procedure Code.

Where a District Judge entertained an appeal against an order granting a review and set aside the order upon grounds other than those mentioned in Order XLVII, rule 7.

Held, that he had no jurisdiction to dispose of the appeal and his order could be interfered with by the High Court under section 115, Civil Procedure Code. **M.** SREENIVASA AIYAR *v.* NATARAJA AIYAR, 2 L. W. 366 **707**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 115,** *scope of—High Court, interference by, extent of—'Acting illegally or with material irregularity in the exercise of jurisdiction'—'Jurisdiction in clause* (3) *of section* 115,' *meaning of—Perverse view of a point arising for decision, and depriving a party of the fruits of prior proceedings, whether grounds for interference in revision.*

A High Court will interfere in revision in all cases in which the order of the Court below is manifestly wrong.

Taking a perverse view of the point arising for decision in a case is a ground for interference in revision by the High Court.

A Judge acts illegally and irregularly in the exercise of his jurisdiction, if the result of his decision deprives a party of the fruits of prior proceedings.

The words "acting illegally or with material irregularity in the exercise of jurisdiction" cover cases in which a Court has falied to arrive at an obvious conclusion which the facts found necessitate or has so misapplied the principles of law as to result in a perversion of justice.

A Court of revision has no power to substitute its own finding of fact for that of the lower Court.

The power to revise being discretionary, mere infringement of the law, even if apparent, is not enough to call for interference if there are no merits in the case of the party invoking the exercise of such power, as such infringement being only technical will afford no ground for interference.

The word 'jurisdiction' in clause (3) of section 115, Civil Procedure Code, is used in a much wider sense than is generally attributed to it and means "the authority or power, which a Court has, to do justice in the causes of complaint brought before it." It must not be restricted to the pecuniary, local, or other statutory limits of a *forum* before which proceedings are taken. **M.** SUBRAMANIA PATTAR *v.* NARAYANA PATTAR, 2 L. W. 230 **189**

——— ——— ——— **s. 115, O. XXIII, r. 1**—*Withdrawal of suit—Appellate Court, power of, to permit withdrawal of suit—Non-joinder of parties, whether sufficient cause—Material irregularity—Revision.*

An Appellate Court commits a material irregularity if it permits a plaintiff on appeal to withdraw his suit, after a decree has been passed against him by the Court of first instance, without assigning any reasons for acceding to the plaintiff's application.

Where it is urged that a suit is bad for non-joinder of parties, an Appellate Court has no jurisdiction to permit the plaintiff to withdraw his suit on that ground, as under the Civil Procedure Code no suit can be dismissed for non-joinder of parties and the Appellate Court can add the necessary parties and dispose of the appeal in some lawful manner.

Quære.—Whether an Appellate Court as such can permit the withrawal of a suit? **M.** VEERA REDDY *v.* AKKA REDDY **487**

Civil Procedure Code—(1908)—contd.

——————— **s. 144**- Suit for profits of immoveable property—Wrongful possession by decree-holder—Restitution—Appeal—Possession taken during appeal, nature of, if appeal successful **85**

——————— **s. 148** **890**

——————— **s. 148**—Pre-emption decree—Extension of time fixed by decree for payment of purchase-money **458**

——————— **s. 149** **890**

——————— **s. 150** **269**

——————— **ss. 151, 152,** *scope of —Mortgage-decree—Property formed into new* mahal *—New description not given in decree—Amendment of decree—Failure of justice.*

A decree for the sale of a mortgaged property which was originally an undivided share in a *mahal* and was so described in the mortgage-deed, but which was before the institution of the suit formed into a separate *mahal*, was passed describing the property as in the deed. On an application being made for amending the decree so as to give the new description of the mortgaged property:

Held, that the Court had jurisdiction under section 151 of the Code of Civil Procedure to amend the decree to prevent mockery and travesty of justice. **C.** MOHABIR PERSHAD CHOWDHURY *v.* CHANDRA SHEKAR SAHAI, 19 C. W. N. 1021 **304**

——————— **s. 152** **304**

——————— **s. 158** **269**

——————— **O. 2, r. 2** **1**

——————— **O. 2, r. 2**- *Suit to establish reversionary right—Subsequent suit for possession—Cause of action, whether same.*

A second suit is not barred by the provisions of Order II, rule 2, of the Civil Procedure Code, unless the same cause of action is to be found within the four corners of the plaint in the first suit.

Where, therefore, a widow sold her husband's house to the defendant and the husband's brother sued for and obtained a decree that the sale could not affect his reversionary rights in half of the house after the widow's death and then sued for possession of the other half:

Held, that the act of the widow in selling the house, though a single act, gave rise to two distinct causes of action being an infringement of two distinct rights possessed by the plaintiff and, therefore, the second suit was not barred by Order II, rule 2, of the Civil Procedure Code. **P.** MUHAMMAD ALI *v.* MIR HAIDAR, 82 P. L. R. 1915 **301**

——————— **O. 3, r. 1**—*Recognised agent, whether has any right of audience.*

A recognised agent as such has no right of audience. **C.** HARCHAND RAY GOBORNHON DAS *v.* BENGAL-NAGPUR RY. CO., 19 C. W. N. 64 **838**

——————— **O. 7, r. 1 (e)**—*Plaint, cause of action to be stated in—Arrest of ship—Suit for trespass, if lies—Proof of malice or its equivalent —High Court as a Colonial Court of Admiralty, powers of—Detention—Damages, liability for—Admiralty Court Act,* 1840 (3 *&* 4 *Vict. C.* 65)—*Admiralty Court Act,* 1861 (24 *&* 25 *Vict. C.* 10), *ss.* 5,

Civil Procedure Code—(1908)—contd.

35—*Colonial Courts of Admiralty Act,* 1890, (53 *&* 54 *Vict. C.* 27), *s.* 2 (3) (*a*)—*Interpretation Act,* 1889, (52 *&* 53 *Vict. C.* 63), *s.* 18 (2)—*Maritime necessaries—Action* in rem—*Wrongful seizure—Limitation Act (IX of* 1908), *Sch. I, Art.* 29, *scope of*

Under Order VII, rule 1 (*e*), the plaint must contain, in addition to other particulars, "the facts, constituting the cause of action and when it arose."

An ordinary suit for trespass, in the absence of proof of malice or its equivalent, does not lie for the arrest of a ship.

The arrest of a ship consequent on a suit *in rem* instituted in the High Court as a Colonial Court of Admiralty, for an amount alleged to be due for maritime necessaries, is a judicial act of the Court and an ordinary step in an action *in rem*.

When possession of the subject of controversy is with the Court, the competing parties are simply preferring their claims in the ordinary course of law, and any damages which the successful party may suffer from the continuance of litigation are due to the law's delay and not to any legal wrong perpetrated by his unsuccessful competitor.

In England previous to the passing of 3 & 4 Vict. C. 65, the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship, though perhaps it occasionally purported to exercise the jurisdiction where not prohibited.

Quære:—Whether the extended powers under 3 & 4 Vict. C. 65 and 24 & 25 Vict. C. 10 have become vested in Indian High Courts by virtue of the several Letters Patent?

Assuming that the extended powers under 3 & 4 Vict. C. 65 and 24 & 25 Vict. C. 10 did not vest in Indian High Courts by virtue of the several Letters Patent, the jurisdiction of the Calcutta High Court in relation to necessaries rests on the Colonial Courts of Admiralty Act, 1890, which vests in it (among other things) the powers described in section 5 of 24 & 25 Vict. C. 10, providing that the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the part to which the ship Court belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales.

As it is provided by the Colonial Courts of Admiralty Act, 1890, section 2 (3) (*a*), that any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction in England when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales and as by the Interpretation Act, 1889, section 18 (2), it is provided that the expression "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, British India and Burma thus take the place of England and Wales for the purposes of this case.

To take away jurisdiction it is not enough that the owner was domiciled in Burma, but that domicile must be alleged and proved to the satisfaction of the Court, before judgment.

Assuming that a person aggrieved by the arrest of his ship is entitled to compensation even in the

Civil Procedure Code—(1908)—contd.

absence of proof of malice or its equivalent, the action would be for wrongful seizure under legal process and as such would be barred by Article 29 of the Limitation Act if not brought within one year of the date of seizure. **C.** MADRAS STEAM NAVIGATION CO. LD. v. SHALIMAR WORKS, LD., 42 C. 85 **463**

——————— **O. 7, r. 4, O. 14, r. 2,** *construction of—Limitation Act (IX of 1908), ss. 6, 8, 9, 22, Sch. I, Art. 91—Minority, insanity and idiocy—Limitation, disqualifications to save—Court of Wards, position of—Suit, right of—Representative capacity, suit in—Plaint, amendments made in—Properties belonging to idols, transfer of, by Court of Wards—Court of Wards Act (IX of 1879), s. 18, scope of.*

Order XIV, rule 2, Civil Procedure Code, does not only apply to cases in which the issues of fact have not been settled, but also to cases where the Court has not postponed the settlement of the issues of fact.

Under the terms of the Indian Limitation Act, 1908, no other cause of disqualification than those mentioned in the Act, *viz.*, minority, insanity and idiocy, can be admitted to save limitation and time runs against a disqualified proprietor whose property is taken under the Court of Wards.

No one except the disqualified proprietor can bring a suit in relation to property taken charge of by the Court of Wards.

Order VII, rule 4, Civil Procedure Code, does not require that where the plaintiff sues in a representative capacity that fact should be stated in the cause-title of the plaint although, no doubt, that is a convenient place to state it.

The amendments made in the plaint by the leave of the Judge cannot, in any view, amount to an addition or substitution of a new plaintiff within the meaning of section 22 of the Indian Limitation Act.

Where certain properties belong to idols the conveyance of those properties by the Court of Wards, is a nullity, and Article 91 of the Limitation Act does not apply.

The Court of Wards can only deal with the property of the ward in the manner provided by section 18 of the Court of Wards Act (IX of 1879.) **C.** KUARMANI SINGHA v. WASIF ALI MURZA **818**

——————— **O. 8, r. 6**—*Suit by Official Liquidator for recovery of money due to Company—Defendant having money in fixed deposit with Company—Set-off—Companies Act (VI of 1882), ss. 147, 150.*

A debtor to a Company who is not a member of the Company is entitled, in an action by the Liquidators to recover the amount due from him, to plead by way of set-off that an ascertained sum of money is then due to him from the Company and to claim that only such balance (if any) as is due to the Company is recoverable from him.

Where, therefore, in a suit by the Official Liquidators of a Banking Company in liquidation for recovery of money due to the Company, the defendant claimed to set off a sum of money due to him from the Company on account of his fixed deposit:

Held, (1) that the suit was an ordinary suit for recovery of money not brought under any special provisions of the Indian Companies Act 1882, and on general principles it was open to the defendant to claim a set-off under the provisions of Order VIII, rule 6, of the Civil Procedure Code;

(2) that in order to find out whether the amount due to the defendant was "ascertained" or not, the date to be taken into consideration under the rule was not the date of the winding up, but the date of the institution of the suit. **P.** MEHR CHAND v. AMRITSAR BANK, 69 P. W. R. 1915; 89 P. L. R. 1915 **975**

——————— **O. 9, r. 8** **567**

——————— **O. 9, r. 8, O. 11, r. 21, O. 17, r. 2**—*Plaintiff not present on day he was required to produce account book—Dismissal of suit—Application for restoration rejected—Appeal—Dismissal of suit, when under O. XI, r. 21.*

The plaintiff was required to produce some books of account on a fixed date. The plaintiff being absent on that day, the Court dismissed the suit. An application to restore the suit was also dismissed by the Munsif:

Held, that an appeal lay from the order of the Munsif rejecting the application for restoration inasmuch as the order dismissing the suit was passed under Order IX, rule 8, read with Order XVII, rule 2 and not under Order XI, rule 21, of the Code of Civil Procedure.

A suit can be dismissed under Order XI, rule 21, for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleadings or affidavits. **A.** JWALA PERSHAD SAHU v. BIGALRAM **905**

——————— **O. 9, r. 13**—*Decree ex parte against some superseded by Appellate Court—Original Court, whether can set aside ex parte decree at instance of ex parte defendants—Jurisdiction—Valuation of appeal.*

Where a decree of the lower Court is superseded by a decree of the superior Court, the former cannot alter or amend its decree at the instance of the defendants against whom it had passed an *ex parte* decree.

Where the valuation of the original suit is over Rs. 5,000 but the appellant is interested only to the extent of Rs. 200, he can value his appeal at Rs. 200. **A.** MATHURA PARASAD v. RAMCHARAN LAL, 13 A. L. J. 283; 37 A. 208 **261**

——————— **O. 11, r. 21** **905**

——————— **O. 14, r. 2** **818**

——————— **O. 17, r. 2** **905**

——————— **O. 20** **589**

——————— **O. 20, r. 6**—*Amendment of decree—Property erroneously described in schedule of plaint—Same copied into decree—Decree in conformity with judgment—Amendment, if allowed.*

An amendment of a decree merely to correct an erroneous description of property copied into the decree from the plaint, cannot be ordered to be made when the decree is, in other respects, in conformity with the judgment. **M.** GOTIKE KESAVA REDDY v. VUDHYA RAMAYYA **920**

——————— **O. 20, r. 16**—Preliminary decree in suit for accounts, when to be passed **452**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 20, r. 63** **367**

——— ——— ——— ——— **O. 21, r. 2** **468**

——— ——— ——— **O. 21, r. 2**—*Adjustment of decree—Transactions, which amount to adjustment, which not—Enquiries in suits or proceedings, nature of.*

The adjustment of a decree referred to in Order XXI, rule 2, of the Civil Procedure Code, 1908, is a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree.

Therefore, a transaction by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realized in execution in that suit or the time when the decree becomes executable, is not an adjustment of the decree within the meaning of Order XXI, rule 2, of the Civil Procedure Code, but is a transaction which attempts to vary the terms of the decree, leaving the altered terms to stand in the place of the terms of the decree so as to constitute a new executable decree and a decree cannot be varied by such transactions.

Enquiries in a suit or in execution proceedings should be confined to matters the decision with reference to which matters could be taken advantage of by the parties in the proceedings in the suit or the execution itself. **M.** LADD GOVINDOSS v. RAMDOSS VISHNADOSS, 17 M. L. T. 222; (1915) M. W. N. 225 **376**

——— ——— ——— ——— **O. 21, r. 16** **906**

——— ——— ——— **O. 21, r. 35** **1000**

——— ——— ——— ——— **O. 21, rr. 46, 54**—*Attachment of mortgagee's interest—Proper procedure.*

In a suit for declaration that plaintiff was the full owner of certain properties, it appeared that plaintiff was the transferee-in-interest of the original owner who had mortgaged them to one *S*. The mortgagee's interest passed to his son *C* and the defendant got it attached before judgment on 14th August 1904. *C* in September 1910 sub-mortgaged it to *K* whom the plaintiff redeemed in September 1911. The attachment was effected under section 174 of the old Code corresponding to Order XXI, rule 54, of the new Code and was duly confirmed and the property brought to sale. It was contended that the payment having been made after the attachment was void:

Held, that the attachment ought to have been made under section 268 of the old Code (Order XXI, rule 46 of the new Code) and not having been so made, it did not affect the plaintiff's right as no notice of the attachment was served upon him.

Difference between the two modes of attachment under sections 268 and 274 explained. **M.** RAMASMI MOOPAN v. SRINIVASA IYENGAR, 28 M. L. J. 338 **284**

——— ——— ——— **O. 21, r. 46**—*Debt—Attachment—Payment to decree-holder—Judgment-creditor not entitled to recover debt—Debtor not absolved from liability to pay debt to creditor.*

A debtor is not absolved from liability to pay debt due to his creditor by the fact that he paid the debt to a decree-holder on receipt of a warrant attaching the debt in execution of his decree, when the judgment-creditor was not entitled to recover the debt from the debtor against whom warrant of attachment was issued, for in such cases it is the duty of the debtor to contest his liability to pay the debt to the decree-holder. **P.** HARI RAM v. HUKAM CHAND, 50 P. L. R. 1915 **317**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 21, r. 50 (2),** *applicability of—Nattukottai Chetties—Trade assets—Presumption—Private right in property, how claimed.*

A Nattukottai Chetty can claim private rights in properties possessed by him, only by letting proof rebutting the ordinary presumption that such property is part of his trade assets.

Order XXI, rule 50 (2), of the Code of Civil Procedure applies only when the decree is executed against parties not impleaded in the suit as defendants. **M.** BANK OF BENGAL v. RAMANADHAN CHETTY, (1915) M. W. N. 180 **260**

——— ——— ——— ——— **O. 21, r. 52**—*Garnishee order—Attachment of revenue payable in future—Execution proceedings kept alive.*

Property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders under Order XXI, rule 52, of the Civil Procedure Code, and revenue *in futuro* is for the purposes of attachment on the same footing as interest or dividend and thus attachable under the rule.

The plaintiff and the defendant submitted their differences to arbitration and obtained a consent-decree, which provided that the defendant should pay the sum of Rs. 41,000 in 14 years by instalments of Rs. 3,100 a year and in the 14th year an instalment covering the balance. On an application in 1894 for execution of the decree a further agreement was entered into, whereby the defendant was constituted a tenant of the plaintiff and the defendant's share of the revenue of the villages was made payable to the plaintiff through the Court. The Court then issued a prohibitory order giving effect to the above arrangement and the revenue continued to be paid to the plaintiff till 1912, when the Court of its own motion took up the matter again and came to the conclusion that it was *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands under the agreement of 1895:

Held, that the order on the *darkhast* of 1894 continued alive and effective up to 1912 and would remain so until the plaintiff's debt was satisfied. **M.** UMABAI SHANKAR GODBOLE v. AMRITRAO ANANT, 17 BOM. L. R 133; 39 B. 807 **18**

——— ——— ——— **O. 21, r. 52,** *scope of—Attachment — Application for formal attachment under O. XXI, r. 52—Previous attachment, effect on.*

Order XXI, rule 52, is not restricted only to cases in which the property sought to be attached is in the custody of a Court other than that executing the decree but also provides for attachment where the property is in the custody of the same Court.

Where the property to be attached is in the custody of any Court, the attachment in the words of Order XXI, rule 52, shall be made by a notice to such Court that such property may be held subject to the further order of the Court.

If there was an attachment, the mere fact that the respondent by way of abundant caution prayed for formal attachment in strict compliance with the

Civil Procedure Code—(1908)—contd.

terms of Order XXI, rule 52, would not take away the effect of the attachment already made. **C.** SURJAMULL AGARWALA v. RAM CHANDRA MISTRY **123**

——— ——— ——— **O. 21, rr. 57, 64**—*Attachment, determination of—Dismissal of execution application, whether determines attachment—Moveable property, attachment of—Sale, whether production of property necessary—Dismissal of application for non-payment of* batta—*Attachment, whether raised*

An attachment by a prohibitory order previously existing can be determined only by proper steps taken under the Code.

Under Order XXI, rule 57, a previously existing attachment ceases to exist on the dismissal of an application for execution only when the circumstances required by the rule are established.

The object of the rule is to prevent the continuance of an attachment for an indefinite period on the practice of "striking off" an application for execution previously in vogue for statistical purposes and the operation of the rule must, therefore, be confined within the smallest possible limits.

To order the sale of moveable property, it is not necessary under Order XXI, rule 64, that the Court should have the property before it. Where a non-payment of *batta* results in the dismissal of the application for sale there is no legal order of dismissal and the attachment previously existing is not determined but continues effective. **M.** KAMISETTI PEDDA VENKATASUBBIAH v. TANGATOOR SUBBIAH, (1915) M. W. N. 159 **62**

——— ——— ——— **O. 21, r. 61** **14**

——— ——— ——— **O. 21, r. 64** **62**

——— ——— ——— **O. 21, rr. 66 (2), 90**—*Time of sale, omission to specify, whether irregularity.*

An omission to specify the time of sale under Order XXI, rule 66 (2), is an irregularity within the meaning of Order XXI, rule 90, and, if substantial injury has been sustained by reason of it, the sale should be set aside. **O.** MAHMUD ALI v. GOBIND PRASAD, 18 O. C. 1 **184**

——— ——— ——— **O. 21, r. 72 (3), O. 43, r. 1 (j), s. 104 (2)**—*Order of Appellate Court setting aside sale in execution—Second appeal, whether maintainable—Revision—High Court's power to interfere with a wrong decision on point of law.*

No appeal lies from an order of the Appellate Court setting aside a sale in execution.

Where an appeal is competent to a District Judge from an order passed by a Court of first instance, the High Court cannot interfere in revision with the appellate order of the Judge merely because he decided a question of limitation wrongly. **A.** MAHABIR SAHU v. BHIRGU RAI, 13 A. L. J. 351 **270**

——— ——— ——— **O. 21, r. 89** **571**

——— ——— ——— **O. 21, r. 89**—*Attaching creditor, right of, to have sale set aside.*

A decree-holder who attaches a property before it is put to sale at auction, is not entitled to get the sale set aside under Order XXI, rule 89, of the Code of Civil Procedure. **A.** FAKHRAN v. RAJAB ALI KHAN, 13 A. L. J. 401 **949**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 21, r. 89**—*Occupancy holding not transferable without consent of landlord, purchaser of, right of, to apply under Order XXI, r. 89—Landlord, right of, when himself purchaser at rent-decree—Eastern Bengal and Assam Tenancy Act (I of 1908), s. 170 (4), applicability of.*

A landlord can terminate the interest of a purchaser at an execution sale of an occupancy holding not transferable without the consent of the landlord and his right to do so is independent of an execution sale.

Therefore such a purchaser has no *locus standi* to make the application to have the sale for arrears of rent set aside under Order XXI, rule 89 of the Civil Procedure Code, where the purchaser under the rent decree is the landlord himself.

The Eastern Bengal and Assam Tenancy Act, section 170 (4), does not debar the landlord when he has himself purchased the holding at a sale held in execution of a decree for arrears of rent due thereon, to challenge the right of the purchaser (who has not been recognised by him) to make the deposit on the ground that as against him such purchaser has acquired no title and, therefore, cannot come under Order XXI, rule 89. **C.** ABDUL RAHMAN SARKAR v. PROMODE BEHARY DUTTA, 22 C. L. J. 108 **182**

——— ——— ——— **O. 21, r. 90** **184**

——— ——— ——— **O. 22, r. 4, cl. (3)**—*Practice—Re-hearing—Death of respondent before date of hearing—Legal representatives of deceased not brought on record—Appellant, whether entitled to re-hearing of appeal.*

It is only a party who has not been heard that can claim a re-hearing on the ground that he has been prejudiced.

Two days before an appeal came on for hearing, one of the respondents died. Neither the appellant's Vakil nor the deceased respondent's Vakil were aware of this and the appeal was heard and dismissed. The appellant claimed a re-hearing of the appeal on the ground that it had been decided without bringing the legal representatives of the deceased respondent on the record:

Held, that the appellant had no claim to a re-hearing of the appeal as in the interest of justice, it is not desirable to give a right to an unsuccessful litigant to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing. **M.** VELLAYAN CHETTY v. JOTHI MAHALINGA AIYER, 28 M. L. J. 138; 2 L. W. 166; (1915) M. W. N. 201 **83**

——— ——— ——— **O. 22, r. 5, O. 43, r. 1**—*Order refusing to make a person party to appeal as representing a deceased appellant, appeal from, whether maintainable.*

An order dismissing an application to be brought on record as the representative of a deceased appellant is not a decree and no appeal lies from such an order. **A.** DUNI CHAND v. ARJA NAND, 13 A. L. J. 381 **687**

——— ——— ——— **O. 22, r. 9**—*Sufficient cause to be shown—High Court, discretion of, if any—Deceased party, representatives of—Party, duty of.*

Under Order XXII, rule 9, Civil Procedure Code, it must be proved that the appellant was prevented by

Civil Procedure Code—(1908)—contd.

sufficient cause from going on with the suit within the time allowed by law; otherwise, the appeal once abated shall not be revived, and the High Court has no discretion in the matter.

When succession to the estate of a deceased person is in doubt, a person litigating with the deceased should take every step to bring his representatives on the record. **C.** GOPAL LAL *v.* KERANI GOPE **803**

——— ——— ——— **O. 22, r. 14 (1)** **379**

——— ——— ——— **O. 23, r. 1** **487**

——— ——— ——— **O. 23, r. 1**—*Suit referred to arbitration—Joint application of both plaintiff and defendant to withdraw suit without obtaining permission to bring fresh suit—Second suit, maintainability of.*

A suit for profits was dismissed on a joint application of the parties on the ground that the dispute between the parties had been referred to arbitration. The plaintiff did not ask the Court for permission to bring a fresh suit in case the arbitration fell through:

Held, that a second suit for profits for the same years was barred by the provisions of Order XXIII, rule 1 of the Civil Procedure Code. **A.** JADUNANDAN *v.* SHEOBALAK, 13 A. L. J. 347 **601**

——— ——— ——— **O. 23, r. 1 (2)**—*Withdrawal of suit—Appellate Court, power of, to grant permission to withdraw suit with liberty to bring fresh action—Jurisdiction.*

An Appellate Court can under Order XXIII of the Civil Procedure Code give a plaintiff permission to withdraw his suit with liberty to bring a fresh one. **A.** AFZAL BEGAM *v.* AKHARI KHANAM, 13 A. L. J. 441; 37 A. 326 **857**

——— ——— ——— **O. 23, r. 1 (3)**—*Suit by reversioner for declaration that certain alienation was not binding, withdrawal of, without permission—Fresh suit for possession, whether maintainable.*

A suit for possession by a reversioner on the ground that the alienation made by the widow is not binding on him is barred by Order XXIII, rule 1 (3) of the Civil Procedure Code, 1908, if a previous suit by him for a declaration that the said alienation was not binding was withdrawn without permission to bring another suit. **M.** SENNAVA REDDIAR *v.* VENKATACHALA REDDIAR, 2 L. W. 177 **91**

——— ——— ——— **O. 30, rr. 1, 2**—*Suit on behalf of firm by one member as agent—Other members made plaintiffs, after limitation—Suit, whether barred—Limitation Act (IX of 1908), s. 22, applicability of.*

A suit on behalf of a firm by one of its partners as agent, once instituted within time, does not become time-barred merely because it is barred when the other partners are brought on record as co-plaintiffs. **M.** MARAYYA CHETTY *v.* SAMI CHETTI, 2 L. W. 239 **210**

——— ——— ——— **O. 32, r. 4**—*Appeal against minor—Costs incurred by guardian ad litem—Appellant to pay costs of guardian—Practice.*

Where an appeal is filed against a minor under the guardianship of an officer of the Court, the appellant must pay to such guardian such sum of money as would enable him to oppose the appeal. **A.** KEDAR RAI *v.* SHEOPAL RAI **852**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 33, r. 3**—*Presentation of application for leave to sue in forma pauperis—Authorized agent, meaning of—General power-of-attorney, whether sufficient.*

An authorized agent within the meaning of Order XXXIII, rule 3, of the Civil Procedure Code, does not include a recognized agent or Pleader as such. He must be specially authorized to present an application under Order XXXIII and must fulfil the other conditions detailed in rule 3.

Where, therefore, an application for permission to sue as a pauper was presented under the authority of a power-of-attorney granted by the plaintiff to two Pleaders and a duly certificated *Mukhtar*:

Held, that as the Legal Practitioners merely had an ordinary power-of-attorney and were not specially authorized for the presentation of such an application, this was not a due presentation within the meaning of the rule and the application was rightly rejected. **P.** SAKINA BIBI *v.* CHARNJIT SINGH, 80 P. L. R. 1915 **448**

——— ——— ——— **O. 34, r. 2 (a)**—*Interest after date fixed for redemption, whether allowed—Property, how to be proved self-acquired.*

The fact that a mortgage-deed does not expressly refer to the payment of interest after the date fixed for redemption, is no reason for refusing to allow interest at the contract rate. The document should be construed as providing that the parties intended to make a complete contract.

A person who claims a particular property to be his self-acquisition must affirmatively prove that the acquisition was made out of the fruits of his own exertions unaided by family property. But this does not mean that the fact may not be proved by showing that there was no source of income available except such unaided exertions.

Where, therefore, it appeared that the joint family property was of very little title and there was no surplus income left out of which the properties in suit could be acquired:

Held, that the properties were shown by a process of exclusion to be self-acquired. **M.** MALAYAPPAIYAR *v.* PICHAI ASARI, 2 L. W. 236; (1915) M. W. N. 208 **195**

——— ——— ——— **O. 34, r. 5 (2)**—*Application to make decree absolute, limitation for—Court, duty of, to pronounce judgment—Section 14 of Limitation Act, whether applicable to appeals*

——— ——— ——— **O. 34, r. 8** **211**

——— ——— ——— **O. 35, r. 5**—*Interpleader suit—Agent—Railway Company accepting goods for carriage, whether agent of consignor.*

A Railway Company by accepting goods for carriage does not become an agent of the consignor within the meaning of Order XXXV, rule 5 of the Civil Procedure Code, 1908, and can file an interpleader suit against the consignor and any party claiming adversely to the consignor. **B.** CHANGANLAL HIMATLAL *v.* B. B. & C. I. RY., 17 B. L. R. 339 **862**

——— ——— ——— **O. 38, r. 1**—*Security bond for appearance of defendant, object of—Enforcement of bond.*

The object of a security bond executed under **948**

Civil Procedure Code—(1908)—contd.

Order XXXVIII, rule 1, of the Civil Procedure Code, is merely to secure the rights of the judgment-creditor and Government are not interested in the proceedings in any way. It should be enforced only on the application of the judgment-creditor, and then only to the extent of the sum of money found payable under the decree. **S.** HUSSEINALI SILLEMANJI v. SECRETARY OF STATE, 8 S. L. R. 270 **92**

——————— **O. 39, r. 2**—*Mandatory injunction, whether can be granted on interlocutory application.*

A Court has power to remedy an injury or wrong by a mandatory injunction on an interlocutory application. **B.** CHAMPSEY BHIMJI & CO. v. JAMNA FLOUR MILLS CO., 16 BOM. L. R. 566 **121**

——————— **O. 40, r. 1**—*Receiver, appointment of, ground for—Just and convenient—Judgment-debtor will be reduced to poverty if his properties are sold, if ground for appointment of Receiver.*

The fact that a judgment-debtor will be reduced to poverty if his properties are allowed to be sold is no ground for the appointment of a Receiver of his properties advertised for sale as in all cases in which a judgment-debtor's property is advertised for sale, he is liable to become poor.

An appointment of a Receiver in such a case is not just and convenient within the meaning of Order XL, rule 1, Civil Procedure Code. **C.** RAMESHWAR SINGH v. BHEEKHARI SINGH **505**

——————— **O. 41, r. 4**, *applicability of—Decree on a ground common to all parties—Partition—Costs severed—Appeal by one defendant, reversal of.*

It is not necessary for the application of Order XLI, rule 4, Civil Procedure Code, that the decree should proceed on every ground common to all the parties. It is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs.

Therefore, the fact that a decree for partition which proceeds upon a ground common to all the parties is severed so far as to make each party of defendants liable for the costs allocated against it, does not prevent the Court on an appeal by one defendant to make an order that will enure to the benefit of all the defendants.

Where there is no bar to the application of Order XLI, rule 4, Civil Procedure Code, it is not necessary to invoke the aid of Order XLI, rule 33, which gives the Court of Appeal very wide powers for the purpose of doing justice between the parties. **C.** AMBICA PROSAD SINGH v. PARDHIP SINGH, 19 C. W. N. 233; 42 C. 451 **446**

——————— **O. 41, r. 6**—*Objection to finding not filed within time allowed, effect of—Appellate Court, power of, to go behind finding.*

Order XLI, rule 6, of the Civil Procedure Code, 1908, provides that after the expiration of the period fixed by the Appellate Court to file objections to the finding returned by the Court of first instance, it should proceed to determine the appeal. The effect of not presenting a memorandum of objections within the period fixed is not that the finding becomes final: the Appellate Court can still go behind and upset it. **A.** DODRAJ v. NATHU **597**

Civil Procedure Code—(1908)—contd.

——————— **O. 41, rr. 7, 8** **64**

——————— **O. 41, r. 10**—*Appeal, security for costs of—Suit not vexatious—Appellant having no money, whether bound to give security.*

Where it cannot be said that the suit is merely vexatious, the mere fact that an appellant has no money of his own but has got relations who have money to pay, is no sufficient ground for demanding security for the costs of the appeal. **C.** RAGHUNATH SINGH v. PREYA SAKHI DEBI, 19 C. W. N. 446 **598**

——————— **O. 41, r. 19** **64**

——————— **O. 41, r. 23** **485**

——————— **O. 41, r. 27, O. 47, r. 1**—*Appeal—Application, preliminary, to file fresh evidence, legality of—Application, whether sustainable—Appellate Court, power of—Additional evidence, admission of.*

A preliminary application to admit fresh evidence before appeal is heard is not warranted by the terms of Order XLI, rule 27.

An application to admit fresh evidence discovered out of Court by the parties comes under Order XLVII, rule 1, not under Order XLI, rule 27.

Order XLI, rule 27, does not authorize an Appellate Court to admit fresh evidence, documentary or oral, and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred, unless the Appellate Court, after examining the evidence on the record, comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely that there is a *lacuna* or defect in the evidence on the record. **C.** GARDEN REACH SPINNING AND MANUFACTURING CO. v. SECRETARY OF STATE FOR INDIA, 19 C. W. N. 401 **865**

——————— **O. 41, r. 27**—*Appeal—New evidence, admission of, illegal—Decree based on such new evidence, if sustainable.*

Where an Appellate Court, during the hearing of an appeal, having before it a petition only for the admission in evidence of one single exhibit and evidence connected therewith, admitted other exhibits and evidence without any petition therefor and without recording its reasons, and disposed of the appeal after considering the evidence so admitted:

Held, that the order of the Appellate Court admitting the evidence was opposed to the provisions of Order XLI, rule 27, Civil Procedure Code, and that the decree based on such evidence could not be supported. **M.** ARIYAMUTHU PILLAI v. SINNAYA PILLAI **11**

——————— **O. 41, rr. 27, 33**—*Appellate Court, powers of—Reception of additional evidence—"Substantial cause," meaning of—Errors in decree—High Court, power of, to correct in absence of some of the parties.*

An Appellate Court is entitled to receive additional evidence if it thinks necessary to do so in the interest of justice.

The disability to produce documents in the first Court for causes not due to fault or negligence of the party is "substantial cause" within the meaning of Order XLI, rule 27 (*b*), of the Code of Civil Procedure, for admission of such evidence.

Civil Procedure Code—(1908)—contd.

A High Court is entitled to correct errors in the decree of a lower Court even if some of the parties are not present before it in appeal. **M.** VENKATACHELA PILLAI *v.* RANGA PILLAI, 1 L. W. 771; (1915) M. W. N. 795 **694**

——————— **O. 41, r. 27**—*Appellate Court, powers of, to admit additional evidence—Evidence on record otherwise unintelligible—Mutual, open and current account—Barred items—Guardian, power of, to accept.*

Under Order XLI, rule 27, of the Civil Procedure Code, 1908, an Appellate Court is entitled to admit additional evidence when the evidence already on record is unintelligible without it.

A guardian of a minor can accept accounts on the footing that they are mutual, open and current accounts even if some of the items may be barred by limitation. **M.** SUBBA NAIDU *v.* ETHIRAJMMAL **640**

——————— **O. 41, r. 31**—*Appellate Court's judgment—Finding on each material issue necessary.*

An Appellate Court's judgment which does not set out the points for determination, the Court's decision thereon and its reasons for so deciding, does not fulfil the requirements of Order XLI, rule 31, Civil Procedure Code, and cannot be upheld. **M.** PERIAMMAL *v.* VAITHILINGA UDAYAR **354**

——————— **O. 41, r. 33** **694**

——————— **O. 41, r. 33**—*Appellate Court, power of, to set right decree although respondent not appealing.*

An Appellate Court has power to set the decree of the Court below right even in respect of that portion of it which is against the respondent and in respect of which the respondent has not appealed. **A.** MORDHAJ SINGH *v.* JAHANGIRI MAL **428**

——————— **O. 43, r. 1** **687**

——————— **O. 43, r. 1 (j)** **270**

——————— **O. 44, r. 1**—*Appeal* in forma pauperis—*Applicant, right of, to be heard—Court, power of.*

An applicant applying for permission to appeal against a decree *in forma pauperis* is not entitled to be heard in person or by Pleader before the Court exercises its power to allow or reject the application. **M.** *In re* PARAMASIVAM PILLAI **957**

——————— **O. 47, r. 1** **865**

——————— **Sch. II, para. 10** **427**

——————— **Sch. II, para. 17**—*—Application to file reference, whether suit—'Suit,' meaning of—Order setting aside award, whether a decree—Appeal.*

A suit is a process for the recovery of a right or claim and can be prosecuted either in a regular Court of Law or partly before a private tribunal and partly in a Court of Law.

An application to file in Court an agreement to refer to arbitration merely asks the Court for assistance to prosecute a claim before a private tribunal and cannot be converted into a "suit" by the mere process of numbering and registering the application as a suit.

Civil Procedure Code—(1908)—concld.

An order setting aside an award is not a decree within the meaning of the Code and is not appealable. **S.** SEUMAL NIHALCHAND *v.* MULOMAL RAHUMAL, 8 S. L. R. 260 **60**

——————— **Sch. II, para 20** **298**

——————— **Sch. II, para. 21 (1)** **557**

Coercion. *See* CONTRACT.

Colonial Courts of Admiralty Act, 1890, (53 & 54 Vic., c. 27), s. 2 (3) (a) **463**

Companies Act (VI of 1882), s. 58—*Share-holder—Transfer of share—Transferee's name not registered—Winding-up of Company—Liquidation proceeding—Share-holder, right of, to have transferee's name entered as contributory—Sufficient cause—Default - Delay.*

Where a share-holder having sold his shares in a Company applied to the Company for registration but before registration the Company went into liquidation, the share-holder is entitled, under section 58 of the Companies Act, to have the names of his transferees entered in his place as contributories only if he shows absence of sufficient cause or default or unnecessary delay in entering that fact in the register on the part of the Company. **B.** *In re* THE INDIAN SPECIE BANK, 17 BOM. L. R. 342 **983**

——————— **S. 147**—Suit by Official Liquidator for recovery of money due to Company—Defendant having money in fixed deposit with Company—Set-off **975**

——————— **S. 150** **975**

——————— **ss. 151, 173, 177 (b)**—(i)—*Jurisdiction of Court to revise order* suo motu.

The application against a contributory for payment of call money filed by a Liquidator of a Company, which was being voluntarily wound up, was dismissed by the District Judge, who, however, subsequently *suo motu* revised his order and under section 61 of the Companies Act directed the contributory to pay up the sum due by him. The appeal against the order was dismissed and the contention of the appellant that the District Judge had no power *suo motu* to revise his order was disallowed:

Held, on second appeal, that the contention was valid, for section 151 of the Companies Act did not apply to the case of a Company which was being voluntarily wound up. **P.** NANAK SINGH *v.* EMPEROR, 13 P. L. R. 1915 **281**

——————— **ss. 162, 163, 169**—*Order for examination, when to be made—Discretion of Court—Appeal.*

Before granting an application under sections 162 and 163 of the Companies Act, 1882, for the discovery and inspection of the books and papers of a Company and for the examination of certain of its Directors, the Court ought to be satisfied that the inquiry is just and beneficial for the purposes of the winding-up, and not merely intended to harass and annoy the Directors and Manager.

Companies Act—(1882)—contd.

An appeal lies against an order made for the examination of Directors, where the order impugned is vexatious or oppressive so far as the appellant is concerned and when it is not necessary or beneficial for the purposes of the winding-up.

It is in the discretion of the Court conducting the winding-up to determine whether it will exercise the powers vested in it by sections 162 and 163 of the Act, but the discretion must be exercised judicially and not without consideration. **P.** HARKISHEN LAL *v.* SARASWATI RAM, 77 P. L. R. 1915; 40 P. R. 1915 **286**

——— ——— ——— **ss. 169, 219**—*Appeal preferred to Divisional Court returned for want of jurisdiction—Extension of time—Liability of contributories—Duty of Court to decide objections—Transfer.*

Where appeals against the order of the District Judge making the appellants liable as contributories were lodged in the Divisional Court within three weeks from the date of the order and having remained pending in that Court for a long time, were returned to the appellants for want of jurisdiction and were finally presented to the Chief Court:

Held, that as the appeals were lodged in the Divisional Court well within three weeks and the appellants had a *bona fide* belief that that Court was the proper tribunal to entertain them, this was a fit case for extending the period prescribed by section 169 of the Companies Act, 1882.

It is the duty of the Court to inquire into and decide the objections raised by the contributories to their liabilities as such. **P.** GANESHA SINGH *v.* SHANKAR LAL, 56 P. W. R. 1915; 138 P. L. R. 1915 **142**

——— ——— ——— **s. 163**—*Companies Act (VII of 1913), s. 284—Appeal—Notice not served within three weeks—Second appeal incompetent—Procedure under old Act, applicability of—Pending cases.*

Section 284 of Act VII of 1913 expressly provides that for the purposes of the pending proceedings the old Companies Act shall be deemed to remain in full force.

Where the Divisional Judge dismissed an appeal on the ground that notices were not served within three weeks on the respondent as required by section 169 of the Companies Act, 1882:

Held, (1) that a second appeal was not competent;

(2) that having regard to the fact that section 169 of the old Act was applicable to the case the first appeal was rightly rejected. **P.** THAKAR DAS *v.* OFFICIAL LIQUIDATOR, THE PESHAWAR BANK, LTD., 40 P. L. R. 1915 **90**

——— ——— ——— **s. 169**—*Companies Act (VII of 1913), s. 284—Liquidation commenced before new Act came into force—Course of appeal—Limitation—Extension of time.*

Where the iquidation of a Limited Company began before the new Act VII of 1913 came into force, all the proceedings in the winding up including the course of appeal are governed by the old Law as is provided by section 284 of the said Act VII of 1913. Therefore, an appeal is barred by

Companies Act—(1882)—concld.

time if notice of appeal is not served on respondent within three weeks according to the provisions of section 169 of the old Act VI of 1882.

But if an appeal be presented within the prescribed period, the Appellate Court can extend the time if required for service of the notice. **P.** KHIALI RAM *v.* OFFL. LIQ., PEOPLES' BANK, 43 P. W. R. 1915; 13 P. L. R. 1915 **600**

——— ——— ——— **s. 169**—*Settling a shareholder's name on list of contributories—Forfeiture of shares—General notice to forfeit shares by Company—Absence of resolution to forfeit share of certain share-holder, effect of—Share-holder, whether can insist on forfeiture—Clause in Company's Articles that shares will ipso facto be forfeited on default, effect of—Default in payment of calls—Option of Company to forfeit.*

To constitute a valid forfeiture of shares there must be power to forfeit, and intention to forfeit, and a notice of that intention, and further, the intention must be actually carried into effect. A default in payment of calls does not *ipso facto* bring about a forfeiture, nor does the intention to forfeit not carried into effect amount to a forfeiture

A Company has got the option to forfeit or not and unless the option is exercised the defaulter continues to be a member of the Company. Even where the Articles provide that a forfeiture shall take place *ipso facto* on default in payment of calls, the defaulting share-holder cannot insist on the clause acted upon. **P.** GOKAL CHAND *v.* LAHORE BANK, 31 P. W. R. 1915; 99 P. L. R. 1915; 36 P. R. 1915 **431**

——— ——— ——— **ss. 173, 177 (b) (i)** **281**

——— ——— ——— **s. 219** **142**

——— ——— ——— **s. 254**—*Power to make rules limited to certain proceedings—Costs in other proceedings regulated by rules under the High Courts Act.*

The power of the High Court to make rules specially relating to Company applications is conferred by section 254 of the Companies Act (VI of 1882), and that power is limited to making rules concerning the mode of proceeding to be had for winding-up a Company, and for giving effect to the provisions contained as to the reduction of capital and the sub-division of the shares of the Company. For the purpose of regulating the costs in other proceedings in Company matters, recourse must be had to rules framed by the High Court under its rule-making power under the High Courts Act. **B.** DAMODAR MOHOLAL GINNING & MANUFACTURING CO., LTD. *v.* NAGINDAS MAGANLAL, 17 BOM. L. R. 297; 39 B. 283 **359**

Companies Act (VII of 1913), s. 96—*Agreement to refer all disputes between parties to arbitration—Contract not under seal of Company, legality of.*

A contract to refer to arbitration any dispute which might arise between a Company and an individual is not illegal because it is not under the seal of the Company. **A.** GANGES SUGAR WORKS, LTD. *v.* NURI MIAH, 13 A. L. J. 312; 37 A. 273 **384**

Companies Act—(1913)—contd.

——————— **s. 184**—*Contributory—Share-holder—Repudiation of liability—Waiver—Acquiescence—Interpretation of Statute—Person agreeing to take share upon special conditions—Conditions precedent and subsequent, effect of—Allottee, conduct of—Estoppel.*

Where the provisions of the Indian Companies Act are not at variance with the law obtaining in England, decisions of the English Courts may be followed to interpret the provisions of the Companies Act.

The appellant contended that the General Manager of the Company, who allotted the shares to him not having been properly given the authority in this behalf, the allotment was not valid. It appeared that the appellant not only paid money at the time of allotment but also subsequently acted as a share-holder without any objection having been raised as to the validity of the allotment:

Held, that the contention could not be allowed.

The law recognizes that the observance of formalities may be dispensed with, and irregular, as distinguished from void, transactions may be confirmed. Consequently, a person may become a share-holder to most, if not to all, intents and purposes, without complying with all the formalities prescribed in that behalf by the Statute, Charter, or deed of settlement constituting the Company and although there may have been irregularities in the issue of the shares to him; for if, notwithstanding these circumstances, he has been treated as a share-holder, by the Company, and has acted as a share-holder, both he and the Company will be estopped from denying that he is a share-holder. Once the shares have been registered in the name of the allottee and he has done acts only consistent with his being a member, he will be taken to have agreed to take the shares or at any rate he will be estopped from denying that he had so agreed.

But even where the agreement is void, if the applicant's name is put on the register and he, with full knowledge of all the facts, does acts which are only consistent with his being a share-holder in respect of such shares, he will be bound as a share-holder. In such a case, the placing of the applicant's name on the register would seem to amount to an offer and the acts done with full knowledge to be an acceptance of such offer.

A contract induced by fraud or misrepresentation is not void but voidable at the option of the party whose consent has been so obtained. But the right of rescission which is ordinarily available against the Company cannot be enforced against its creditors who are the persons vitally interested in the winding-up.

The share-holder who seeks to be discharged must have repudiated the contract and have got his name taken off the register, subject to the qualification that if he has before the commencement of the winding-up taken proceedings to have his name removed, that will be sufficient.

If one share-holder commences a litigation to have his name removed and there is an agreement between the Company and other repudiating share-holders that all the cases shall stand or fall by the result of his litigation then if that case is decided in favour of the litigant share-holder the others will be relieved.

Companies Act—(1913)—concld.

A person cannot be settled on the list of contributories if before the commencement of winding-up he has not only repudiated his shares but has also asserted his right to repudiate them in an action by the Company to enforce calls upon him.

The position of a person who has agreed to take shares upon special conditions depends upon the determination of the question whether the conditions are conditions precedent to his becoming a share-holder or conditions subsequent. In the latter case or where the condition precedent has been waived, the applicant for shares is a share-holder.

If the allottee transfers his shares or attends meetings and accepts dividends, he will be bound by his acts and cannot rely upon the non-performance of a condition precedent. **P.** PIARA SINGH *v.* PESHAWAR BANK, LTD., IN LIQUIDATION, 22 P. L. R. 1915; 54 P. R. 1915 **53**

——————— **s. 284** **90, 600**

Company—Contract—Contract with Company, whether can be altered by resolution of Company **847**

Compensation—Complaint of theft before Village Magistrate—Report to Police officer—Charge—Compensation, right to **104**

———————Improvement - Presumption **389**

Complainant, whether can delegate his right **107**

Compromise. *See* CONTRACT.

——————— *Condition penal—Defendant, whether relieved.*

The plaintiff sued the defendant to recover certain property which was sold by the latter to the former. The suit was compromised on condition that the defendant should pay into Court a certain sum of money within a certain date and that he should get back the promissory notes exhibited in the suit and return them cancelled to the plaintiff within the said date. The defendant paid the money within the date, but took out the notes and deposited them after the date. On his applying for entering up satisfaction of the decree:

Held, that the provision regarding possession to be given to the plaintiff, if the conditions were not complied with within the time limited, was penal and the defendant could be relieved from the penalty. **M.** BHEEMA VENKATARAMANA *v.* BOMMINI GURAPPA, 28 M. L. J. 488; 2 L. W. 537 **970**

——————— of criminal case—Consideration **550**

——————— **decree,** setting aside of **337**

Confession of co-accused, when to be acted upon **657**

——————— *Joint trial of person who confesses along with other accused—Admissibility of confession.*

Where several persons were tried for an offence under sections 211 and 109 of the Indian Penal Code and one of them entered confession, but not being convicted on the plea of guilty was tried jointly with the other accused:

Held, that his confession was admissible in evidence as against all the accused. **A.** EMPEROR *v.* DIP NARAIN, 13 A. L. J. 337; 37 A. 247; 16 CR. L. J. 327 **663**

Confession—concld.

——— *Plea of guilty, when can be withdrawn—Incriminating statement made in Police custody and before Magistrate, admissibility of, against maker and accused jointly tried—Criminal Procedure Code (Act V of 1898), s. 364—Statement, recording of—Irregular procedure—Defect, how cured—Evidence Act (I of 1872), ss. 25, 26, 27, 30.*

Where to a charge under section 376, Indian Penal Code, the accused made the following answer "I did not commit rape, I only held the lady's hands:"

Held, that the answer constituted a plea of guilty.

Where the accused at the time of making an incriminating statement is enfeebled by illness and is undefended, a withdrawal of the plea can be allowed if the accused wishes to withdraw it.

No part of an incriminating statement whether amounting to a confession or not, written by an accused person himself while in Police custody, is admissible either against him or against the person jointly tried with him unless it has led to the discovery of any fact within the terms of section 27 of the Evidence Act I of 1872.

A deposition (not amounting to a confession) of a person recorded on solemn affirmation by a Magistrate is admissible against the deponent only but not against any other person jointly tried with him.

A statement made by an accused person before a Magistrate who subsequently commits him to the Court of Session must be recorded in the form prescribed by section 364, Criminal Procedure Code, 1898, but any defect therein can be cured by proving it by the evidence of the Magistrate who had recorded it.

A confession of an accused is not admissible under section 30 of the Evidence Act, against a co-accused if the former is convicted on his own plea of guilty. **P.** EMPEROR *v.* SHULDHAM, 44 P. W. R. 1914; 16 CR. L. J. 257 **145**

——— ———, recording of—Confession retracted, evidentiary value of **738**

Consideration—Compromise of criminal case **550**

——— ——— *Hundi* — Plaintiff giving evidence for consideration—Presumption, whether arises **390**

——— ———— Retaining of amount **555**

——— ———, whether mortgagor can question the passing of **825**

Conspiracy—Murder. *See* PENAL CODE, s. 302.

Construction of deed — Compromise—Absolute estate, creation of **529**

——— ——— **of document**—*Post diem* interest **161**

——— ——— *Will, interpretation of—Moveable property only, charge on*—Res judicata.

Where a Will provided that a certain stipend was to be paid to a person out of the testatrix's allowance from *wasika* and notes, etc., and that the whole of her landed property was to be divided among her relations according to their lawful shares:

Held, that the stipendiaries must look for payment only to the fund consisting of the notes and the rest of the testatrix's moveable property, and not to her immoveable property.

Construction—concld.

Where a Court does not itself actually decide a point, but simply expresses its concurrence with an *obiter dictum* quoted from a ruling, its finding on the point is not *res judicata*. **O.** AMIR MIRZA *v.* HAIDAR MIRZA, 2 O. L. J. 113 **217**

——— ——— **of Will** **130**

——— ——— Canons of construction **481**

Contempt of Court—Newspaper Article **738**

Contract—Act of God, how far excuses non-performance of contract **5**

——— ——— *Agreement to purchase—Option to withdraw—Earnest money, refund of, on withdrawal.*

Where an agreement for the purchase of a house gives an option to the purchaser to withdraw on his being not satisfied with the defendant's title, he is entitled on his withdrawing to a refund of the earnest money given. **P.** BUA DITTA *v.* RATTAN DEVI, 24 P. L. R. 1915 **12**

——— ——— Breach of contract of marriage—Cause of action—Suit for damages—Action founded on conspiracy—Malice—Father's right to breach of daughter's engagement according to Hindu Law **408**

——— ——— *'C. i. f.' meaning of—Bill of lading—Insurance against war risks—Purchaser, whether bound to pay the premium—Shipment at enemy port—Royal Proclamation forbidding trading with enemy, effect of.*

A *c. i. f.* contract is one under which the purchaser is bound to pay the stated price for the goods on tender of the documents showing that the goods have been shipped for transit, to the port of destination, duly insured according to the terms of the contract, and that freight has been paid.

A bill of lading, as known to merchants, is a receipt for goods actually delivered over and shipped on board the ship named therein signed by the captain of the steamer or his representative, and no document which does not conform to these conditions can strictly be called a bill of lading.

A *c. i. f.* purchaser is entitled to ask for a bill of lading, for he is not bound to pay upon proof merely that the goods have arrived at the port of departure.

On the 9th of June 1914 the defendants contracted with the plaintiff for the purchase of five tons of round copper bottoms "*c. i. f.* Mahomerah, net cost in Bombay against bill of lading." The copper was shipped on board the steamer Tangistan on or about the 28th July 1914. On the 5th of August in consequence of war having broken out between Great Britain and Germany, the plaintiff's agent in England insured the copper against war risks. The documents arrived in Bombay on the 7th of September, whereupon the plaintiff demanded payment of the price and the war insurance premium which latter the defendants refused to pay. By another contract in writing, dated the 17th July 1914, the defendants purchased from the plaintiff 900 bags of sugar *c. i. f.* Mahomerah, July shipment, the defendants undertaking to pay for the sugar in Bombay against the bills of lading. The sugar was shipped at Hamburg on board the steamer Nicomedia on the 28th of July and was insured against war risks on the 29th,

Contract—contd.

The documents arrived in Bombay on the 15th August when the plaintiff demanded payment, which the defendants refused on the ground that there were no bills of lading and that owing to the war and the Royal Proclamation of 5th August, the contract had become impossible of performance:

Held, (1) that as the plaintiff was not bound to insure the copper against war risks, the defendants were not liable to pay the war insurance premium;

(2) that in view of the Royal Proclamation the second contract had become impossible of performance and the defendants were not liable to pay.

It is certainly desirable that a Judge trying a commercial cause should have a power to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence or otherwise. **B.** NISSIM ISAAC BEKHOR *v.* SULTANALLI SHUSTARY, 17 BOM. L. R. 243 **433**

——— through coercion – Plea, whether supported by suspicion or mere probability **921**

——— *Company—Contract with Company, whether can be altered by resolution of Company.*

Once the rights of parties dealing with a registered Company, have become fixed by a contract, the Company cannot by a resolution subsequently passed by it alter those rights. **M.** CONJEEVARAM HODGSONPET *v.* KANDASAWMY **847**

——— Mortgage, decree on—Payment by mortgagee to set aside sale of mortgaged property in rent decree—Mortgagor and mortgagee, relationship of—Mortgagee, right of—Lien—Remedy provided in mortgage-deed, nature of **571**

——— *Mortgagor and mortgagee—Compromise—Equity of redemption—Agreement to release—No writing or registration—Agreement acted upon for 35 years*—Locus penitentiæ *and* rei interventus, *doctrines of—Mortgage, whether can be re-agitated—Equity.*

The *locus penitentiæ* or "the power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which a writing is requisite, and has not been adhibited in an authentic shape," exists only where the parties stand upon nothing but an engagement not final or complete. If, however, the actings and conduct of the parties are founded on, then the plea of *locus penitentiæ* is excluded by *rei interventus*, which raises a personal exception. Such an inference is drawn "from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect, provided that they are unequivocally referable to the contract and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable."

Equity will support a transaction, though clothed imperfectly in legal forms to which finality attaches, especially if it had been acted upon by the parties for a long time.

In certain proceedings between the mortgagor and mortgagees, in 1873, prior to the passing of the Transfer of Property Act, in respect of certain mortgages of 1848 and 1871, the parties entered into a compromise whereby it was agreed that the equity of redemption in a portion of the mortgaged properties should be released in favour of the mortgagees, who were from that time forwards to be solely entitled to the ownership of the portion so released, that the mortgagor was to be absolutely entitled to the portion retained by her *free* of the encumbrance and that a conveyance was to be executed by the mortgagor to the mortgagees in respect of the properties in which the equity of redemption had been so released. No conveyance was actually executed, but the parties acted up to the terms of the said arrangement and enjoyed their respective lands and alienated them also. In a suit brought in or about 1908 for redemption of the mortgages of 1848 and 1871:

Held, that as the transaction took place before the Transfer of Property Act came into force no writing or registration was necessary to complete the conveyance, that even if it was defective or inchoate, the conduct of the parties and the approbatory acting or homologation of the mortgagor had supplied the necessary defects and that the existence of the mortgages could not be re-opened. **P. C.** MAHOMED MUSA *v.* AGHORE KUMAR, 17 BOM. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 288 **930**

——— *Person having two estates larger and smaller conveying entire property without limitation—Inference—Principle—Exception*

Where a person has two estates, one larger and the other smaller, and purports to convey the entire property without any words of limitation, he must always be taken to be conveying the highest estate he has: that is to say, if an executor having a one-third personal beneficial interest in the estate purports to convey the whole of it without qualification or limitation, he must be taken to be conveying in his character as executor and not in that of one having a beneficial interest only in a fraction of the whole estate purported to be conveyed.

Upon this general principle, exceptions may be grafted with reference to the particular facts of particular cases. **B.** GANGABAI *v.* SONABAI, 17 BOM. L. R. 303 **544**

——— of sale unregistered, whether creates interest **946**

——— Surety—Bail, person giving—Contract with third person to be indemnified—Forfeiture—Contract, whether legal **560**

Contract Act (IX of 1872), ss. 14, 19, 64, 65—*Fraud at time of entering into a contract and subsequently, effect of—Material alteration in terms of contract, effect of—Contract, whether enforceable—Void contract—Party deriving benefit, duty of.*

Section 19 of the Contract Act read with section 14 deals only with fraud so far as it affects the free will of the parties *at the time* of entering into a contract; therefore, the explanation to section 19 must not be taken as meaning that any subsequent fraud will not affect the validity of the original contract.

A contract is vitiated by a material fraudulent alteration of its terms and is not enforceable at the instance of the party making the alteration.

Any one who has received any benefit or advantage under a void contract is bound to make it good. **M.** CHITTURI SURAYYA *v.* BODDU RAMAYYA, (1915) M. W. N. 150; 17 M. L. T. 160 **57**

Contract Act—contd.

——— ——— **s. 16**—*Document—Undue influence—Burden of proof—Circumstances dominating the will—Inference.*

Where a *kabuliat* registered three days after its execution contained nothing in the document itself to show that it was a hard bargain or otherwise of an exacting nature, it is for the executant to prove that it was executed under undue influence. The fact that a compoundable criminal case was pending between the parties and the prosecution was ready to compound the offence and to withdraw the charge if the *kabuliat* was executed and that the executant was ready to execute it on condition of the withdrawal of the charge, would not lead to the necessary inference that the other side was in a position to dominate the will of the executant and that he used that position to obtain an unfair advantage upon him. **A.** KALLU *v.* PARBHU LAL **438**

——— ——— **ss. 17, 23, ill. (c)**—*Agreement among intending purchasers not to bid against each other, whether legal—Public policy.*

The plaintiffs entered into an agreement with the defendant and some others that in case of any one of them becoming the purchaser at an auction to be held by the Executive Engineer of the right to collect *lac*, that right was to be disposed of among all the "partners" by sale to the highest bidder, and that they would not only not bid against each other but that there was to be a show of bidding up to a certain limit in order to make the Executive Engineer believe that there was no combination between them and that there was keen competition among the bidders. The right having been sold by the Executive Engineer to two of the "partners" the plaintiffs bought it from them paying a certain sum over and above the auction price and divided this surplus among all the "partners", the defendant receiving his share. The plaintiffs then applied to the Executive Engineer for a transfer of the right in their name, and on the application being refused they sued the defendant for recovery of the amount paid to him:

Held, that the agreement being fraudulent and opposed to public policy was void and the plaintiffs could not recover the amount paid under it. **S.** CHATTAMAL JETHMAL *v.* REWACHAND, 8 S. L. R. 247 **40**

——— ——— **s. 19** **57**

——— ——— **s. 20** **51**

——— ——— **s. 20**—Planting of trees before grant of land—Cancellation of grant—Grantee, whether entitled to value or compensation—Transfer of Property Act (IV of 1882), s. 51 **51**

——— ——— **s. 23, ill. (c)** **40**

——— ——— **s. 35** **633**

——— ——— **s. 45**—*Landlord and tenant—Tenant paying rent to one out of several joint landlords, effect of.*

Where a tenant pays off the *entire rent* due from him to one of two co-sharers, he can escape liability to the other, if he shows that his payment to that co-sharer was one made *bona fide*.

But if the payment by him was not made in good faith and was made to defeat the claim of the other co-sharer to his share of the rent, the latter's right to recover his share of rent is not affected.

Contract Act—contd.

A co-sharer who has been paid his share of the rent is not a necessary party to the suit by the other for his share. **M.** CHOCKALINGAM CHETTY *v.* PERIYA KARUPPAN CHETTY, 28 M. L. J. 197 **141**

——— ——— **ss. 64, 65** **57**

——— ——— **s. 65** **442**

——— ——— **s. 65,** *application of—Agreement not to prosecute, whether given under undue influence or pressure—Transaction, set aside—Consideration, suit to refund, maintainability of.*

If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security ordered to be returned.

But in every case of illegal composition of a non-compoundable criminal offence, a refund cannot be demanded at law.

Section 65 of the Indian Contract Act does not apply to such cases of refund of money. **C.** AMJADNESSA BIBI *v.* RAHIM BAKAS SIKDAR, 19 C. W. N. 383; 21 C. L. J. 642 **713**

——— ——— **s. 69** **456**

——— ——— **ss. 69, 70**—*Purchaser of equity of redemption, payment by, of amount not charged on mortgaged property—Contribution, right of—Liability, when arises—Benefit—Opportunity to accept or reject benefit.*

A purchaser of the equity of redemption, who pays off at the time of redemption of the mortgage the amount of a bond not charged on the mortgaged property, cannot be said to be interested in the payment of that amount within the meaning of section 69 of the Contract Act, so as to be entitled to recover the amount from the mortgagor.

In order to enable a party to recover money paid by him to another under section 70 of the Contract Act, it is necessary that the party sought to be made liable must not only have benefited by the payment, but must also have had the opportunity of accepting or rejecting such benefit. **M.** PALANIAPPA CHETTY *v.* RANGACHARIAR **697**

——— ——— **s. 70** **456, 697**

——— ——— **s. 70**—*Plaintiff and defendant co-owners of land irrigated from same source—Repairs effected by plaintiff—Defendant benefited by repairs—Contribution—Option to accept or refuse benefit, if necessary.*

The plaintiff and the defendants held equal areas of land irrigated from the same source and certain repairs became necessary for the preservation of the irrigation works. The plaintiff submitted an estimate of repairs to the defendants and called on them for a proportionate contribution. The defendants replied that they had no objection to the repairs being done but they were under no liability to contribute and would not do so. The plaintiff effected the repairs and brought the present suit to recover a proportionate share of the cost from the defendants. It was found that the repairs were lawfully effected and the defendants were benefited by them and the plaintiff did not intend to do them gratuitously:

Contract Act—contd.

Held, that section 70 of the Indian Contract Act applied to the case and the defendants were liable to contribute towards the cost of the repairs.

Per *Ayling, J.*—Section 70 of the Contract Act does more than reproduce the English Law as laid down in *Lampleigh* v. *Brathwait*, 1 Sm. L. C. 141; Hob. 105; Moore 866; Brownl. & Gold. 7 and it is the duty of the Courts of India to have regard to the section itself without considering the restrictions imposed by the English Case-Law.

Per *Tyabji, J.*—There is no warrant for introducing the necessity for option of declining or accepting the benefit in construing section 70 of the Indian Contract Act. **M.** SAPTHARISHI REDDIAR *v.* SECRETARY OF STATE, 17 M. L. T. 234; 28 M. L. J. 384; 2 L. W. 329; (1914) M. W. N. 256 **309**

——— ——— — **s. 73** **196**

——— ——— **ss. 73, 212, ill. (a)**—*Breach of contract— Damages—Agreement to realise money and pay debt due out of it—Failure to pay—Suit by creditor against debtor—Debt recovered with costs—Costs paid, whether recoverable as damages—Plaintiff, duty of, to mitigate damages.*

A person who undertakes for another to collect certain debts due to him and pay certain other debts due by him out of such collections, is bound to obey the instructions of the person whose debts he undertakes to collect and if he fails to discharge the debts from the collections, he will be liable for the loss caused thereby.

There is nothing in the Indian Contract Act which renders the principles of English Law regarding the liability of a party for the consequences of a breach of contract inapplicable to India.

Illustration (*a*) to section 212, Indian Contract Act, is traceable to the distinction between collateral damages arising from the retention of money and from failure to perform other contracts.

The defendant undertook to collect some moneys due to the plaintiff and out of such collections to pay a debt due by the plaintiff to the defendant and a third person, but after collecting the moneys the defendant failed to pay the debt. The third person demanded an acknowledgment of the debt from the plaintiff as the claim was about to be barred by limitation. The plaintiff refused to do so, whereupon the third person sued him and recovered the debt with costs. The plaintiff then sued to recover from the defendant the amount of the debt and costs which he had had to pay:

Held, that the defendant was not liable for the costs, as the law does not regard consequential damages arising from delay in payment of money.

Held further, that the basis of the claim for compensation was that the plaintiff did not act wilfully and obstinately in refusing to avail himself of his opportunities to remedy the inconvenience caused to him, and as the plaintiff in the present case could have avoided incurring the costs by giving the acknowledgment asked of him and as he could not be said to have acted prudently in refusing to do so, the plaintiff was debarred from recovering the costs from the defendant under the Explanation to section 73, Indian Contract Act, which is an equitable provision against the rigour of the law. **M.** RANGASAMY AIYAR *v.* VENKATARAMA AIYAR, 2 L. W. 342; 17 M. L. T. 253; (1915) M. W. N. 246 **635**

Contract Act—concld.

——— ——— **s. 74** **633**

——— ——— **s. 74**—*Deposit of certain amount —Condition of forfeiture on breach of contract—Amount deposited only one-twentieth of the amount stipulated to be paid under the contract—Forfeiture or penalty.*

Whether a certain sum of money was paid by way of deposit to be forfeited in case of a breach of contract or penalty to be relieved against, is a question of fact to be determined on the facts of each case.

In such cases the smallness or largeness of the amount is only a factor in determining whether there was deposit in reality, although it goes by that name in the contract.

The rule of law applicable to cases of sale, which forfeits the deposit in case of breach of contract, equally applies to leases also, and there is no essential difference in the characteristics attached to each of these kinds of contract.

Where there is an express contract which stipulates that on breach of it the amount deposited shall be forfeited, that contract must be given effect to without reference to section 74 of the Contract Act.

Section 74 of the Contract Act has no application to cases where a certain sum of money was paid as a precautionary measure for the performance of a contract.

Where there are two remedies open to a party independent of each other, adoption of one does not show that effect is given to the other also. **M.** ORR *v.* CHITHA CHINNA YEGAPPA CHETTY, 17 M. L. T. 229; (1915) M. W. N. 249 **318**

——— ——— **s. 78** **536, 633**

——— ——— **ss. 108, 178** **633**

——— ——— **s. 212, ill. (a)** **635**

——— ——— **s. 254**—Partnership, dissolution of—One partner keeping funds and employing them for his own benefit—Interest, liability for—Misconduct or fraud, if essential—Direction to pay into Court in a partnership suit, if discretionary and when interfered with in appeal—Party taking the chance of success, if can be permitted to question jurisdiction of Court in case of failure **710**

Contribution. *See* CONTRACT ACT, s. 70.

——— ——— ———, suit for—Decree for arrears of rent against joint tenants, realized from one tenant only—Tenants in possession of separate fields in joint *khata*—Suit for contribution, whether maintainable **587**

——— ——— ———, *suit for—Government revenue, a joint charge on two lands—Payment by owner of one —Right to claim proportionate share—Liability, whether personal—Contract Act (IX of 1872), ss. 69, 70, applicability of.*

If a person who owns one of two lands on both of which the Government revenue is jointly made a charge by Statute pays the whole revenue, he is entitled to claim contribution for the proportionate sum due by the other land.

But neither section 69 nor section 70 of the Contract Act is applicable as the liability of the owner of the land is not personal. **M.** NARAINA PAI *v.* APPU **456**

Contributories. *See* COMPANIES ACT, 1882, ss. 169, 184.

——————, settling list of—Question, whether can be re-opened **95**

Co-sharers—Building improvements – Sale of house by some of co-sharers during minority of others—New house erected by vendee—Right of minors on attaining majority—Delay in filing suit **350**

Costs. *See* COMPANIES ACT, 1882, s. 254.

——Appeal **455**

——Sanction to prosecute proceedings **329**

Co-tenant, possession of, when adverse – Ouster —Intention, whether sufficient **22**

Court Fees Act (VII of 1870), s. 7 (iv) 624

—————— **s. 7 (iv) (c)**—*Suit for declaration that decree passed against plaintiff is not binding on him—Consequential relief—Court bound to accept valuation put by plaintiff*—Ad valorem *Court-fee.*

A suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree passed against the plaintiff for a debt is not binding on him, is not a mere declaratory suit, but is one with consequential relief falling under section 7 (*iv*) (*c*) of the Court Fees Act and the Court is bound to accept the valuation put by the plaintiff, on which *ad valorem* fee should be paid. **M.** ARUNACHALAM CHETTY *v.* RANGASAMY PILLAI, 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 154 **79**

—————— **s. 7 (iv) (f)**—*Suit for rendition of accounts and winding-up of partnership —Preliminary decree—Appeal—Court-fees to be* ad valorem.

An appeal from a preliminary decree in a suit for rendition of accounts and winding-up of a partnership must bear an *ad valorem* Court-fee on the amount at which the relief is valued in the plaint. **P.** KANJI MAL *v.* PANNA LAL, 7 P. R. 1915 **262**

—————— **s. 11**—*Proceedings for ascertainment of profits—Order directing payment of additional Court-fee within fixed time—Effect of non-payment—Appellate Court, whether can extend time —Civil Procedure Code (Act V of 1908), ss.* 148, 149.

No special procedure for dismissal for default in payment of Court-fee under section 11 of the Court Fees Act is necessary so long as it is clear that the parties have had fair notice of the nature of the proceedings.

Where, therefore, in proceedings for the ascertainment and recovery of profits in a partition suit an order was made ascertaining profits and directing the decree-holder to pay additional Court-fee on or before a fixed date:

Held, (1) that as the order was merely inserted incidentally in a decision on an application made by the decree-holder for a different purpose, there was no adjudication or valid dismissal of the suit;

(2) that an Appellate Court can neither extend the time fixed by the first Court for payment of the Court-fee nor reduce the amount awarded and that sections 148 and 149 of the Civil Procedure Code do not give it this power either separately or jointly. **M.** NATHERSA ROWTHER *v.* MAHOMAD ROWTHAN **890**

Court Fees Act—concld.

—————— **s. 13** **300**

—————— **s. 19 D** — *Probate—Will disposing of joint Hindu family property in favour of survivors—Duty payable—Party, whether can go behind Will.*

The Probate of a Will purporting to dispose of property held jointly between the testator and his minor son as members of a joint Hindu family is not exempted from Probate duty under section 19*D* of the Court fees Act.

In such a case even the least part of the joint property cannot be said to have been held "in trust not beneficially" at his death by the testator as prescribed in Annexure *B* of Schedule III of the said Act.

Where the matter in question is Probate, the parties claiming under the Will cannot go behind its terms or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the Will itself, but with the express statements made therein. **B.** KASHINATH PARASHRAM *v.* GOURABAI MALLAPPA WARAD, 17 BOM. L. R. 169; 39 B. 245 **473**

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 195, 476—*Sanction without application, legality of—Order directing prosecution, when to be made—Complainant, whether can delegate his right.*

An application is a necessary condition precedent to the grant to a private person of sanction to prosecute.

Where the facts constituting an offence are not brought to the notice of a Magistrate in the course of a judicial proceeding, he has no authority to act under section 476.

A person cannot delegate to another the right to file a complaint. A District Magistrate cannot, therefore, authorise the Public Prosecutor to file a complaint on his behalf. **P.** LADHA SINGH *v.* EMPEROR, 13 P. R. 1915 CR.; 20 P. W. R. 19 5 CR.; 16 CR. L. J. 251 **107**

—————— **s. 39**—Magistrate—'Specially empowered'—'Generally empowered'—Notification by Government empowering all second class Magistrates to try cases under Opium Act, if amounts to 'specially empowered'—Jurisdiction **156**

—————— **ss. 45 (1) (c), 250**

—Complaint of theft before Village Magistrate—Report to Police officer—Charge—Compensation, right to.

Where a complaint of theft was made to the Village Magistrate who communicated the information to the nearest Police station and the Police in due course charged the case:

Held, that the case must be regarded as instituted upon information given to a Police Officer within the meaning of section 250 of the Criminal Procedure Code, and the Magistrate was competent to pass an order for compensation. **M.** MURUDAI VEERAN *v.* PICHAN AMBALAGARAN, 16 CR. L. J. 248 **104**

—————— **s. 75**—*Warrant—Seal of Court.*

Under section 75 of the Code of Criminal Procedure the seal of the Court is essential to the validity of a warrant. **C.** MAHAJAN SHEIKH *v.* EMPEROR, 19 C. W. N. 224; 16 CR. L. J. 336 **672**

Criminal Procedure Code—contd.

——————— **s. 103 (2)** **152**

——————— **s. 106**—*Second class Magistrate, who is also Sub-Divisional Officer, whether can pass order binding accused to keep peace for over six months.*

A Magistrate of the second class, who is also a Sub-Divisional Magistrate, can pass an order under section 106 of the Code of Criminal Procedure binding over a person to keep the peace for a period exceeding six months. **A.** RAJA SINGH *v.* EMPEROR, 13 A. L. J. 268; 37 A. 230; 16 CR. L. J. 350 **734**

——————— **ss. 110, 514**—*Conviction of person under security—Forfeiture of bond—Proper procedure.*

One *F* was put on Rs. 1,000 security for a year under section 110 of the Criminal Procedure Code. Before the year was over he was convicted of an offence under section 323, Indian Penal Code, and sentenced to imprisonment for two weeks and a fine of Rs. 20. Upon this the District Magistrate confiscated Rs. 205 of the security money from *F* and his sureties jointly:

Held, that there was no real ground for dealing heavily with the surety and a forfeiture of Rs. 50 as against the principal *F* was enough in the circumstances of the case. **P.** FATTA *v.* EMPEROR, 6 P. R. 1915 CR.; 15 CR. L. J. 287 **335**

——————— **s. 110**—*Evidence—Evidence of Police, value of—Police diaries.*

Evidence of a Police officer in a case under section 110 of the Criminal Procedure Code, when it is based upon hearsay rumour and above all on diaries, is of infinitesimal value, more particularly where other evidence is available.

Police diaries may be of use when a Judge has to decide about the guilt of an accused person and they contain matter which seems to point in the opposite direction, but they are dangerous evidence against a person. **A.** ABDUL KHALIQ *v.* EMPEROR, 13 A. L. J. 412; 16 CR. L. J. 281 **329**

——————— **s. 110**—*Restrictions and limitations on sureties—Magistrate, duty of.*

In proceedings under section 110 of the Criminal Procedure Code, Magistrates must not act arbitrarily, and any restrictions or limitations that they impose on sureties must be reasonable. **U. B.** NGA SHWE MYO *v.* EMPEROR, U. B. R. 1914, II 44; 16 CR. L. J. 422 **998**

——————— **ss. 110, 118, 122**—*Security for good behaviour—Sureties offered not to be refused except after judicial inquiry.*

Sureties for good behaviour under section 118 read with section 110 offered by accused should not be refused, except after judicial inquiry by the Magistrate who has made the order under section 118, and such inquiry should be made under the provisions of section 122 of the Criminal Procedure Code. **C.** HIRÁN *v.* EMPEROR, 19 C. W. N. 220; 16 CR. L. J. 327 **663**

——————— **ss. 110, 123**—*Security for good behaviour, object of—Surety, rejection of—Grounds—Enquiry, whether can be delegated—Reference to Sessions Court.*

The petitioner was ordered to give security for good behaviour for a term of three years and in default to suffer imprisonment for one year. The Magistrate ordered a security bond to be given for Rs. 1,000 and four sureties to bind themselves. Four sureties were offered. The Magistrate on the report of Police rejected one of them on the ground that he was a boy and another as a bad character and the remaining two for they were relatives. Financially it was admitted that each of these persons was fit to be surety for Rs. 1,000. The appeal against the order was rejected summarily:

Held, that since the order did not state whether each and all of the sureties required were liable for Rs. 1,000 on occasion arising or Rs 1,000 between them the order was bad in law;

that to prevent misunderstanding particulars like these should always be stated;

that mere relationship is no reason for refusing a surety, on the contrary relationship is a recommendation;

that a Magistrate should inquire himself into the question of eligibility of a person as surety and not delegate such inquiry to any one else;

that the District Magistrate should not have rejected the appeal summarily merely because it did not contain just the particulars he wanted and that he was bound by law to examine the facts and see whether the order of the Magistrate required amendment;

that under section 123 (2) of the Criminal Procedure Code, inasmuch as the order for security specified a term exceeding one year during which accused was to be of good behaviour, the Magistrate in ordering detention of the accused should have referred the case to the Sessions Court and that the fact that the Magistrate ordered imprisonment for one year only did not affect the question of jurisdiction;

that a delegation of the power to inquire into questions of the eligibility of surety to the Sub-Inspector who was the same who had *challaned* the case was peculiarly objectionable. **P.** MAHALA *v.* EMPEROR, 6 P. R. 1914 CR; 142 P. L. R. 1914; 16 CR. L. J. 337 **721**

——————— **s. 110**—*Security for good behaviour—Fresh proceedings after release—Circumstances after release to be considered.*

Where fresh proceedings under section 110 of the Criminal Procedure Code are taken against an accused after his release from the last security, they must be confined to facts and circumstances alleged against him after his release. **C.** RAMDEO PANDEY *v.* EMPEROR, 19 C. W. N. 223; 16 CR. L. J. 312 **648**

——————— **ss. 112, 118, 439 (5)**—*Order requiring sureties of a certain status, validity of—Revision.*

Section 112 of the Criminal Procedure Code gives the Magistrate power to define the class of sureties. An order, therefore, requiring sureties to be landholders in the neighbourhood of the accused, either holding 100 acres of land or paying income-tax and able to control the accused, is perfectly legal.

Section 439 (5) of the Code precludes the High Court from entertaining an application for revision of an order under section 118 where the right of appeal has not been exercised. **S.** JUMO *v.* EMPEROR, 8 S. L. R. 229; 16 CR. L. J. 252 **108**

Criminal Procedure Code—contd.

——————— ss. 117, 118 527

——————— s. 118 108, 663

——————— ss. 118, 120, 123—*Security, failure to give—Imprisonment, whether can run concurrently with sentence accused already undergoing.*

Section 120 (1) read with section 123 (1) of the Code of Criminal Procedure, makes it illegal for a Magistrate to pass a sentence of imprisonment to run concurrently with some other sentence the accused is already undergoing. **M.** *In re* CHINNASWAMY, 16 CR. L. J. 272 160

——————— s. 120 160

——————— s. 122 663

——————— s. 123 160, 721

——————— s. 133 733

——————— ss. 133, 137—*Nuisance—Conditional order—Objection—Proper procedure—Magistrate's duty.*

Where a Magistrate made a conditional order under section 133 of the Code of Criminal Procedure to remove any unlawful obstruction from a way used by the public and the opposite party showed cause: *Held*, that the provisions of section 137 (1) must be observed and that the Magistrate should take evidence in the matter as in a summons case and should not at once drop the proceedings.

In such a case it is open to the Magistrate to consider, when that evidence is taken, whether there is a complete answer to the case against the opposite party or whether this is not a proper case where the parties should be referred to the Civil Court for the purpose of determining a matter which for some reason or other the Magistrate considers that he cannot decide. **C.** SAROJBASINI DEVI *v.* SRIPATI CHARAN, 19 C. W. N. 332; 16 CR. L. J. 415 799

——————— Ch .X, ss. 133, 439—*Order under s. 133—Order in criminal trial—Letters Patent, s. 15—Review by single Judge—Appeal, maintainability of.*

The orders passed under Chapter X of the Criminal Procedure Code are orders in a criminal trial within the meaning of section 15 of the Letters Patent and, therefore, no appeal lies from an order of a single Judge reviewing such an order under section 439 of the Criminal Procedure Code. **M.** NISSANKARA RAO SUBBAYYA *v.* COOLA RAMAYYA, (1915) M. W. N. 240; 16 CR. L. J. 349 733

——————— s. 137 799

——————— s. 144 (5)—*Time expired order, setting aside of.*

An order, which on the date on which it is sought to be revised by the High Court ceased to be in force by efflux of time under section 144 (5) of the Code of Criminal Procedure, should not be interfered with in revision under section 435 of the Code of Criminal Procedure. **M.** SAWMINATHA MUDALIAR *v.* GOPALAKRISHNA NAIDU, 16 CR. L. J. 228 160

——————— ss. 145, 526—*"Criminal case"—Transfer—Interpretation of Statutes—Change of language in the same Act—Presumption.*

Criminal Procedure Code—contd.

A proceeding under section 145 of the Criminal Procedure Code cannot properly be called a "criminal case" within the meaning of section 526, for the action which a Magistrate can take on such a proceeding, is of a purely preventive and provisional nature in a civil dispute and not of a punitive nature.

A change of language in the same Code or Act may be presumed to indicate a change of intention on the part of the Legislature. **S.** FARID *v.* PIRU, 8 S. L. R. 215; 16 CR. L. J. 249 105

——————— ss. 145, 146—*Dispute between members of Muhammadan family—Right to collect rents from tenants—Possession with managing member, effect of—Magistrate, discretion of, to allow application to re-summon witnesses—Forcible dispossession—Right to fractional share, if right to tangible immoveable property.*

In an inquiry under section 145, Criminal Procedure Code, it is in the discretion of the Magistrate to allow witnesses to be re-summoned upon a petition presented towards the end of his inquiry.

A dispute as to a right to collect rents is a dispute within the operation of section 145 of the Criminal Procedure Code

Where the dispute is between the members of a Muhammadan family who claim fractional shares in the properties of the family, only that person can be said to be in actual possession within the meaning of section 145, Criminal Procedure Code, who is in actual receipt of rent and to whom the tenants pay such rent.

Where more than two months have elapsed from the date of the death of the last person in possession, there is 'no' forcible dispossession within two months within the meaning of section 145 of the Code of Criminal Procedure.

A right to a fractional share may be a right to tangible immoveable property even when the shares are not definitely ascertained. **M.** BULKIS BIVI *v.* NAGOOR KANNI ROWTHER, 17 M. L. T. 225; (1915) M. W. N. 267; 16 CR. L. J. 284 332

——————— s. 145—*Record of Rights recently published, entries in—Presumption therefrom—Factum of possession.*

Whatever presumption may be raised by a recently published Record of Rights, it does not in itself establish the *factum* of possession; and if the Magistrate decides the *factum* of possession wrongly in a proceeding under section 145, Criminal Procedure Code, that is not a question with which the High Court can interfere under the Charter, it not being a question of jurisdiction. **C.** CHINTAMONI JENA *v.* JAGANNATH RAMANUJA DAS, 19 C. W. N. 123; 16 CR. L. J. 315 651

——————— s. 146 332

——————— s. 193 (2)—*Power of Sessions Judge to transfer appeal to Assistant Sessions Judge—Jurisdiction—'Case,' meaning of.*

Section 193, clause 2 of the Code of Criminal Procedure, confers on the Sessions Judge no power to transfer appeals to the Assistant Sessions Judge. The word "case" in the section does not include an appeal. **A.** EMPEROR *v.* ABDUL RAZZAK, 13 A. L. J. 353; 16 CR. L. J. 316; 37 A. 286 652

Criminal Procedure Code—contd.

——————— — **s. 195** **107, 645, 999**

——— ——— ——— **s. 195**—*Application for sanction to prosecute—Dismissal for default, whether competent.*

A Court has no jurisdiction to dismiss in default an application for sanction to prosecute. **P.** RUP NARAIN *v.* MAHA DAYAL, 4 P. R. 1915 CR.; 16 CR. L. J. 288 **336**

——— ——————— **ss. 195, 476, 537**—*Requisites of legal sanction—Notice to accused, whether necessary—Judicial proceeding, scope of—Taking action on extra-judicial information, legality of.*

A sanction for prosecution which is not addressed to any one in particular, and does not, as far as practicable, specify the Court or other place in which and the occasion on which the offence was committed, is not a legal sanction under section 195 of the Criminal Procedure Code.

A Court, acting under section 195 (*b*), is competent to, and in a proper case should, give notice and make inquiry before granting sanction, but the law does not compel the giving of notice or the holding of any inquiry before granting sanction.

Section 537 of the Code can only be used to repair irregularities which have not occasioned any failure of justice. It cannot make legal that which is illegal.

The offence for which a prosecution can be ordered, under section 476 of the Criminal Procedure Code, must have been either committed before the Court making the order or brought to its notice in the course of a judicial proceeding pending before it.

The calling up of a record under section 476 of the Criminal Procedure Code and the subsequent examination thereof do not constitute a "judicial proceeding" within the meaning of that phrase in the Code.

A Magistrate taking action in respect of an offence notified to him extra-judicially commits an illegality not curable by section 537 of the Code. **N.** GOPAL *v.* EMPEROR, 11 N. L. R. 36; 16 CR. L. J. 289 **513**

——————— ——— **s. 195**—*Sanction to prosecute refused—Costs.*

It is not competent to a Court to make an order as to costs in proceedings under section 195, Criminal Procedure Code. **P.** BISHEN DAS *v.* RAHMAT KHAN, 5 P. R. 1915 CR.; 16 CR. L. J. 281 **329**

——————————— **ss. 195, 537**—*Sanction to prosecute granted—First complaint dismissed—Second complaint without fresh sanction—Irregularity, objection as to, taken at the very first stage, effect of.*

Section 537 of the Code of Criminal Procedure was never intended to allow a Magistrate to override the clear provisions of the Code. The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the trial. Where, therefore, the want of sanction for prosecution of a complaint is at once brought to the attention of the Court, it is the duty of the Magistrate to refuse to take cognizance of the complaint on the ground that he cannot do so by reason of the terms of section 195 of the Code.

Criminal Procedure Code—contd.

Sanction to prosecute Z and some other persons was granted under section 195. On the basis of the sanction a complaint was filed but the accused were discharged as the complainant was not present on the date of hearing. A fresh complaint was filed against Z alone:

Held, that the second complaint was not in continuation of the first. **A.** ZAHIR SINGH *v.* EMPEROR, 13 A. L. J. 345; 16 CR. L. J. 310 **646**

——— ——— ——— **s. 203** **999**

——— ——— ——— **Ch. XVIII**—*Inquiry—Power of trying Magistrate to discharge accused—Scope of his inquiry in a charge triable by Court of Session—Penal Code (Act XLV of 1860), ss. 463, 464.*

In the case of offences which are triable solely by a Court of Session, a Magistrate cannot be considered to have the power to proceed to the trial of the accused in those inquiries, and the chief business of the Magistrate is to see whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible in regard to every ingredient of the offence that is charged.

Where in a charge under sections 463 and 464 of the Penal Code, the fact of the alteration of the promissory note was proved, but no evidence was adduced to prove that either of the accused altered the document in question:

Held, that the trying Magistrate had power to discharge the accused. **M.** NARASAPPAYYA *v.* NARASAYYA SHANBHOGUE, (1915) M. W. N. 233; 16 CR. L. J. 307 **643**

——— ——— ——— **ss. 208, 438**—*Session case—Inquiry before Magistrate—Summoning of witnesses on date of committal—Proper procedure.*

In an inquiry before a Magistrate preliminary to commitment to Sessions, the fact that an application was made on the date on which the accused was committed to the Sessions for the summoning of further witnesses, introduces no conditions which show that the provisions of section 208 of the Code of Criminal Procedure have not been observed. **C.** EMPEROR *v.* SURATH, 19 C. W. N. 335 **799**

——— ——— ——— **ss. 209, 210, 213**—*Inquiry before commitment—Discretion of Magistrate to discharge accused.*

When a Magistrate has heard the evidence for the prosecution with entire disbelief, where he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* where, after examining certain witnesses named on behalf of the accused, he comes to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses he is well within his discretion in discharging the accused and not committing him to the Sessions. **A.** DHARAM SINGH *v.* JOTI PRASAD, 13 A. L. J. 497; 16 CR. L. J. 429; 37 A. 355 **1005**

——— ——— ——— **ss. 210, 213** **1005**

——— ——— ——— **ss. 233, 239, 537**—*Misjoinder of charges—Joint trial—Offences in different villages on different nights—One accused*

Criminal Procedure Code—contd.

charged with offences under ss. 457 and 380, Penal Code, and other with offences under ss. 457 and 380 or 411, Penal Code—'Same transaction'—Irregularity or illegality, whether curable.

Section 239, Criminal Procedure Code, does not permit the joint trial of accused for different offences committed in the course of different transactions.

Where, in respect of offences of house-breaking and theft committed in two different villages on two distinct nights, the 1st accused was charged with the offences under sections 457 and 380, Indian Penal Code, and the second accused with those under sections 457 and 380 or 411, Indian Penal Code, and both the accused were tried at one trial in respect of the above charges:

Held, that the trial was bad.

Held further, that the charge was bad for vagueness, as it did not specify the articles stolen or the name of the person whose house was broken into and the place of offence was given only as one village whereas the trial was for offences committed at that village as well as another.

Per *Seshagiri Aiyar, J.*—Disregard of a plain duty cast by law on a Magistrate cannot be condoned with reference to section 537, Criminal Procedure Code.

Section 233, Criminal Procedure Code, must be strictly applied save where the Code itself provides exceptions. **M.** MALA MEKKALAKATI SUBBADU, *In re*, 2 L. W. 265; 28 M. L. J. 381; 16 CR. L. J. 298 **522**

——————— **ss. 234 to 236**—*Misjoinder of charges—Transaction, meaning of—Illegality—Irregularity.*

The accused were charged of having entered the house of the third prosecution witness with a view to coerce the deceased person and his brother to deliver certain promissory notes and receipts and, later in the evening, of having obstructed the complainant's party when they proceeded to prefer a complaint in regard to what the accused had done in the morning:

Held, that the accused could not be charged together for their action in the morning and in the evening in one and the same trial, and that the joinder amounted to an illegality which could not be cured by the application of section 537 of the Criminal Procedure Code.

Whether a series of acts forms the same transaction or not depends upon community of purpose and the continuity of aim.

An objection as to misjoinder of parties can be taken in the High Court, even if the same was not taken before the Sessions Judge.

Courts have not to concern themselves with the ultimate object of the offender in determining the nature of the transaction. It is the immediate purpose of the attack that determines the character of the particular transaction. Mere interval of days will not disturb the oneness of the transaction nor necessarily the fact that different sets of persons were engaged on different occasions. If the aim of the accused on the different occasions was directed towards effecting different purposes, the transactions are different. In each case it is a question of fact whether the acts are so connected together as to form part of the same transaction.

Criminal Procedure Code—contd.

The word 'transaction' means a completed act. **M.** VIRUPANA GOWED *v.* EMPEROR, 17 M. L. T. 242; (1915) M. W. N. 241; 28 M. L. J. 397; 16 CR. L. J. 323 **659**

——————— **s. 234**—*One trial of not more than three offences of same kind against same person—Great care and caution to be used with different complainants—Charges, when to be brought together.*

Per *Fletcher, J.*—Section 234 of the Code of Criminal Procedure is not limited to cases where the offences have been committed against the same person.

The power given by section 234 is one that requires to be used with great care and caution where there are different complainants.

Per *Beachcroft, J.*—Where there is no fear of the accused being prejudiced the charges are always tried together. **C.** SUBEDAR AHIR *v.* EMPEROR, 19 C. W. N. 557; 16 CR. L. J. 332 **668**

——————— **s. 236** **641**

——————— **ss. 236, 237, 403**—*Penal Code (Act XLV of 1860), s. 457—Rangoon Police Act (IV of 1899), s. 31—Second trial for a graver offence when conviction on the same facts for lesser offence subsisting, whether legal.*

When a man has been convicted of committing an act constituting an offence, and further evidence subsequently comes to light which shows that his act constituted a graver offence than that of which he was convicted, he cannot merely on that ground alone be put upon his trial for the graver offence.

Therefore, a person who is convicted under section 31 of the Rangoon Police Act for being in possession of an article supposed to be stolen cannot be again tried and convicted later on for the offence under section 457, Indian Penal Code, simply on the ground that the owner of the article is traced and some further evidence is available to constitute an offence under section 457 of the Indian Penal Code. **L. B.** NGA SHWE YI *v.* EMPEROR, 16 CR. L. J. 267 **155**

——————— **s. 237** **155, 641**

——————— **s. 239** **522**

——————— **s. 239**—*Principal offender and abettor, joint or separate trial of—Judicial discretion.*

Under section 239, Code of Criminal Procedure, judicial discretion has been given to the Court to try the principal offender and the abettor either jointly or separately; and the manner in which this discretion should be exercised must depend on the facts of each case. **C.** DWARKA SINGH *v.* EMPEROR, 19 C. W. N. 121; 16 CR. L. J. 348 **732**

——————— **s. 250** **104**

——————— **s. 256**—*Commencement of inquiry as in a warrant case—Offence disclosed not triable as such—Duty of Magistrate to afford accused opportunity for cross-examination of prosecution witnesses.*

Where an inquiry commenced as in a warrant case and the accused curtailed their cross-examination of the prosecution witnesses under the impression that they could have a further opportunity of cross-examining them, but no offence triable as a warrant

Criminal Procedure Code—contd.

case having been disclosed, the Magistrate closed the case and convicted the accused:

Held, that it was the duty of the Magistrate to allow the accused an opportunity of completing their cross-examination before proceeding with the case. **M.** APPAVU PADAYACHI, *In re*, 16 CR. L. J. 250 **106**

——— ——— ——— **s. 257**—*Right of accused to call for prosecution evidence, whether can be exercised before framing of charge—Warrant case.*

Where in a case of a criminal breach of trust the Magistrate allowed the application of the accused for inspection of documents in the complainant's possession after the examination-in-chief of the witnesses for the prosecution had concluded but before the charge had been framed:

Held, that the Magistrate should not have entertained the application at that stage of the case but should have informed the accused that he was at liberty to renew it if the charge was framed against him.

Per *Pratt, J. C.*—The accused's right to call evidence, either witnesses or documents, does not arise until after the charge has been framed and read to him. The right is given by section 257 of the Criminal Procedure Code and is subject to the limitations enjoined by that section.

Per *Fawcett, A. J. C.*—The Magistrate should satisfy himself that the documents called for have some bearing on the issues in the case and are relevant before granting a summons for their production. **S.** TAHILRAM LILARAM *v.* PITAMBERDAS VALABDAS, 8 S. L. R. 267; 16 CR. L. J. 245 **101**

——— ——— ——— **s. 307** **641**

——— ——— ——— **s. 307** — *Reference — Jury, verdict of disagreement with, in respect of some of accused—Judge, duty of—Confessions of co-accused, when to be acted upon.*

Per *Fletcher, J.*—When the Judge agrees with the verdict of the Jury as against any particular accused, it is clearly his duty to pass sentence on that accused.

The confessions of the co-accused can be taken into consideration, but the Court requires corroboration before it will act upon them.

Per *Beachcroft, J.*—Sub-section (2) of section 307 of the Code of Criminal Procedure does not intend that when the Judge is not prepared to accept the verdict of the Jury in its entirety, the whole case is to be referred to the High Court. It only contemplates a reference in the case of those persons in respect of whom the Judge declines to accept the verdict. **C.** EMPEROR *v.* BABAR ALI GAZI, 19 C. W. N. 584; 21 C. L. J. 492; 16 CR. L. J. 321 **657**

——— ——— ——— **ss. 337, 364**—Pardon, grant of— Magistrate, power of—Accused charged of one conspiracy, whether can be found guilty of another—Conspiracy, member of, liability of—Conspiracy to commit murder—Offence, nature of—Punishment, considerations in—Members joining before and after murder—Deposition of witness, weight of—Deficiencies, effect of—False denial by accused—Presumption—Confession, recording of—Confession retracted, evidentiary value of **738**

Criminal Procedure Code—contd.

——— ——— ——— **ss. 337, 339**—*Tender of pardon, object of—Approver resiling from his evidence in Sessions Court—Forfeiture of pardon—Trial—Defence—Evidence before Committing Magistrate, relevancy of—Statement, meaning of—Procedure—Evidence Act (I of 1872), s. 24.*

The object of tendering a pardon is to obtain the evidence of the person to whom the pardon is tendered and the "full and true disclosure" in section 337 (1), Criminal Procedure Code, refers to a full and true disclosure in the evidence which the approver is required to give.

Where the evidence of an approver in the Sessions Court is not a compliance with the conditions of his pardon, the fact that he gave evidence in accordance with those conditions before the Committing Magistrate does not save him from being treated as a person who has forfeited his pardon within the meaning of section 339, Criminal Procedure Code. Such a person cannot plead the pardon as a bar to his trial.

The evidence of an approver in the committal proceedings is a statement within the meaning of section 339 (2) of the Criminal Procedure Code and is not governed by section 24 of the Evidence Act and can be used against him in evidence when the pardon has been forfeited.

The proper procedure in such cases indicated. **N.** LOCAL GOVERNMENT *v.* MULLU, 11 N. L. R. 59; 16 CR. L. J. 417 **993**

——— ——— ——— **s. 339** **993**

——— ——— ——— **ss. 345, 439**—*Compounding of offence in revision, whether allowed.*

Section 345 of the Criminal Procedure Code allows a case in which appeal is pending to be opened to composition with the leave of the Court before which the appeal is to be heard, but the section does not apply to cases coming up in revision. **A.** RAM CHANDRA *v.* EMPEROR, 13 A. L. J. 104; 37 A. 127; 16 CR. L. J. 247 **103**

——— ——— ——— **ss. 349, 528**—*Reference to Sub-Divisional Magistrate—Jurisdiction—Transfer.*

Jurisdiction to deal with the proceedings under section 349 of the Criminal Procedure Code is conferred upon District Magistrates and Sub-Divisional Magistrates and upon no other Magistrates.

Section 528 of the Code has no application to proceedings submitted to a Sub-Divisional Magistrate by a second Class Magistrate under section 349. **B.** EMPEROR *v.* VINAYAK NARAYAN ARTE, 16 BOM. L. R. 598; 38 B. 719; 16 CR. L. J. 273 **321**

——— ——— ——— **s. 364**—Statement, recording of—Irregular procedure—Defect, how cured **145**

——— ——— ——— **s. 364** **738**

——— ——— ——— **s. 403** **155**

——— ——— ——— **s. 408 (b)** — *Assistant Sessions Judge—Some accused sentenced to imprisonment for over four years, others for less period—Accused sentenced to less than four years' imprisonment, whether entitled to appeal to High Court.*

Where at a criminal trial held by an Assistant Sessions Judge some of the accused were sentenced

Criminal Procedure Code—contd.

to an imprisonment for more than four years and some for less than that period:

Held, that an appeal by the latter would also lie to the High Court under section 408 (*b*) of the Criminal Procedure Code. **A.** RICHHA *v.* EMPEROR, 13 A. L. J. 272; 16 CR. L. J. 353 **737**

——— ——— ——— **s. 432**—*Reference by Municipal Magistrate of Calcutta under Calcutta Municipal Act (III B. C. of 1899), ss. 3 (32), 343, 442, applicability of—"Owner of land," meaning of—Chairman's duty—Service of notices on owner and occupier.*

Per *Fletcher, J.*—The term "owner of land" as defined in section 3, sub-section (32) of the Calcutta Municipal Act includes the landlord. The duty of removing a building which comes within the terms of section 343 after notice has been served, falls clearly, amongst others, on the landlord.

Under section 343 of the Calcutta Municipal Act the person who is the owner of the land, having had a notice served upon him, is liable to comply with the terms thereof.

Section 442 of the Calcutta Municipal Act does not, in any manner, abridge the power that is conferred by section 343.

Per *Beachcroft, J.*—Section 442 of the Calcutta Municipal Act provides that if the Chairman considers a building to be in so dangerous a state as to render immediate steps necessary for the safety of the public, he is to take those steps and then to serve notices on the owner and occupier. This section contemplates a case of much greater urgency than section 343 does, and in no way limits the powers of the Chairman under the latter section. **C.** CORPORATION OF CALCUTTA *v.* MANMOTHA NATH SET, 19 C. W. N. 391; 21 C. L. J. 497; 16 CR. L. J. 317 **653**

——— ——— ——— **s. 436** **656**

——— ——— ——— **s. 438** **799**

——— ——— ——— **s. 438**—*Reference—Interested party, report made by, order thereupon invalid—Sufficient inquiry—Accused, evidence of, to be taken by Court.*

The petitioners presented a petition to a Sub-Divisional Magistrate complaining against certain persons, the servants of a factory, and prayed for proceedings against these persons under sections 144 and 107, Criminal Procedure Code. The Sub-Divisional Magistrate asked the Manager of the factory to report. On receipt of report the petitioners were called upon to show cause why they should not be prosecuted under section 182, Indian Penal Code:

Held, that this order was bad in law, for the Manager being an interested party ought not to have been asked to make a report in the judicial proceedings;

that an order, under section 476, Criminal Procedure Code, directing that action should be taken against the petitioners under section 182, Indian Penal Code, was also bad in law;

that sufficient inquiry had not been made into the complaint made by the petitioners and that a local inquiry was desirable;

that in such cases the accused petitioners should be examined if they choose to give evidence. **C.** EMPEROR *v.* RABBI RAUT, 19 C. W. N. 127; 16 CR. L. J. 320 **656**

Criminal Procedure Code—contd.

——— ——— ——— **s. 439** **103, 733**

——— ——— ——— **s. 439**—*Revision—Acquittal, order of, revision of—Practice.*

A High Court has power under section 439, Criminal Procedure Code, to revise an order of acquittal, but in practice that power should not ordinarily be exercised because an appeal can always be instituted by the Local Government. **O.** TILAK RAM *v.* BHAGGA SINGH, 2 O. L. J. 190; 16 CR. L. J. 352 **736**

——— ——— ——— **s. 439 (5)** **108**

——— ——— ——— **s. 476** **107, 645**

——— ——— ——— **s. 476**—*"Court," meaning of—Officer appointed to record tenants' right, whether Court—Statements, whether evidence—Perjury, offence of, whether committed in making false statements before such officer—Madras Estates Land Act (I of 1908), ss. 164, 166.*

An officer charged with the duty of recording tenants' rights under Chapter XI of the Madras Estates Land Act is not a "Court" within the meaning of section 476 of the Code of Criminal Procedure.

Therefore statements made before him are not "evidence" and no prosecution for perjury will lie on such statements.

Per *Seshagiri Aiyar, J.*—Persons exercising *quasi*-judicial functions should not be regarded as Courts, and the mere fact that an inquiry is necessary will not constitute the inquiring officer a Court. The test to be applied for ascertaining whether an officer is a Court or not is to see whether there is a power to record evidence and to come to a judicial determination on the evidence so recorded. **M.** AVASARALA VENKATA HANUMANTHA RAO, *In re*, 28 M. L. J. 123; 2 L. W. 180; (1915) M. W. N. 177; 16 CR. L. J. 241 **97**

——— ——— ——— **s. 476**—Judicial proceedings, scope of **513**

——— ——— ——— **s. 476**—*Prosecution for offence under s. 211, Indian Penal Code—Person giving information, whether institutes proceedings—Penal Code (Act XLV of 1860) s. 211.*

The petitioner petitioned the Collector in his revenue capacity for a refund of the money which he alleged a Reddi had collected from him and misappropriated. The Collector directed the prosecution of the Reddi under section 409, Indian Penal Code. The Reddi was tried, acquitted and the Magistrate ordered the prosecution of the petitioner under section 476, Criminal Procedure Code, for an offence under section 211, Indian Penal Code:

Held, that as the petitioner did not institute or cause to be instituted criminal proceedings, he could not be prosecuted under section 211 of the Indian Penal Code. **M.** DAPPILE CHENCHUGARI RANGA REDDY *v.* EMPEROR, (1915) M. W. N. 253; 16 CR. L. J. 252 **108**

——— ——— ——— **s. 488**—*Order awarding maintenance—Appeal.*

An order awarding maintenance under section 488 of the Criminal Procedure Code is an order passed in a criminal trial and is not appealable. **M.** RAJANA APPADU *v.* RAJANA APPAMMA, 17 M. L. T. 830; 28 M. L. J. 483; 16 CR. L. J. 326 **662**

Criminal Procedure Code—concld.

——————— **s. 514** **335**

——————— **s. 517** **518**

——————— **s. 523 (2)**—*Gambling on public highway—Public nuisance—Conviction—Currency notes not traced to any person—Ownerless property.*

Where it is found that the accused caused a nuoyance and obstruction to the public by gambling on a throughfare, their conviction for committing a public nuisance is justified.

Where the currency notes found in the course of such gambling are not traced to any particular person as owner, the Magistrate is entitled to treat them a ownerless property and deal with them as such. **M.** JUTURI VENKATAPPA, *In re*, 16 CR. L. J. 254 **110**

——————— **s. 526** **105**

——————— **s 526**—*Appeal, adjournment of—Application for transfer made to High Court at earliest opportunity after receipt of notice of hearing.*

An appeal was presented by some accused to a District Magistrate on the 15th of May 1914, who transferred it on the same day to a Joint Magistrate. The Joint Magistrate issued the notice of hearing of the appeal on the 15th of July 1914, which was served on the 17th July 1914, fixing the 21st of July 1914 as the date for hearing. The High Court being closed on the 18th and 19th of July 1914, the accused applied to the High Court on the 20th July 1914 for transfer of the appeal and thereafter on the 21st they applied to the Joint Magistrate to adjourn the hearing. The Joint Magistrate refused to adjourn on the ground that the accused had had sufficient time to apply to the High Court but delayed and thereafter heard the appeal on merits and dismissed it:

Held, that the hearing of the appeal should have been adjourned as the accused had applied for transfer on the first day, they could have applied, after receipt of notice. **M.** VENUGOPAL REDDY, *In re*, 16 CR. L. J. 244 **100**

——————— **s. 528** **321**

——————— **s. 537** **158, 646, 522, 513**

Criminal trespass, offence of, when complete **159**

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Custom. *See* PRE-EMPTION.

———, proof of—Pre-emption—*Wajib-ul-arz* entry, production of, whether sufficient—Burden of proof **306**

——— **Hindu Law**—*Athangudi—Chetties* or *Yezhoor Nagarathars* of Madura District—*Patnibhaga—Mooppu—Mooppu Muri* **278**

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——————— Religious endowment - Head of a *mutt* —Succession—Custom of election to be definitely proved **829**

——————— **Succession**—*Arains of Lahore District—Females succeeding male proprietors as heirs, extent of rights of—Suit for declaration that sale by defendant shall not affect plaintiff's reversionary right*—Onus.

Among the tribe of Arains in the Lahore District the rights of females who succeed male proprietors as heirs in certain contingencies are wider than the rights possessed by females among other agricultural tribes in the Province.

Where, therefore, the plaintiff sued for a declaration that the sale by her sister shall not affect her reversionary rights in land which was inherited by both the sisters in equal shares:

Held, (1) that inasmuch as there was no express rule of custom applicable to the parties according to which both the sisters succeeded to the land merely on a life-estate analogous to the estate of a widow, it could not be assumed that their interest was not that of a full owner;

(2) that the *onus* was on the plaintiff to prove affirmatively that she had a right to challenge the alienation made by her sister;

(3) that as the plaintiff had failed to establish that her sister was holding only a life-estate she could not get the declaration prayed for. **P.** AHMAD KHAN *v.* BAKHTAWAR, 45 P. R. 1915; 86 P. W. R. 1915 **951**

——— **Succession**—Chundawand — Pagwand —*Chawinda and Dogranwali villages, Zaffarwal Tahsil, Sialkot District.*

A person died leaving land in Chawinda and Dogranwali villages of the Sialkot District. The plaintiff claimed land in the Chawinda village and contended that the *chundawand* rule of succession governed the parties. It was admitted that *chundawand* was the rule in Dogranwali:

Held, that though ordinarily *pagwand* is the rule of succession, the *chundawand* rule must be held applicable to the case having regard to the fact that in Dogranwali the mutation was effected without contest and the plaintiff made no claim to a share in the land left by the deceased in that village. **P.** HAKIM *v.* GHASITA, 26 P. L. R. 1915 **20**

——————— *Thakorate of* Gamph—*Primogeniture—Maintenance to junior members—Estate held by junior members, nature of—Death of maintenance-holder without male issue, effect of—Reversion—* Chudasama Girasias—*Females, right of, to succeed—Adoption by widow of last holder, effect of—Mortgagee from maintenance-holder, right of—Construction of deed—Compromise—Absolute estate, creation of—Ahmedabad Taluqdars Act (Bom. Act VI of* 1862), *s.* 12—*Alienation, effect on.*

The Thakorate of Gamph is governed by the rule of primogeniture. There is a custom of giving away for maintenance villages to junior members of the family. The estate is not governed by the ordinary law of co-parcenary and is not partible. The villages given to the junior members of the family are given for maintenance upon terms that upon the failure of male issue they will revert to the holder of the "*gadi*."

Such a reversion is not impeded by the existence of a female.

Where the widow of a last maintenance-holder adopts a son, the adopted son does not divest or defer the vesting of the estate which reverts by the custom of reversion.

Custom—concld.

Among Chudasama Girasias there is a custom that wives and daughters do not succeed as heirs.

The Thakor of Gamph granted a village for maintenance to one of his junior sons. There was a litigation between the successor of the Thakor and the sons of the grantee, which resulted in a settlement under which the greater part of the village was given to the sons of the grantee and their descendants and heirs as *maliks*, *mukhtiars* and *dhanies*. All the sons died without any male issue. The plaintiff, Thakor, claimed the village by right of reversion. At this time the whole of the estate of the Thakor was under the management of the Taluqdari Settlement Officer. The widow of the last maintenance-holder who had adopted a son objected:

Held, that the compromise deed did not confer an absolute estate upon the grantee's sons and heirs; that the alienation under the compromise deed was invalid under section 12 of the Taluqdars Act of 1862, and the adoption had no effect on the reversion.

A mortgagee from a maintenance-holder or an assignee of the mortgagee has no right whatever in the estate when the estate reverts to the grantor on the death of the maintenance-holder. **B.** AGARSINGJI RAISINGJI *v.* BAI NANIBA, 17 BOM. L. R. 273 **529**

——— **Trust,** religious—Permanent lease, whether valid—Custom, validity of—Transfer of Property Act (IV of 1882), s. 51—Improvements—Compensation, right of—Estoppel—Trust—Conduct of trustees **840**

Dahyak. *See* DASAUNDH.

Damages. *See* EASEMENTS ACT.

———Arrest of ship, liability for **463**

———Breach of contract—Agreement to realise money and pay debt due out of it—Failure to pay—Suit by creditor against debtor—Debt recovered with costs—Costs paid, whether recoverable as damages—Plaintiff, duty of, to mitigate damages **635**

———, measure of—Tortious act, liability for **1**

———, suit for. *See* MALICIOUS PROSECUTION.

———, suit for—Breach of contract of marriage **408**

Darkhast Rules—*Standing orders of Board of Revenue, S. O. No. XV, r. 16—Grant, whether subject to revision—Tahsildar making grant under mistake of fact—Power of Deputy Collector to cancel grant—Mistake of fact contemplated by rule, nature of—Contract Act (IX of 1872), s. 20—Planting of trees before grant of land—Cancellation of grant—Grantee, whether entitled to value or compensation—Transfer of Property Act (IV of 1882), s. 51.*

A grant of land made under the *darkhast* rules is subject to revision under the conditions laid down in clause 16 of Standing Order XV of the Board of Revenue. The proviso regarding the interests of Government or of the public is only intended to apply to cases in which the grant exceeds the limits of authority possessed by the officer making it—not to decisions passed under a mistake of fact or owing to fraud or misrepresentation.

Darkhast Rules—concld.

The mistake of fact contemplated in the rule is not such a mistake as would render an agreement void under section 20 of the Contract Act.

Where, therefore, a Tahsildar makes a grant under the mistaken impression that plaintiff's *darkhast* is only for a portion of the survey number, while in fact it is for the whole, the Deputy Collector does not act without jurisdiction in cancelling the grant.

Where it appears that both the planting of trees and the removal of prickly pear took place before the grant of land to the defendant, *i. e.*, at a time when he could not be said to have believed in good faith that he was absolutely entitled to the land:

Held, that the defendant was not entitled to the benefit of section 51 of the Transfer of Property Act and could not claim the value of the trees or any compensation for the amount spent in clearing the prickly pear. **M.** DEVARAMANI BHOGAPPA *v.* PEDDA BHIMAKA GOWD, (1915) M. W. N. 148 **51**

Dasaundh or dahyak, *decree for, effect of—Possession of land, right to—Under-proprietor or* thekadar, *possession as.*

Ordinarily a decree for *dasaundh* or *dahyak* does not in itself connote any right to possession of land, either as under-proprietor or as *thekadar*. **U. P. B. R.** MUHAMMAD ABUL HASAN KHAN *v.* KELO SINGH, 2 O. L. J. 154 **919**

——— *right to—Possession of land, right to—Settlement decree, interpretation of—Lease, termination of—Terms of lease—Notice of ejectment, validity of—Decree of Court, tenant holding under—Oudh Rent Act (XXII of 1886), s. 52.*

A right to *dasaundh* does not in itself imply a right to hold the lands on which the *dasaundh* is imposed.

The plaintiffs held a village under a settlement decree under which they were entitled to *dasaundh* and also to hold the village as lessees, such lease to be determined if the village came under direct management or if the lessees refused to accept a lease on the terms offered by the *talukdar*. Subsequently on their refusal to accept the terms proffered by the *talukdar*, he issued a notice of ejectment against them:

Held, that the plaintiffs had a right to hold the village only till the *talukdar* chose to take it under direct management or till they refused to accept the terms he proffered.

Held, further, that when the plaintiffs refused to accept the terms proffered by the *talukdar*, they ceased to hold under the decree, although their rights to *dasaundh* remained unaffected, and thus it was not necessary for the *talukdar* to have proceeded by suit under section 52 of the Oudh Rent Act. **U. P. B. R.** COURT OF WARDS *v.* PARMATMA DIN, 2 O. L. J. 156 **929**

——— *Under-proprietary right—Ordinary tenant, land held as, by* dasaundh-*holder.*

A right to *dasaundh* is a *quasi*-under-proprietary right and does not carry with it any under-proprietary rights in the lands held by the *dasaundh*-holder as an ordinary tenant. **U. P. B. R.** SABER DIN *v.* MUHAMMAD ABUL HASAN KHAN, 2 O. L. J. 191 **847**

Debt. *See* HINDU LAW.

——Attachment—Payment to decree-holder—Judgment-creditor not entitled to recover debt—Debtor not absolved from liability to pay debt to creditor **317**

Decree, amendment of—Property erroneously described in schedule of plaint—Same copied into decree—Decree in conformity with judgment—Amendment, if allowed **920**

—— for *dahyak* or *dasaundh*, what connotes **919**

——, declaratory, validity of **307**

Defamation—*Act committed outside British India—Jurisdiction of British Courts—Liability, when arises—Publication, if requires communication to more persons than one—Tort—Law applicable to torts in India—Superior officer, direction of, when available as plea—Absolute privilege, if available to servants of independent Sovereign, acting under his orders and in course of their official duties.*

Publication in regard to libel and slander does not require communication to more persons than one. There need be nothing like 'publication' in the common acceptance of the term.

In a suit for damages for defamation the fact that the alleged defamation was committed outside British India will not necessarily take away the jurisdiction of British Indian Courts, though it may affect the law to be administered.

According to sections 19 and 20, Civil Procedure Code, the residence of a defendant within the territorial limits of a Court is sufficient to give jurisdiction to it, even in respect of torts committed outside the local limits of the jurisdiction of such Court.

The law of torts not having been codified in India and there being no determinate law delivered to the Courts by the Sovereign as to the law that has to be administered in adjudicating upon a personal tort committed outside the local limits of a Court's jurisdiction, the Court ought to be guided by the rules of justice, equity and good conscience. Consequently a person should not be held liable in tort for an act which would be justifiable by the *lex loci*, or the law of the place where the act was done; nor should he be held liable unless the act is wrongful by the *lex fori*, or the law of the country where the Court is situated.

Where an act is wrongful *per se*, a plea that the act was done under the directions of a superior officer, not subject to the jurisdiction of the Court, is of no avail, though the result of the action will give rise to a moral claim of indemnity as against such superior officer.

Where under the authority of the Rajah of Cochin an inquiry was held touching an improper intimacy alleged to exist between the plaintiff and a certain woman, and as the result thereof the plaintiff was ordered to be ex-communicated and this order was communicated by the *sarvadhikariakar* or the general agent of the Rajah to the superintendent of the temple who communicated it to the 2nd defendant (respondent) in his official capacity, and the latter in his turn handed over a copy of the said letter to the *pattamali* or manager of the temple which he was bound to do as a part of his official duties:

Held, that the act of the Rajah was absolutely

Defamation—concld.

privileged and that the defendant was not liable for the publication of the libel. **M.** GOVINDAN NAIR *v.* ATCHUTHA MENON, 28 M. L. J. 310; 2 L. W. 290 **394**

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13 **589**

—— —— —— **s. 47**—Conciliator's certificate **493**

Deposit of pre-emption money after fixed period, when good—Court's error, effect of **379**

Deshgat watan—*Grant for personal service—Grantor, when can resume land.*

Where there is a grant of *deshgat watan* land for personal service, it is not at the option of the grantor to determine the services and resume the land. Where the grantor claims his right to resume, he must show that the terms of the grant give him that right or, if the terms are unknown, that the proved circumstances justify an inference that he has that right. **B.** YELLAVA SAKREPPA BARKI *v.* BHIMAPPA GIREPPA DESAI, 17 BOM. L. R. 128; 39 B. 68 **12**

Discretion. *See* COMPANIES ACT, 1882, ss. 162, 163.

—— ——.—Inquiry before commitment—Discretion of Magistrate to discharge accused **1005**

Divorce. *See* HINDU LAW; MUHAMMADAN LAW.

Earnest money, refund of—Agreement to purchase—Option to withdraw **12**

Easements Act (V of 1882), s. 23—*Altering mode and place of enjoyment—Right to discharge rain water by sloping eaves—Raising height of eaves, when justified—Trespass—Projections over another's land, when amount to trespass—Remedy in case of trespass—Specific Relief Act (I of 1877), s. 55—Injunction, grant of.*

Where the sloping eaves of the roof of a dominant tenement projected over a servient tenement to a certain extent, and the dominant tenement acquired an easement to discharge rain water by those eaves on the servient tenement, and where the dominant owner in constructing an upper storey raised the height of the eaves and further projected the flat roof planks and balcony or verandah roof of the first floor beyond the extent of the original projection:

Held, (1) that the dominant owner had a right to raise the height of the eaves so long as he did not throw an increased burden upon the servient tenement;

(2) that the projections beyond their original extent amounted to an actual trespass on the principle of the maxim "*Cujus est solum, ejus est usque ad cœlum*;

(3) that under the circumstances of the case injunction and not damages was the proper remedy. **S.** AYOOB ISMAIL *v.* NUR MAHOMED SILEMAN **169**

—— —— —— **ss. 33, 35**—*Easement, disturbance of—Injunction—Damages — Disturbance, substantial or trivial—Construction completed pending suit, effect of.*

In case of disturbance of an easement, ordinarily the plaintiff is entitled to an injunction rather than to

Easements Act—concld.

damages. It is open to the plaintiff to be content with damages but under section 35 of the Easements Act he is not entitled to an injunction except in such cases where he would be entitled to recover damages under Chapter IX of the Act.

Section 33 of the Act allows compensation to be recovered for the disturbance of an easement provided that the disturbance has actually caused substantial damage to the plaintiff.

De Minimus non curat lex:—The law does not concern itself with a disturbance which is trivial or immaterial.

Where the plaintiff comes into Court at once when the disturbance of his easement is threatened and the defendant completes his construction pending the suit, he does so at his own peril **A.** GAJADHAR *v.* KISHORI LAL, 13 A. L. 385 **962**

——— **s. 35** **962**

Eastern Bengal and Assam Tenancy Act (I of 1908), s. 170 (4) 182

Ejectment. *See* AGRA TENANCY ACT, s. 57 (*b*) CENTRAL PROVINCES TENANCY ACT, s. 94 (1).

——— Gift by a tenant's widow—Possession by donee—Death of donee—Resumption by widow, liability of **305**

——— *notice of—Rent, wrong entry of, effect of.*

A mere accidental wrong entry of rent in a notice of ejectment does not invalidate it, if the entry does not in any way prejudice the tenant. **U. P. B. R.** SHEORAJ SONAR *v.* PRATAB BAHADUR SINGH, 2 O. L. J. 112 **211**

——— *Non-transferable holding, purchaser of—Limitation Act (IX of 1908), s. 18, scope of.*

A plaintiff suing in ejectment a purchaser of a non-transferable occupancy holding cannot succeed, unless he makes out a case under section 18 of the Indian Limitation Act, where his right to possession accrued long before 12 years of the commencement of the suit. **C.** PANCHKARI CHATTAPADHYA *v.* MAHARAJ BAHADUR SINGH, 19 C. W. N. 136 **708**

——— *Occupancy tenant—Tenant, whether entitled to keep house appurtenant to his holding.*

A tenant who has been ejected from his holding cannot keep possession of the house appertaining to the holding. **A.** PHUL BIBI *v.* ZAHUR ALI **849**

———, *suit for*—Benamidar, *appeal by, whether maintainable—Mesne profits, decree for—Whole decree, when to be challenged—Appeal, common ground of—Bengal Tenancy Act (VIII of 1885), s. 87, scope of—Abandonment, proof of—Occupancy holding, mortgagee of—Rent, acceptance of, by landlord, without protest, effect of—Forfeiture, waiver of.*

Where it was found, in a suit for ejectment brought against several defendants, that one of them was a *benamidar* of the defendant 1st party, and where a decree for mesne profits and costs had been passed against both defendants 1st and 2nd parties:

Held, that the appeal preferred by the *benamidar* defendant alone against the whole decree was maintainable, and that as the ground was common to himself and defendant No. 1, so far at least as the question of mesne profits was concerned, the whole

Ejectment—concld.

case came under review in appeal, inasmuch as there could be no decree for mesne profits unless there was a decree for possession.

Section 87 of the Bengal Tenancy Act is not exhaustive and the landlord may proceed by suit, if he can prove that the facts and circumstances of the case lead to an inference of abandonment.

There is a complete recognition of the mortgagee of an occupancy holding as such where the landlord, on receipt of rent without protest even for one occasion, gives a receipt in the name of the tenant through the mortgagee, and the landlord cannot evict the mortgagee in possession as a trespasser.

Acceptance under protest of rent also would operate in favour of the payer as a waiver of any forfeiture incurred.

The protest, therefore, under which a landlord receives rent deposited by the mortgagee of an occupancy holding does not make the receipt the less a receipt of rent from the mortgagee. **C.** MOTTOOKDHAR SHUKUL *v.* JUGDIP NARAIN SINGH, 21 C. L. J. 261 **343**

——— *Res judicata*—Suit in Revenue Court—Question of proprietary title decided—Appeal not filed in Civil Court—Finality of decision—Subsequent suit in Civil Court, maintainability of **432**

Election—*Triplicane temple scheme—General bribery—General personation—Illiterate voters, signature by—Invalidity of election.*

Per *Sadasiva Aiyar, J.*—The presence of a large number of illiterate voters would make it easy to secure votes by bribes; but a Court cannot take any account of surmises of this kind.

The fact that certain voters have been carried to the voting both at the expense of the candidate cannot by itself vitiate the election.

Where it is proved that a certain voter was dead and a certain other person voted in his name, the whole election is not invalid. That voting card alone should be discarded.

The Common Law principles relating to parliamentary elections cannot govern the decision in a case which relates to the election of a temple trustee, though wherever the rules of that law are in conformity with justice, equity and good conscience, they might be referred to for the mental satisfaction of a Judge in India.

Because the agent of a candidate acting in his interests asked somebody to personate a dead voter whose name by mistake continued to be in the list of voters, it is not just or right to disqualify the candidate without proof that he authorised or ratified the agent's act. It is right and just to treat that vote as invalid and not to go further.

The election of a trustee of the Triplicane temple under the scheme of 1895 cannot be set aside on the sole ground that an agent of the successful candidate without authority from the candidate abetted a false personation which could have had no effect upon the result of the election.

Where the election appears to have been fairly and honestly conducted it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the Courts are disposed to give effect to elections when

Election—contd.

possible. Gross irregularities not amounting to fraud do not vitiate an election. No election would be avoided at Common Law for general personation.

The intention of the scheme decree of 1895 is that it is not open to question the validity of a vote passed by the trustees without objection having been raised at the time of their receiving it, and that it is not open to question the decisions given honestly on the objections raised by the surviving trustees by any proceedings in Court. The requirement that they should state the objection and their decisions in writing can only have been intended for the purpose of its evidentiary value in case their decision is attacked as dishonest in a subsequent suit. The omission to record the objections and decisions where objections were disallowed, though it amounts to a serious irregularity, does not invalidate the election.

If an illiterate voter's name is written with his consent in the presence of the polling officers, it is in the eye of the law of the same effect as a literate voter himself signing. Where the voting paper is required to be signed or marked by the voter, the signature put in by his authorised agent in his presence satisfies the requirements of the clause of the scheme.

It is a substantial compliance with the clause in the Triplicane temple scheme if the voter hands the voting paper to somebody in the presence of the *darmakarthas* and if that person at once hands it in to the presiding *darmakartha*.

The Courts cannot disqualify a man merely because he was anxious to become a trustee of a temple, trusteeship being now a coveted and honourable civil office which gives influence and power in the community, though according to the true Hindu religion a Hindu ought not at all to be anxious for a *darmakartha's* place.

As regards the scheme itself, the extreme democratic view that education and character should have no weight, that the vote of the most ignorant or the least honest should have the same effect as the vote of the most highly cultured or the most saintly person, is repugnant to the Hindu Shastras which are based upon a heirarchical system in which the character and learning of the persons giving opinions should be given much more weight than the numerical strength of such persons.

Per *Napier, J.*—The Triplicane temple scheme as settled by the Court did not create the right to vote. It only limited the exercise of that right to a certain number of such persons. Clause 17 of the scheme is not an ouster of the jurisdiction of an ordinary Court. The Court has got power to review such decisions.

Where a judicial tribunal comprised of two persons performs its functions by one only, its decision is a nullity.

Personation by itself does not invalidate an election. The proper course is to strike off the number of votes proved to have been given by personation. Where in spite of such striking off, the result will not be affected, the election need not be set aside.

Where the facts proved do not establish that the majority have been prevented from electing the candidate they preferred, the election need not be set aside.

Rules of equity and good conscience do not require

Election—concld.

that an election should be declared void because the agent of a candidate has been guilty of one or two acts of bribery. No agency can be imputed in the case of a crime; nor should it be presumed unless the bribery by, the agent is very extensive or other circumstances bring it home clearly to the authority of the candidate. **M.** RAMANUJULU NAIDU *v.* PARTHASARATHY AIYENGAR, (1915) M. W. N. 290; 2 L. W. 383; 17 M. L. T. 331 **612**

Enquiry—Interested party, report made by—Accused, evidence of, to be taken by Court **656**

Equity. *See* MERGER.

———Compromise - Equity of redemption—Agreement to release—No writing or registration—Agreement acted upon for 35 years **930**

——— **of redemption.** *See* MORTGAGE.

Estoppel. *See* EVIDENCE ACT, s. 115.

——— ——— Agreement, force of—Claim, bar of **357**

———Allottee, conduct of **53**

———Defence - Denial of contract and at the same time pleading contract as of wager, whether permissible **538**

——— ——— Mortgagor, if can plead invalidity of mortgage for want of consideration **702**

——— ——— Trust—Conduct of trustees **840**

Evidence. *See* PRESUMPTION.

——— Acts done by co-conspirators, when evidence against others—Approver, evidence of, value of—Conviction based on such evidence, legality of—Corroboration, necessity of **738**

———Admission of person as tout, whether sufficient to declare him as such—Proof necessary **918**

——— ——— *Agricultural lease, unregistered, for less than five years, admissibility of—Exemption from registration—Government Notification,* 1885, *force of—Registration Act (XVI of* 1908*)—General Clauses Act (X of* 1897*), s.* 24.

An unregistered agricultural lease for a term not exceeding five years and reserving a rent less than Rs. 50 is admissible in evidence, as such leases were exempted, by a notification of the Government—still in force—dated 3rd September 1885, from registration. **A.** HAZARI SINGH *v.* TERBENI SINGH, 12 A. L. J. 792 **577**

——— Appellate Court acting on report of Thumb Impression Bureau - Illegality **132**

——— Direct evidence disbelieved, effect of—Conviction, legality of **795**

———Evidence of Police, value of—Police diaries **329**

——— ——— Land on which fruit trees stand—Evidence of possession—Enjoyment of usufruct of trees, if sufficient **266**

——— ——— , opportunity to produce—Appellate Court, duty of **50**

——— ——— Relinquishment—Non-occupancy right **430**

Evidence—concld.

——— *Report of Tahsildar, when evidence.*

The report of a Tahsildar when acting as a commissary to the Court is good evidence. **P.** GIRDHARI LAL *v.* ABDUL RAHMAN, 39 P. L. R. 1915 **87**

——— Supplementary paper-book, relevancy of **322**

——— Unregistered lease, admissibility in evidence of **879**

——— *Unnatural offence—Uncorroborated testimony of complainant, whether sufficient—Prosecution, when not bound to produce all witnesses—Penal Code (Act XLV of 1860), s. 377.*

In the case of unnatural offence under section 377, Indian Penal Code, conviction can safely be based on the uncorroborated testimony of the victim, if it is not otherwise doubtful.

The prosecution is not bound to produce witnesses who are not expected to speak the truth. **P.** SARDAR AHMAD *v.* EMPEROR, 42 P. W. R. 1914 CR.; 16 CR. L. J. 263 **154**

——— *Wajib-ul-arz*, evidentiary value of **34**

Evidence Act (I of 1872), ss. 9, 11—*Account book, entry in, relevancy of—Signature of a document, place and manner of, immaterial—Document to be authenticated—Signature anywhere to be put—Insertion of name validates document in handwriting of party—Document, when operates as release.*

The absence of an entry in a book of account is regarded as a relevant fact not under section 34, but under sections 9 and 11 of the Indian Evidence Act, to prove that an alleged payment was not made; but the weight to be given to such absence depends upon the circumstances of each case.

The place and manner of signature of a document are immaterial, provided that the signature is inserted in such a manner as to authenticate the document; and where an instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at the commencement.

Hence, a document giving a co-debtor release from all liabilities is operative as such though not signed by the executant, and is a valid agreement although it may not operate to the prejudice of the other debtor, should a question of contribution arise, as between them. **C.** GANGA RAM AGARWALLA *v.* LACHI RAM KISHEN DYAL, 19 C. W. N. 611 **705**

——— **s. 10**—Illustration **738**

——— **s. 11** **705**

——— **s. 24** **993**

——— **ss. 25, 26, 27, 30** **145**

——— **s. 32 (5)**—*Suit against minor—Minor's age, proof of—Statement by minor's aunt as to date of birth in application to be appointed his guardian, if admissible in evidence—Relationship.*

In a suit against a minor, a statement made by the minor's aunt in an application to be appointed his guardian, to the effect that he was born on a particular day is admissible in evidence under section 32, clause (5) of the Evidence Act, as it relates to the existence of relationship. **C.** MONINDRA MOHAN ROY *v.* RAM KRISHNA SADHUKHAN, 21 C. L. J. 621 **595**

——— **ss. 33, 58**—*Court, duty of, while admitting statement of absent witness—Irregularity—Consent of accused or his Counsel as to admission of certain evidence, effect of—Criminal Procedure Code (Act V of 1898), s. 517—Trial by Jury—Charge to Jury—Misdirection, effect of.*

Under section 33 of the Evidence Act the Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable, before he admits a statement made by the absent witness in a previous judicial proceeding. It is not enough to have the statement of the Public Prosecutor to that effect but there must be independent evidence before him before he can exercise the powers given to him under the Evidence Act.

Therefore, where a Judge acts upon the statement of the Public Prosecutor his procedure is irregular.

The English decisions relating to evidence can be relied upon in India.

Prima facie the consent of the accused or his Counsel is the presumptive evidence of the absence of prejudice.

The rules of evidence are subject to the general principles of jurisprudence and it is the duty of the prosecution to establish the case against the accused, and they should not rely upon admissions made by him in the course of his trial for convicting him.

In a trial by jury, reception of inadmissible evidence by the Judge and his failure to warn the jury against considering such evidence amounts to misdirection, which vitiates the whole proceeding. **M.** ANNAVI MUTHIRIYAN *v.* EMPEROR, 28 M. L. J. 329; 17 M. L. T. 214; (1915) M. W. N. 229; 16 CR. L. J. 294 **518**

——— **s. 43**—*Judgment not inter partes, when admissible.*

Z was in possession as mortgagee of a six-annas share belonging to *R* in a certain village. During the continuance of the mortgage *Z* executed a lease of the property in favour of *A*. Subsequently *R* executed a simple mortgage in favour of *A* and covenanted that the usufructuary mortgage in favour of *Z* should be paid out of its consideration. This was done and the mortgage in favour of *Z* was redeemed. Nevertheless *A*'s name continued to be recorded as lessee in respect of the property. On the strength of the entry in the papers, *A* brought a suit for profits against *M*, the *lambardar*, and obtained a decree. *M* thereupon sued *A* for a declaration that the mortgage of *Z* having been redeemed, *A* was not entitled to the decree for profits and that the entry of his name as lessee was erroneous. *A* defended the suit on the ground that by an arrangement between him and *R*, he was left in possession of the property as lessee for the remaining period of the lease and that he had been made to account to *R* in a suit between them on the simple mortgage for the very year for which he had obtained the decree for profits against *M*. He produced the judgment between himself and *R* to prove his allegation:

Held, that the judgment produced by *A* was admissible in evidence under section 43 of the Evidence Act. **A.** MOHAMMAD AHMAD SAID KHAN *v.* MASIH-ULLAH KHAN, 13 A. L. J. 317 **387**

——— **s. 47**—Opinion as to handwriting of one's clerk—Relevancy **722**

Evidence Act—contd.

——— ——— **s. 58** **518**

——— ——— **ss. 63, 65, 144**—*Public document—Proof—Secondary evidence—Certified copy not preserved—Other evidence, whether admissible.*

Where a certified copy of a lost public document is not preserved, other secondary evidence of the contents of it is admissible.

Orders issued by public officers in the discharge of official duties kept together in a register in the usual course of business should be presumed to be accurate copies of the original public documents and are admissible in evidence as "secondary evidence" of such public documents under sections 63 and 65 of the Evidence Act. **M.** KRISHNA RAO *v.* MUTHANGI BUCHI **808**

——— ——— **s. 65** **808**

——— ——— **s. 65**—*Document not produced but found inadmissible in a previous suit—Secondary evidence, admissibility of—Hindu Law—Gift to wife—Absolute interest or life-interest—Presumption.*

Secondary evidence of a document which is not produced but which in a previous suit was found to be inadmissible as being not registered cannot be given.

In the absence of any evidence to the contrary a Hindu widow has only a life-estate in the property obtained by her from her husband. **M.** NATARAJA SARMA *v.* RAMABHADRA NAIDU GARU **853**

——— ——— ——— **s. 91**—Legal relationship, existence of, proof as to—Gift by a Muhammadan—Deed of gift, inadmissible in evidence—Oral evidence, admissibility of **180**

——— ——— ——— **s. 91**—*Secondary evidence, when can be given—Original document t ndered found to be a forgery—Written admissions, how far secondary evidence—Limitation Act (IX of 1908), s. 19.*

Per *Sadasiva Aiyar, J.*—Where the plaintiff brought a suit for redemption of a particular mortgage in renewal of a prior mortgage and the lower Courts found that the mortgage sued on was a forgery:

Held, that the plaintiff, failing to establish the mortgage on which the suit was based, should not be allowed to fall back upon the earlier mortgage which might be established by admissions made by defendants during the proceedings without the plaint being amended and that no evidence primary or secondary of the earlier mortgage could be given for obtaining relief.

Per *Tyabji and Spencer, JJ.*—For the purpose of section 19 of the Limitation Act it is not necessary that all the legal consequences that may flow from the thing acknowledged should be specified to constitute an acknowledgment.

Per *Spencer, J.*—When a contract has been embodied in a document the parties to it are precluded by section 91 of the Evidence Act from enforcing by way of suit obligations arising out of such contract except by proving the original document itself or by letting in secondary evidence of its contents when the original is lost or withheld by the opposite party knowing that they will be required to produce it.

Secondary evidence is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible, secondary evidence of its contents is not admissible. An admission cannot be made use of as

Evidence Act—concld.

secondary evidence of a document inadmissible in evidence for want of stamp or registration; and similarly it cannot be used as secondary evidence of the contents of a document when the document put forward as an original is found to be a forgery. The provision for receiving written admissions as proof of the contents of a document is confined to cases where the original is in existence and might be, but is not, produced. It will not apply to cases where the original is put forward as primary evidence of the terms of a contract and that original is found to be a forgery. It will not be available against persons other than the person who made the written admission and his successors-in-interest. **M.** KALLIANI AMMA *v.* NARAYANAN NAMBIAR, (1915) M. W. N. 105; 17 M. L. T. 170; 28 M. L. J. 266 **69**

——— ——— ——— **s. 114** **738**

——— ——— **s. 114**—Mutation register—Presumption **695**

——— ——— ——— **s. 115**—*Estoppel—Claim petition not pressed—Agreement to get petition dismissed without costs, whether void—Contract Act (IX of 1872), s. 78.*

An estoppel arises only when a man is not allowed to deny the truth of some matter which he has made another to believe to be true.

Where it was agreed between the parties that the claim petition of the defendant should be allowed but without costs and that the plaintiff should apparently in consideration of the defendant giving up his costs refrain from instituting a suit:

Held, that section 115 of the Evidence Act did not apply and there was no estoppel.

Quære.—Whether such an agreement would be void on the principle contained in section 28 of the Contract Act ?

In a suit instituted under Order XXI, rule 63, of the Civil Procedure Code, there is no question of setting aside the consent order because if a party does not object to an order being passed against him, it cannot be inferred that the order passed is not against him. **M.** VENKATARAMA AIYAR *v.* NARAYANA AIYAR, (1915) M. W. N. 237 **536**

——— ——— ——— **s. 116**—Tenant, whether estopped from showing defect in *khot's* title **134**

——— ——— **s. 133** **738**

——— ——— **s. 144** **808**

Execution of decree—Attachment, determination of—Dismissal of execution application, whether determines attachment—Moveable property, attachment of—Sale, whether production of property necessary—Dismissal of application for non-payment of *batta*—Attachment, whether raised **62**

——— ——— ——— ——— Attachment, objection against—Suit by unsuccessful objector, when allowed—*Pro forma* defendant in original suit—Second appeal, grounds of—Finding of fact based on inadmissible evidence—Appeal—Additional evidence, irregularly admitted **14**

——— ——— *Death of judgment-debtor prior to decree—Legal representatives not brought on record in Appellate Court—Appellant one of legal representatives in possession of part of deceased's estate—Right to object*

Execution of decree—concld.

Where the party on record is himself the legal representative of a deceased judgment-debtor and in possession of part of the deceased's estate and his liability is admittedly restricted to the assets come to his hands out of the estate of the deceased, he has no right to object to execution on the ground that the legal representatives of the deceased have not been brought on the record. **M.** MUHAMMAD NAINA MARAKAYAR *v.* SHEIK MARAKAYAR **925**

——— ——— ——Mortgage of occupancy holding before passing of Agra Tenancy Act—Decree for possession **278**

——— ———*Receiver, appointment of—Property sold—Receiver, right of—Suit between decree-holder and auction-purchaser, separate, maintainability of.*

A Receiver appointed in the course of an application for execution of a decree becomes *functus officio* immediately the properties attached are sold in execution, as the judgment-debtor's interest in them ceases on such sale.

To such an application for execution, the auction-purchasers are not necessary parties, and the right between them and the decree-holder should be determined by a separate suit and not in the execution proceedings. **M.** GANSHAM DOSS *v.* RAJAH OF KALAHASTI, 2 L. W. 326; (1915) M. W. N. 245 **551**

——— ———Sale amended—Final decree of a Civil Court, meaning of—Limitation **876**

——— ———Step-in-aid of execution—Date of application or date on which Court takes step—Time from which limitation runs—Agreement not to arrest judgment-debtor, validity of—Agreement, whether stops running of time **381**

EX PARTE **decree.** *See* CIVIL PROCEDURE CODE, 1908, O. IX, R. 13.

Findings, nature of **1000**

Forfeiture. *See* CONTRACT ACT, s. 74.

Forfeiture of bail. *See* SURETY.

Forfeiture of bond—Proper procedure **335**

Forfeiture of shares. *See* COMPANIES ACT, 1882, s. 169.

Forgery. *See* PENAL CODE, s. 464.

Fraud. *See* CONTRACT ACT, s. 14.

Fraudulent decree, *setting aside of—Decree obtained within jurisdiction of Court other than that in which suit filed—Court, jurisdiction of, to entertain suit—Cause of action—Fraudulent service of summons—Property attached, whether gives cause of action.*

The plaintiff sued the defendant in Agra praying that a decree for money obtained against him by the defendant in Siliguri within the jurisdiction of the Calcutta High Court be set aside, on the ground that the defendant fraudulently prevented the institution of the suit from becoming known to him by causing the notice of suit to be served on some other person in Agra and an incorrect return to be made to the Court:

Held, that as part of the fraud was committed in Agra, the cause of action arose in part at least in Agra and that, therefore, the Courts in Agra had jurisdiction to entertain the suit.

Semble:—A suit to set aside a decree on the ground of fraud may be brought in a Court other than that by which the impugned decree was passed, if the property of the plaintiff situated in that Court is attached in that decree.

In such a suit the execution of the decree and the application for the realization of the amount of it are acts of the defendant which infringe the rights of the plaintiff and afford him his principal cause of action.

A plaintiff in such a case cannot succeed merely on proving that the summons was not served on him. **A.** JAWAHIR *v.* NEKI RAM, 13 A. L. J. 190; 37 A. 189 **502**

Fraudulent transfer—*Mortgagor and mortgagee*—Benami *transaction—Mortgage executed to defraud creditors—Claim petitions filed by mortgagee dismissed—Subsequent suit upon mortgage—Mortgagor, if can plead invalidity of mortgage for want of consideration—Estoppel.*

Where, in order to defraud his creditors, a person executed a mortgage *benami* and set up the mortgagee to prefer claim petitions based on such mortgage and where those petitions had been dismissed by the Court:

Held, that he was not estopped from afterwards setting up the fraudulent nature of the mortgage and questioning it on the ground of want of consideration. **M.** YADAVALLI APPAVADHANULU *v.* KODALI VENKIAH, 2 L. W. 361; (1915) M. W. N. 273 **702**

FRUCTUS. *See* TRANSFER OF PROPERTY ACT, s. 72

Garnishee order Attachment of revenue payable in future—Execution proceedings kept alive **18**

Gift. *See* HINDU LAW; MUHAMMADAN LAW; WILL.

———Ante-nuptial gift—Interest of co-occupant in survey number—Relinquishment—Pre-emption **355**

———, *deed of—Compulsory registration—Subsequent deed executed and registered by donor—Prior gift revoked.*

A registration against the wishes of the donor will not render an instrument of gift effective.

Where, therefore, the deceased executed a deed of gift in favour of the defendant who got it registered after the donor's death, and subsequently executed and registered another deed of gift in favour of the plaintiffs' predecessor-in-title:

Held, that the gift in favour of the defendant was revoked by the donor and the prior deed, having been registered against her wishes, did not carry any title to the defendant. **M.** DASI SWARNAM *v.* DEIVANYAGAM PILLAI, 2 L. W. 269; 28 M. L. J. 378 **271**

——— *by a tenant's widow—Possession by donee—Death of donee—Resumption by widow—Ejectment, liability of.*

The widow of an original tenant made a gift of her husband's tenancy in absolute title and permanently to a stranger who, after enjoying it for three years, died. On his death the widow resumed the tenancy:

Held, that by merely occupying the land on the death of the donee without proving herself an heir

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she could not acquire any right of tenancy in the land in question, and, therefore, she was liable to ejectment by the *zemindar*. **C.** MAHANTA HUNUMAN SARAN *v.* SHEONATH MAHTO **305**

Good faith—Due diligence **347**

Grant—Grove—Land granted to plant grove—No time fixed—No grove planted—Conditon, whether broken—License—Unrevocable—Resumption **680**

——— *of land under* darkhast *rules—Land submerged under water not struck out of* patta*—Such land included in grant—Grant, right to cancel.*

A grant of land once made under *darkhast* rules by an officer competent to make it can be set aside by superior officers only for fraud, mistake of fact or want of jurisdiction. An assignment of a *warg* once made under the impression that it included also submerged lands, cannot subsequently be cancelled on the ground that it did not.

Land submerged under water is still the property of the former owner, unless struck out from his *patta* and the assessment proportionately reduced. **M.** ABDUL RAZAK SAHIB *v.* SECRETARY OF STATE **719**

———Mining rights, transfer of—Rent-free—*Brahmottar*, grant of, nature of, before Permanent Settlement—Mining rights, how far affected—*Zemindar* presumed owner of underground rights **811**

——— for personal service—Grantor, when can resume land **12**

———*Right of way—Enjoyment for over* 70 *years—Presumption—Limitation Act (IX of* 1908), *s.* 26, *application of—Grant or legal origin.*

The enjoyment of the right of way for a period of over 70 years is evidence which would lead a Court to refer such enjoyment to a grant or other legal origin.

Where the plaintiffs did not state in the plaint that they claimed the way under any kind of grant, nor did they state that they claimed it under section 26 of the Limitation Act, the defendant is not prejudiced, regard being had to the facts proved raising a presumption of grant or other legal origin. **C.** KSHIROD CHANDRA GHOSE *v.* SRISH CHANDRA GHOSE **894**

Grove—*Land granted to plant grove—No time fixed—No grove planted—Condition, whether broken—License—Unrevocable—Resumption.*

Where a land was granted for the purpose of planting a grove with a provision that the grantee might cut down the trees and re-place them as often as he pleased, and might appropriate to his own use the produce of the trees, grass and any other produce of the land and if any revenue was assessed on it the grantee had to pay it:

Held that the grant created an interest in the land in favour of the grantee and it was not a license revocable at the will of the grantor.

Held further, that as no time was specified in the grant to plant the grove, the condition could not be said to have been broken until the grantee rendered the plantation impossible either permanently or for an indefinite period. **A.** NAIKRAM *v.* JAWALA PRASAD, 13 A. L. J. 376 **680**

——— *planted in occupancy holding—Right of tenant to transfer trees.*

Where an occupancy tenant plants a grove on his

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holding, he has no right of transfer in the trees. They cannot be sold privately or in execution of a decree against the tenants. **A.** WAZIR AHMAD *v.* DAYA KISHUN **352**

——— *transaction, whether transfer of moveable or of immoveable property, question of fact—Registration Act (XVI of* 1908), *s.* 17 (1) (a)*—Trees, whether moveable or immoveable property—Evidence Act (I of* 1872) *s.* 91*—Legal relationship, existence of, proof as to—Gift by a Muhammadan—Deed of gift, inadmissible in evidence—Oral evidence, admissibility of.*

The question whether a grove transaction amounts to merely a transfer of standing timber or to a larger transfer of an interest in immoveable property is one to be determined upon the circumstances of each case.

Where a transfer is made of certain plots of land containing trees of various kinds and a house, not with the intention that the trees are to be severed and used as timber, but with the intention that the plots are to be maintained as grove as they are, the transfer is one of immoveable property and the deed of transfer requires registration.

The fact of the existence of a particular legal relationship may be established by oral evidence, although the terms which govern the relationship may be expressed in writing.

Where a Muhammadan executes a deed of gift which is found to be inadmissible in evidence, oral evidence is admissible to prove that the gift has been validly made in accordance with the Muhammadan Law. **O.** ALI BAKHSH *v.* GHURAI, 2 O. L. J. 97; 18 O. C 122 **180**

Guardian. *See* MUHAMMADAN LAW.

——— *Mutual, open and current account—Barred items—Guardian, power of, to accept.*

A guardian of a minor can accept accounts on the footing that they are mutual, open and current accounts even if some of the items may be barred by limitation. **M.** SUBBA NAIDU *v.* ETHIRAJAMMAL **640**

——— **and ward**—*Guardian purchasing property in consideration of money due to minor—Trustee—Limitation.*

Where a decree, passed in favour of a minor under the guardianship of a certain person, is discharged by the guardian in consideration of the transfer made to him of certain property, he holds that property as the trustee for the minor. **A.** MUNNA KUNWAR *v.* VENAIK RAM **861**

Guardians and Wards Act (VIII of 1890), s. 7 (3)—*Guardian, appointment of—Minor, welfare of—Will to be considered independent of Probate.*

There is no power in a Court to appoint a guardian, unless the Court is satisfied that it is for the welfare of the minor that the order should be passed, and that the appointment of the guardian will not infringe sub-section (3) of section 7 of the Guardians and Wards Act.

In such cases where a Will is set up a Judge has jurisdiction and is bound to consider that there is a Will although Probate has not been granted. **C** AKHOY KUMARI DEBI, *In the matter of*, 19 C. W. N. 513 **972**

Guardians and Wards Act—concld.

——— ——— ——— **ss. 7, 17**—*Minor girl—Re-marriage of her mother—Welfare of minor—Court not to proceed under Act where no necessity exists for appointing guardian.*

The re-marriage of a mother is not a sufficient reason to deprive her of the custody of her children, for the question in cases of guardianship always is whether it is for the welfare of the minor to appoint a guardian. It is not for the Court to accept each and every application made for the appointment of a guardian. **P.** FATIMA *v.* RANI, 36 P. W. R. 1915; 101 P. L. R. 1915 **507**

——— ——— ——— **s. 17** **507**

——— ——— ——— **s. 25**—*Ward leaving or removed from guardian's custody—Application under s. 25—Certificated guardian, whether necessary.*

Where a ward leaves or is removed from the custody of a guardian of his person, it is open to an aggrieved party to make an application to the Court under section 25 of the Guardians and Wards Act. In such a case it is not essential that there should be a certificated guardian before an application under section 25 can be entertained by the Court. **B.** DAYABHAI RAGHUNATHDAS *v.* BAI PARVATI, 17 BOM. L. R. 332 **597**

——— ——— ——— **s. 27**—Discretion—Ratification **5**

General Clauses Act (X of 1897), s. 18 **269**

——— ——— ——— **s. 24** **577**

High Court, power of, to correct errors in decree in absence of some of the parties **694**

High Court Act (24 & 25 Vic., c. 104), s. 14 **324**

Hindu Law—Adoption—Adopted son—Ancestral property **683**

——— ——— ——— *Adopted son, liability of, to maintain his adoptive mother—Agreement.*

In the absence of any agreement to the contrary, an adopted son is personally bound to maintain his adoptive mother from his share of the family properties obtained on partition. **M.** VENKATARAMAN *v.* SUBRAMANIA IYER, (1915) M. W. N. 187 **240**

——— ——— ——— *Consent of next reversioner—Refusal on personal grounds—Refusal, whether proper.*

In giving or refusing his consent to an adoption, a *sapinda* is not entitled to proceed upon grounds personal to himself but must act with a deliberate consideration of what is for the benefit of the family.

Where in answer to a request for his consent to an adoption by a widow, the next reversioner refused his consent, stating that the widow was actuated by a desire to prevent her property from devolving on him and his heirs, that he was ready to perform duties which would secure heavenly bliss and that the widow should wait till he got a son:

Held, that the consent was improperly refused. **M.** PILLALAMARRI VENKATAPATHI SOMAYAJULU *v.* PILLALAMARRI PUNNAMMA, 17 M. L. T. 218; 2 L. W. 284; (1915) M. W. N. 236 **373**

Hindu Law—contd.

——— ——— **Adoption,** *remote reversioner's suit to set aside—Nearest reversioner's knowledge of adoption more than six years before suit, whether bar.*

A suit to set aside an adoption, instituted by a remote reversioner more than six years after the knowledge of the same on the part of the nearest reversioners, is barred by limitation.

Quære.—If the same rule applies when the conduct of the immediate reversioners is tainted with fraud? **M.** SUBAMMA *v.* MADI REDDY, 2 L. W. 337 **632**

——— ——— ——— *Sister's son—Invalid.*

In the absence of a special custom, the adoption of a sister's son is invalid according to Hindu Law. **A.** RAGHUNATH DAS *v.* KISHEN LAL **854**

——— ——— ——— *Step-brother, whether can be legally adopted—Nanda Pandita, opinion of, value of.*

Under Hindu Law the adoption of a step-brother is not invalid.

The opinions of Nanda Pandita, when they are not supported by any text of the *Smriti* writers, are generally speaking recommendatory and not mandatory. **B.** GAJANAN BALKRISHNA *v.* KASHINATH NARAYAN, 17 BOM. L. R. 372 **978**

——— ——— **Alienation** *by manager of joint family—Family necessity—Onus—Money borrowed for Government revenue, whether for legal necessity.*

Where certain members of a joint Hindu family executed a mortgage of the joint family property and a suit was brought to enforce the mortgage as against the entire family of the executants:

Held, that it was for the plaintiff to prove that the debt was borrowed for family necessity and that there was necessity to borrow it at a high rate of interest stipulated in the deed.

Money borrowed and utilized in payment of Government revenue amounts to a debt borrowed for family necessity.

The family property can in a mortgage suit be brought to sale for such amount of the debt as the Court finds to have been borrowed for legal necessity. **A.** GAYA PRASAD TEWARI *v.* RAM PHAL MISIR, 13 A. L. J. 246 **21**

——— ——— ——— **Custom**—Athangudi Chetties *or* Yezhoor Nagarathars *of Madura District*—Patnibhaga—Mooppu—Mooppu Muri.

One of the tests to be applied for ascertaining the existence of a valid custom is to see whether the right claimed was ever contested and whether the persons who, but for such custom, would, under the general law, be entitled to certain property, abandoned the contest and suffered themselves to be excluded, thus accepting it consciously as having the force of law.

Where there is no proof that people living in a particular area voluntarily adopted a method of division of property which is contrary to Hindu Law applicable to their caste, it is unreasonable to recognise the existence of such a custom and impose it upon all the persons of the caste resident in the area, whether or not they have entered into special agreements.

In a suit to obtain a partition of family properties, the plaintiffs set up the existence of a custom among the *Athangudi Chetties* or *Yezhoor Nagarathars* of the Madura District, to which community

Hindu Law—contd.

the parties belonged, by which the division was effected *per stirpes* according to the number of wives having sons (or according to *patnibhaga*) and not *per capita* among all the sons (or according to *putrabhaga*). They also set up another custom according to which a member of the community who wished to marry a second wife during the life-time of the first, could only do so after reporting the matter to the *nagarathars* or headmen of the village and executing an agreement, styled *mooppu muri*, binding himself to set apart a certain sum of money or extent of immoveable property or both (which provision was known as *mooppu*) as and for the maintenance of his discarded wife, which *mooppu* became her separate and absolute property, descendible to her own sons:

Held, that the custom as regards *patnibhaga* was not proved but as regards the provision for *mooppu* was made out. **M.** ALAGU CHETTY *v.* PALANIAPPA CHETTIAR, 2 L. W. 272; (1915) M. W. N. 221 **278**

——— **Debt**—*Decree against father—Liability of sons – Sons at first impleaded as parties to suit but claims against them subsequently withdrawn—Effect of such withdrawal on sons' liability*—Res judicata.

Where a son is impleaded as a party to a suit brought upon a promissory note executed by his father, but subsequently the claim as against him was withdrawn and the decree is passed against the father alone, the creditor cannot be put in a worse position as regards the execution of his decree than he would have occupied if he had not impleaded the son.

In execution of a simple money decree against a father, the decree-holder can put to sale the family property, and the sons are entitled to an opportunity of contesting it either on the grounds of non-existence of the debt or of immorality. **A.** INDAR PAL *v.* IMPERIAL BANK, 13 A. L. J. 211; 37 A. 214 **593**

——— *Suit on promissory note executed by father—Sons impleaded as parties to suit—Burden on sons to show that debt is not binding on them—Plea of failure of consideration*—Onus *of proof—Same in case of son and father.*

In a suit on a promissory note executed by a father and filed against him, it is sufficient to join the sons and give them an opportunity of showing circumstances which would prevent the debt being binding on them or a decree being passed against them, and it is not necessary to plead and prove that the debt was incurred by the father for purposes binding on the family.

Where the plea of want of consideration is raised, the *onus* of proof in the case of the sons is not different from that in the case of the father. **M.** NACHIAPPA CHETTY *v.* DAKSHINAMURTHY SERVAI, 17 M. L. T. 232; (1915) M. W. N. 217 **345**

——— **Divorce** *among Hindus—Change of religion, effect of—Legitimacy disputed—Parents, lawful union between, shown to be impossible—Treatment as legitimate son, evidence as to, force of—Presumption.*

The Hindu Law does not recognise divorce, although the Courts do recognise divorce amongst Hindus upon proof of a custom allowing it.

Under the Hindu Law a change of religion does not dissolve the marriage tie.

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In cases where legitimacy of a person is disputed and it is shown that a lawful union between his parents was impossible, but at the same time there is plenty of evidence as to treatment of that person as a legitimate son, the presumption arising from the course of treatment of this kind is a very weak one and must yield to proof of circumstances which, when established, preclude all possibility of a lawful union between his parents. **O.** ABDUL KARIM *v.* ABDUL RAZZAK, 2 O. L. J. 101 **201**

——— **Gift**—Ballavacharya *sect — Custom—Right of transfer in property held by* goswamis—*Gift, validity of.*

A *goswami* of the *Ballavacharya* sect has a specific interest, capable of being partitioned and transfered, in the property held by him, including even the temple and idol. Hence a gift made by one *goswami* of his interest in the property held by him to another *goswami* and his successors-in-office is lawful and not contrary to the customs and usages of the cult. **A.** GOPAL LALJI *v.* GIRDHAR LALJI **715**

——— *of family property to son-in-law legality of.*

A gift of family property to a son-in-law is not necessarily invalid. **M.** KRISHNASAMI AIYAR *v.* SUNDARAM AIYAR **992**

——— to wife—Absolute interest or life-interest—Presumption **853**

——— **Joint family**—*Agreement to divide—Intention.*

Where an agreement entered into by the members of a joint Hindu family provided that all the immoveable and moveable properties relating to the co-parcenary were to be divided as from the date of the agreement and that from that time forward separate accounts were to be kept by the co-parceners and the gain or loss subsequent thereto was on no account to be binding on the other co-parceners:

Held, that the intention of the parties was to divide then and there and not to wait until a complete division of the properties had been effected.

The Court will not refuse to enforce an agreement between the members of a joint Hindu family which provides for the administration of a charity by the members of the family by annual turns. **M.** UMATYORUPAGAM PILLAI *v.* PALANARAYANA PILLAI **908**

——— *Alienation by manager—Family necessity*—Bona fide *belief from inquiries as to necessity, whether sufficient—High Court, power of, to find upon issue of fact—Civil Procedure Code (Act V of* 1908*), s.* 103.

A sale of the family lands, by the managing member, is binding upon the other members of the undivided family, if the purchaser, before making the purchase, made *bona fide* inquires as to the necessity for the sale and then purchased the land for a fair price, *bona fide* believing in the existence of necessity.

A High Court is entitled under section 103 of the Civil Procedure Code to find upon a question of fact on the evidence on record, even though no finding has been arrived at on that point by the lower Appellate Court. **M.** MOTUPALLI GANGESETTI *v.* PALURI RAMAMURTHI, 1 L. W. 249 **673**

Hindu Law—contd.

——**Joint family**—Contract entered into by one member of joint undivided family, suit on—Other members, whether necessary parties **45**

——————*firm, whether family asset—Managing member, powers of, to enter into contracts—Liability of other members—Estoppel—Defence—Denial of contract and at the same time pleading contract as of wager, whether permissible.*

A joint Hindu family firm must be regarded like any other joint family asset.

In a case where a business is carried on by the members of a joint Hindu family for the benefit of the entire family, there may be many persons who do not actively participate in the conduct of the business, there may be many members who are minors, and it is only by a confusion of ideas that these can be associated with those who are actively carrying on business as partners in the ordinary commercial sense. But where it is found as a fact that such a business was being carried on by any one or more members of a joint Hindu family for the benefit of the other members, particularly if such business had been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable to the notion of managership by one or more members for the benefit of the rest.

Where one or more members of a joint Hindu family start a business of their own, not at the expense of the joint family, nor with the intention of sharing its profits and losses with the other members, their position and their liabilities to the other members have to be regulated with reference to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self-acquisition.

It hardly lies in the mouth of a person to say in one and the same breath: "I did not make a contract, but if I did make a contract, I am sure it was a wager." **B.** JOHARMAL LADHOORAM *v.* CHETRAM HARISING, 17 BOM. L. R. 293 **538**

————————*Gift by managing member in favour of his daughter and sister—Conveyance to sister* benami *for daughter—Marriage of daughter a consideration for gift—Intention—Recital about property being self-acquired, effect of—Gift.*

Where the managing member of a joint Hindu family, in order to obtain a husband for his daughter executed a deed of gift in favour of his daughter and his sister, the mother of his future son-in-law and thereby conveyed certain properties to them:

Held (1) that the conveyance to the sister was intended to be *benami* for the daughter;

(2) that in adjudicating upon such gifts all the circumstances of the family should be looked into;

(3) that the donor intended to part with all the interest he possessed in any capacity in the property and that the recital in the deed that the properties were purchased with his self-acquired money did not in the circumstances of the case negative his intention of exercising any power of disposition he might have as managing member of the family. **M.** SABAPATHY CHETTY *v.* PONNUSAWMY CHETTY **365**

——*Money-decree against one member—His interest not attached—Property in the hands of the survivor, whether liable.*

Hindu Law—contd.

The property of a joint Hindu family is not liable for the debt of a deceased member where the debt is a simple unsecured debt, unless a charge has been created by the attachment of the debtor's interest during his life-time.

Where, therefore, *J* obtained a money decree against *N* and applied for attachment of *N*'s interest in the family property and also for rateable distribution between him and another decree-holder on whose application *N*'s interest had already been attached, and the Court transferred the execution of both decrees to the Collector, but while the proceedings were pending before that officer, *N* died and *J* applied that *N*'s father, *B*, should be substituted as his representative in the execution proceedings:

Held, that as no steps had been taken to enforce the debt in the life-time of *N*, his interest in the property survived on his death to his father and could not be reached by the creditor as assets in his hands. **N.** JAGRITDAS *v.* BHAGISAO, 11 N. L. R. 45 **362**

——**Joint family**—*Preliminary decree for partition, whether effects severance of co-parcenary—Holder of preliminary decree for partition, death of—Widow, whether proper legal representative.*

A preliminary decree for partition effects the severance of the members of a joint Hindu family, and if a plaintiff in a partition suit dies issueless after the passing of a preliminary decree, his proper legal representative is his widow. **M.** MAMMAREDDI SATTIRAZU *v.* MAMMAREDDI AMMAYYI, 2 L. W. 325 **543**

——**Maintenance**—Widowed daughter-in-law of predeceased son, right of, to oppose Probate of Will of her father-in-law in favour of his daughter—Maintenance, right of, if enforced against devisee **578**

——**Minority**—Alienation by guardian of minor's property—Suit for possession of alienated property by ward on attaining majority **704**

——**Mutt properties**—Pandarasannadhi, *mortgage by—Property within jurisdiction of different Courts—Decree obtained in one Court transferred for execution to another—Jurisdiction of other Court to declare decree not binding—Disciples, suit by, to contest decree, maintainability of—Civil Procedure Code (Act V of 1908), s. 92—Compromise decree, setting aside of—Legal necessity—Burden of proof—*Pandarasannadhi, *power of, to compromise—*Bona fide—*Position of* Pandarasannadhi, *whether analogous to Hindu widow.*

A very small part of the mortgaged properties was situated within the jurisdiction of *K* Court while the rest was situated within the jurisdiction of *T* Court. A suit was instituted on the mortgage in *K* Court and the decree obtained was transferred to *T* Court for execution. While execution was pending the judgment-debtor sued in *T* Court that the decree was not binding. It was objected that the Court had no jurisdiction:

Held, that under the circumstances the Court had jurisdiction and that there was no absolute rule that no decree could be in any way impeached save in the Court in which it was passed.

A decree passed by consent and without contest, whereby certain *mutt* properties are made liable, stands in no better position than a settlement

Hindu Law—contd.

effected out of Court, and in the absence of sufficient reason it can be questioned in Courts other than that which passed it.

Where a party has a special interest in the preservation and the maintenance of a *mutt* and its properties, he is entitled to sue on his own behalf and without obtaining sanction under section 92 of the Civil Procedure Code, 1908, to set aside a decree wrongfully got against the *mutt* properties.

The powers of a *pandarasannadhi* to compromise suits affecting trust properties cannot be larger than those of a trustee.

Compromises of suits entered into by trustees of charitable endowments are not necessarily void.

In a suit to declare a decree against a *pandarasannadhi* not binding on the *mutt* properties, once it appears that the decree was passed not after contest but on compromise, the onus is on the decree-holders to show that the compromise was a lawful one entered into *bona fide* and, therefore, where it is proved that the compromise was not of that character, the decree cannot stand.

A compromise entered into under the influence of an indirect motive, such as a desire to escape the necessity of having to attend and be examined as a witness by the *pandarasannadhi*, amounts to a breach of duty and cannot be regarded as lawful or *bona fide*.

A *pandarasannadhi*, though not accountable for his expenditure of the income of the *mutt* properties is yet under a moral, if not a legal obligation, to apply the surplus for purposes of a religious or philanthropic nature and he cannot apply it in satisfaction of debts which have been found not to be binding on the *mutt*.

The position of a *pandarasannadhi* is not analogous to a widow and a decree passed against a *pandarasannadhi* for debts not binding on the *mutt* cannot be treated as an alienation binding on his life-interest, as in the case of a decree passed in similar circumstances against a widow. **M.** ARUNACHELLAM CHETTIAR *v.* VELAPPA THAMBIRAN, 28 M. L. J. 410; 18 M. L. T. 135 **337**

——— **Partition**—*Document effecting severance in status, if requires registration—Declaration by member to live separate, if enough to create a severance- Power of mother to enter into partition on behalf of her minor son.*

Per *Sankaran Nair, J.*, (*Oldfield, J.* contra.)—A document merely creating a severance in status among the members of a joint Hindu family does not fall within the provisions of the Registration Act requiring registration. It does not in itself create an interest in property and if any is created, it is by operation of rules of Hindu Law and not by virtue of the instrument.

Per *Oldfield, J.*—A document which effects a severance in status is not admissible to establish partition as regards immoveable property without registration, though it may be operative as regards moveables

Per *Sankaran Nair, J.*—It is open to a member of an undivided family governed by the *Mitakshara* Law to effect a separation between himself and the other members of the family by a declaration to that effect made to other members, but the declaration must be clear and in such a form that it is not open to

Hindu Law—contd.

him afterwards to say that he still continues to be a member.

The differences between the joint tenancy of English Law and the joint Hindu family as known to *Mitakshara* Law pointed out.

Per *Sankaran Nair* and *Oldfield, JJ.*—Where an uncle and his minor nephew formed members of an undivided Hindu family, the mother of the minor is competent to consent to a partition on his behalf with his uncle. The fact that the uncle was at the time of consent very ill and about to die will not vitiate the consent, and the law will not recognise the contingency or probability of a person's death as a reason for not consenting to a demand for partition which a person is entitled to claim. **M.** POTHI NAICKEN *v.* NAGANNA NAICKER, 17 M. L. T. 300; 28 M. L. J. 423; (1915) M. W. N. 303 **625**

——— **Partition,** *how effected—Metes and bounds, division by, whether necessary—Intention to separate*—Res judicata—*Matter directly and substantially in issue—Partition, establishment of—Oral evidence—Separate enjoyment—Inference.*

A partition is effected, under the Hindu Law, between members of a joint family, if there is a division of their rights; an actual distribution of the property by metes and bounds is not necessary.

To determine whether two persons, members of a joint *Mitakshara* family, have separated so as to make the principle of survivorship no longer applicable between them, the Court must find whether they had an intention to separate, and, whether as a result of such intention, there has been severance of title and interest.

Where the question whether the lands of one of the villages, which formed part of the estate, had or had not been divided between the parties by arbitrators, was not directly and substantially in issue in the former suit:

Held, that the finding in the previous suit did not operate as *res judicata*.

A partition may be occasionally established by oral evidence, which, though not directly proving the factum of partition, may be of such a character as to justify the inference that a partition must have been made between the parties or their predecessors.

The mere separate enjoyment of parcels in severalty does not indicate complete partition between the parties.

There may be a mutual arrangement for the management and enjoyment of separate portions of joint property which does not amount to partition. On the other hand, the inference in favour of the theory of partition would be strengthened if it is proved that not only had the parties enjoyed separate and distinct portions of the family property for many years, but had also dealt with the separate portions in every respect as their own property, for instance, carried out improvements on them, or effected alienations, to strangers or to members of the family. **C.** ANAND KISORE CHOWDHURY *v.* DAIJI THAKURAIN, 21 C. L. J. 296 **580**

——— ——, *evidence of—Presumption—Burden of proof.*

Where the evidence relied on to prove a partition is merely oral and not documentary and where it

Hindu Law—contd.

is against the interests of one of the parties to the partition to effect it, the presumption is that no such partition took place.

The burden of proof in such circumstances is on the party who asserts that the partition took place. **M.** PILLADI VENKANNA *v.* PILLADI GANGAMMA **817**

——— **Partition**—Mitakshara—*Partition o family property—Mother's right to share—Her right to maintenance against estate—Sons and step-sons, liability of.*

Under the *Mitakshara* a mother is entitled to a share in the family property when a partition takes place among the sons. Her right to maintenance is not against her sons alone, but against the estate possessed by her husband and which is the subject of partition among his sons.

Therefore, where a mother has got both sons and step-sons the maintenance ought to be paid by both of them. **M.** KANNEPALLI BALA TRIPURA SUNDARAMMA GARU *v.* KANNEPALLI SURYANARAYANA GARU, 17 M. L. T. 188 **349**

——— Mitakshara — *Step-grandmother, whether entitled to share with grandsons on partition of family estate—Necessary party.*

Under the *Mitakshara* School of Hindu Law a step-grandmother is entitled to a share in the family estate on partition of the estate among her grandsons and is a necessary party to the partition suit. **B.** VITHAL RAMKRISHA *v.* PRAHLAD RAMKRISHNA, 17 BOM. L. R. 361; 39 B. 373 **967**

——— **Succession**—*Agreement — Family arrangement, effect of.*

In order to settle a dispute as to the property of a deceased Hindu a settlement was arrived at between the nearest collaterals of the deceased Hindu on the one side and his widow and his daughter as guardian of his daughter's minor son, on the other, whereby the collaterals were put into immediate possession of a very substantial portion of the property of the deceased and the daughter's son was put in absolute proprietary possession of the rest of the property in dispute "from generation to generation:"

Held, that under the circumstances of the case the daughter's son acquired a full proprietary title in the property under the settlement. **A.** RAM NARESH LAL *v.* SADHU SARAN LAL **505**

——— Mitakshara—*Grandmother, whether includes step-grandmother—Sister, preference of, to step-grandmother.*

Under the *Mitakshara* system of Hindu Law a grandmother does not include step-grandmother and, therefore, a sister is entitled to succeed in preference to the paternal step-grandmother. **B.** LINGANGOWDA GOVINDGOWDA *v.* TULSAWA MARIGOWDA, 17 BOM. L. R. 315 **588**

——— **Succession certificate**—*Money due to member of joint Hindu family—Suit to recover same—Succession certificate, if necessary—Adopted son—Ancestral property.*

Where one *M* died leaving a widow and she adopted a boy in pursuance of a power given to her to adopt and the adopted son brought a suit to recover a sum of money due to his adoptive father which he became entitled to by right of survivorship:

Hindu Law—contd.

Held, that he was entitled to recover the money without the production of a succession certificate.

Ancestral property is not taken by an adopted son as his father's heir and he is not bound, therefore, to produce a succession certificate to recover what is found to be ancestral property. **M.** RAMANATHAN CHETTY *v.* SUBRAMANIAM CHETTY, 28 M. L. J. 372; 17 M. L. T. 266 **688**

——— **Temple**—*Offerings to deity, share in, if can be mortgaged—Transfer of Property Act (IV of 1882), s. 6, cl. (a)—Income, uncertain and indefinite, whether transferable.*

Per *Sharfuddin, J.*—A right to share the offerings made to a deity in a Hindu temple is *res extra commercium* and is not transferable.

Offerings are, according to their true significance, made to the deity of which the image is its visual symbol and their appropriation by the officiating priest is not a right with which he is entitled to traffic.

The income arising from the offerings which are voluntary presents, is uncertain and indefinite and thus an income from such a right is not transferable under the Transfer of Property Act, and therefore the mortgage of that right and the purchase of it in execution of the mortgage-decree are invalid.

Per *Coxe, J.*—The chance that future worshippers will give offerings to the temple is a mere possibility within the meaning of section 6, clause (*a*), of the Transfer of Property Act, and so it cannot be transferred. **C.** PUNCHA THAKUR *v.* BINDESRI THAKUR, 19 C. W. N. 580 **675**

——— **Widow** — *Adoption — Reversioner — Consent of divided members, if necessary—Managing member refusing consent—Absence of consent of majority of co-parceners—Validity of adoption—Long delay—Adoption made to enable widow to alienate property outside family—Refusal of consent, propriety of.*

Where a Hindu dies issueless leaving behind him divided and undivided brothers, the consent necessary to enable his widow to adopt a son to him must be obtained from the undivided members of the family, that of the divided brothers being immaterial.

Where the managing member refuses his consent and the widow does not obtain the consent of the majority of the co-parceners, an adoption made by her is invalid. A managing member cannot be said to have acted from improper motives if he declines to sanction an adoption made, after long delay of nearly 30 years, to enable the widow to alienate the property outside the family. **M.** RAO RAMA RAO *v.* NARASIMHA NAYANINI VARU, 2 L. W. 286; 28 M. L. J. 363 **392**

——— *Gift with consent of next reversioner, validity of.*

Where a Hindu widow executed a deed of gift in respect of her husband's property, with the consent of her deceased husband's mother, in favour of those persons who were reversioners next to the mother at the date of the gift:

Held, that the gift was binding upon the mother. **A.** JAMNA KUNWAR *v.* RAMHIT SINGH **496**

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——— ——**Widow**—*Maintenance—Absolute right—Widow having independent means of support, whether debarred from claiming maintenance out of her husband's estate.*

The right of a Hindu widow of a co-parcener to be maintained out of the family property is an absolute right due to her membership in the family and does not depend upon her necessity arising from her want of other means to support herself.

Therefore, a widow who is able to maintain herself out of other property is not debarred from claiming maintenance out of her husband's estate. **M.** DARBHA LINGAYYA *v.* DARBHA KANAKAMMA, 28 M. L. J. 260; 38 M. 153 **200**

——— ——— ——— ——— *in possession of husband's estate, right of, to deal with the estate—Reversioners, right of.*

A Hindu widow is entitled to remain in possession of her husband's estate during her life-time and she is not liable to account to any one. She is also entitled to give the property to any one she likes to enure so long as she lives, and she need ask for no rent or other compensation for what she has done.

But where she alienates or deals with the property to the prejudice of the reversioners in a way not authorized by law, the reversioners are entitled to bring a suit for declaration that the act of the widow shall not prejudice the reversioners. **A.** RENKA *v.* BHOLA NATH, 37 A. 177 **896**

——— ——**Will**—*Bequest in favour of two brothers "in equal shares"—Tenancy-in-common not joint tenancy.*

Where a Hindu made a Will providing that in the absence of a begotten or adopted son to him and after the death of his widow, his two brothers would take his property "in equal shares:"

Held, that the two brothers got a tenancy-in-common and not a joint tenancy under the Will. **A.** HAR PRASAD *v.* SUKHDEVI KUNWAR, 13 A. L. J. 263; 37 A. 241 **561**

Hindu Wills Act (XXI of 1870) **221**

Hire-purchase agreement—*Property in goods sold, when passes—Contract Act (IX of 1872), ss. 35, 74, 78, 108, 178, applicability of—Alienation by purchaser contrary to stipulations—Attachment and Court sale of article—Purchaser, how far protected—Right of vendor under hire-purchase agreement to return of article or its value—Penalty, relief against.*

Property in goods purchased under the hire-purchase system does not pass to the vendee immediately on the execution of the hire-purchase agreement and the 3rd paragraph of section 78 of the Indian Contract Act does not apply to such a case.

Where an article purchased under a hire-purchase agreement is, before the payment in full of the several instalments, pledged contrary to the terms and stipulations of the agreement, and a promissory note is also executed to secure the loan and where the creditor, relinquishing the pledge, sues upon the promissory note, and in execution of the decree obtained therein attaches and sells the

Hire-purchase agreement—concld.

property purchased under the hire-purchase agreement and the article is purchased by a third party, the latter cannot claim the benefit of section 178, Indian Contract Act.

The provisions of Exception 1 to section 108, Indian Contract Act, do not extend to cases of Court sales of properties attached in execution of money decrees.

A clause in a hire-purchase agreement, providing, in case of breach of stipulations contained therein, either for a return of the article or for payment of its full value, is penal in character and Courts will be justified in relieving parties against the same. **M.** BALASUNDARAM CHETTIAR *v.* KRISHNA AIYAR, 2 L. W. 339 **633**

Hundi. *See* NEGOTIABLE INSTRUMENTS ACT.

Immoveable property—Right to fractional share, if right to tangible immoveable property **332**

Improvement. *See* MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT.

——— ——— ———, compensation for—Governing principle **850**

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Inheritance. *See* BUDDHIST LAW; CUSTOM.

Injunction. *See* CIVIL PROCEDURE CODE, 1908, O. 39, R. 2; EASEMENTS ACT; SPECIFIC RELIEF ACT, s. 55.

Inquiry. *See* CRIMINAL PROCEDURE CODE, CH. XVIII.

——— ——— before commitment—Discretion of Magistrate to discharge accused **1005**

——— ——— before Magistrate—Sessions case—Summoning of witnesses on date of committal—Proper procedure **799**

Insolvency—*Cause of action—Survival—Property vesting in Official Assignee—Insolvent incompetent to defend suit independently of Official Assignee.*

No cause of action survives against an insolvent whose interest in the plaint property has devolved upon the Official Assignee. The insolvent and the Official Assignee cannot both stand together on the array, and if the Official Assignee refuses to defend the suit, the insolvent cannot be allowed to do so independently of the Official Assignee. **B.** TRIBHOVANDAS NAROTAMDAS *v.* ABDULALLY HAKIMJI, 17 BOM. L. R. 209 **506**

Insolvents Act (11 & 12 Vict., C. 21), s. 86—*Insolvent absent—Judgment entered up under the above section.*

After due notice being served by the Official Assignee, an insolvent failed to appear at the hearing. Judgment was thereupon entered up against the insolvent under section 86 of the Indian Insolvents Act. **C.** BALCHAND SURANA, *In re*, 19 C. W. N. 433 **623**

Insurance against war risks—Contract—'C.i.f.,' meaning of—Bill of lading—Purchaser, whether bound to pay the premium—Shipment at enemy port—Royal Proclamation forbidding trading with enemy, effect of **433**

Interest after date fixed for redemption, whether allowed **195**

——— Discretion of Court to award interest—Plaintiff not entitled to contract rate as of right **429**

——— Mortgage *Post diem* interest—Fixed rate—Improvements, nature of—Interest on costs of improvement—Interpretation of deed **375**

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——— Mortgagor, when entitled to redeem—Contract, enforcement of—Notice for payment within the term—Interest for whole term, whether can be realised **450**

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Interpleader suit—Agent—Railway Company accepting goods for carriage, whether agent of consignor **948**

Interpretation Act, 1889, (52 & 53 Vic., C. 63), s. 18 (2) **463**

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——— Express words of Statute, whether overriden by equitable principles **946**

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——— Change of language in the same Act—Presumption **105**

Issues—Evidence, opportunity to produce—Appellate Court, duty of **50**

Jagir, *grant of, nature of*—"Putrapoutradi krame," *construction of—Absolute and heritable estate.*

A grant of a *jagir* is a grant for life only, but where the grant is made with the words "*putrapoutradi krame,*" the grantee takes an absolute heritable and alienable estate and all his heirs are capable of inheriting it. **C.** RAM SHARAN LAL *v.* RAM NARAIN SINGH, 19 C. W. N. 466 **610**

Joint family. *See* HINDU LAW.

Joint trial—*Property stolen at one and same theft and separately received by several accused—Irregularity, incurable—Criminal Procedure Code (Act V of 1898), s. 537—Conviction, setting aside of.*

A joint trial of persons separately receiving property stolen at one and the same theft, is bad, and this defect is not an irregularity which can be cured under section 537, Criminal Procedure Code, and a conviction marred by this defect cannot stand. **O.** JAGAN NATH *v.* EMPEROR, 2 O. L. J. 94; 16 CR. L. J. 270 **158**

Judgment—Appellate Court—Finding on each material issue necessary **354**

Jury, verdict of disagreement of, in respect of some of accused—Judge, duty of—Confessions of co-accused, when to be acted upon **658**

———, trial by—Charge to Jury—Misdirection, effect of **518**

Jurisdiction. *See* AGRA TENANCY ACT, s. 167; CRIMINAL PROCEDURE CODE, s. 39.

——— Accounts, suit for—Relationship of parties **955**

——— Appellate Court, power of, to grant permission to withdraw suit with liberty to bring fresh action **857**

——— *Civil and Revenue Court—Suit by* lambardar *against* malikan-i-qabza *for value of tree—Ruling, misapplication of, effect of—Material irregularity.*

A suit by a *lambardar* against *malikan-i-qabza* for value of trees cut by the latter standing on land in their possession is triable by a Civil, and not by a Revenue Court.

The mere fact that a lower Court has misapplied a decision of the Chief Court is not a ground for revision. **P.** NASIB SINGH *v.* HARNAM SINGH, 18 P. L. R. 1915 **919**

——— Conversion of part of an agricultural holding into brick-field—Ejectment, whether from part or whole of holding **298**

——— Defamation—Act committed outside British India—Jurisdiction of British Court—Liability, when arises—Publication, if requires communication to more persons than one—Tort—Law applicable to torts in India—Superior officer, direction of, when available as plea—Absolute privilege, if available to servants of independent Sovereign, acting under his orders and in course of their official duties **394**

——— Fraudulent decree, setting aside of—Decree obtained within jurisdiction of Court other than that in which suit filed—Court, jurisdiction of, to entertain suit **502**

——— Party taking the chance of success, if can be permitted to question jurisdiction of Court in case of failure **710**

——— Policy of Regulation III of 1872—Record of Rights—Conclusive proof—Civil Court, jurisdiction of, to contest entries **241**

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——— Revenue Division—*Venue,* transfer of, from one Revenue Division to another—Jurisdiction of new Court over suits pending in old division Transfer, formal, of suit, if necessary **269**

——— Valuation of appeal **261**

——— Madras Hereditary Village Offices Act (III of 1895), s. 13—Village headman, office of—Emoluments, when become attached to office of village headman—Board of Revenue making the office a salaried one—Suit for declaration of right to office filed after date of Board proceedings. **88**

Jurisdiction—concld.

——— **of Civil and Revenue Courts**—Declaration that defendant is or is not agricultural tenant, suit for, maintainability of—Plaintiff owning half share in village, when entitled to declaratory decree against rights of defendant in village—Decree, declaratory, validity of **307**

——— — — Declaration that plaintiff is not tenant but under-proprietor, suit for, maintainability of **303**

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Lakhiraj grant. *See* MADRAS REGULATION (XXV OF 1802), s. 4.

Lambardar, *definition of—Oudh Rent Act (XXII of 1886), s.* 126 (1)—Lambardar, *duty and liability of.*

Speaking generally, the *lambardar* is the manager of the common lands entitled to collect the rents, settle tenants, eject tenants, procure enhancement of rents, and do all necessary acts relating to the management of the estate for the common benefit.

The manager referred to in section 126 (1) of the Oudh Rent Act is the *lambardar.*

It is the duty of the *lambardar* to take all steps to collect the rents from all persons who are liable to pay rents and, in cases of failure to obtain rents, to take steps to have the persons in default ejected. **O.** BHAN PRATAB SAHI *v.* MANOHAR LAL, 2 O. L. J. 123; 18 O. C. 5 **236**

——— ———, suit by, against *malikan-i-qabza* for value of tree—Jurisdiction **919**

——— ——— ———, whether can sue alone for arrear of rent **838**

Land Acquisition Act (I of 1894)—*Landlord's share—Apportionment—Malabar Law—*" Vilakku *money,*" *nature of.*

" *Vilakku* money, " customarily paid by house-holders in Malabar to the temples on whose land they are living, is in the nature of quit rent and a grant of the said sites to the house-holders, by the Rajahs, though conferring a permanent tenure on the grantee, is subject to the payment of the quit ent.

Though, as a rule, the landlord would ordinarily be entitled to share with the tenant actually in occupation, in the compensation paid for land taken up by the Government under the Land Acquisition Act, 1894, he may be refused a share if, owing to the small extent and value of the land acquired, it is impracticable to apportion the compensation amount. **M.** CHERIA PANGY ACHAN AVERGAL *v.* KRISHNA PATTAI, 1 L. W. 767 **8**

——— ——— ——— ——— **ss. 4, 49**—*Declaration of intention to acquire a part—Owner's desire that the whole should be taken—Fresh notification necessary—Waiver.*

A part only of a certain piece of land was notified under the Land Acquisition Act to be acquired for the Railway. Under clause (1) of section 49 the owners expressed a desire that the whole land should be taken and not a part. The Collector assented to the acquisition of the whole, but did not consider it necessary for Government to declare its intention for acquiring the whole. An award was made, objected to, and the matter was referred to the Court. There, in addition to objections relating to the amount of compensation, the owners

Land Acquisition Act—concld.

alleged that the whole proceedings were *ultra vires,* as there was no notification to acquire the whole land:

Held, (1) that the proceedings were illegal and must be set aside;

(2) that the owners were not under any obligation to take the objection until the matter came before the Court and therefore there was no waiver. **B.** BHAGWANDAS NAGINDAS *v.* SPECIAL LAND ACQUISITION OFFICER, 17 BOM. L. R. 192 **489**

——— ——— ——— **s. 49** **489**

——— ——— ——— **s. 54**—*Civil Procedure Code (Act V of* 1908), *s.* 109—*Land acquisition—Award, appeal from—Award made by Judge on original side of Chief Court, whether appealable.*

An award made under Part III of the Land Acquisition Act is neither a decree nor an order and section 14 of the Lower Burma Courts Act which provides for appeals from decrees and orders made by a single Judge exercising the original civil jurisdiction of the Chief Court does not apply in such cases.

Under section 54 of the Land Acquisition Act there is an appeal from an award made by a District Court, but not from an award made by a single Judge on the original side of the Chief Court as he exercises powers of a High Court. **L. B.** COLLECTOR OF RANGOON *v.* CHANDRAMA **260**

Landlord and tenant—*Dispossession of tenant by landlord—Rent, suspension of.*

Where a landlord dispossesses his tenant from a part of his lease-hold lands, the landlord's right to claim rent is suspended in respect of the entire lease-hold. **C.** SARODA PROSAD BHATTACHARJEE *v.* MANMOTHO NATH MITTER BAHADUR, 19 C. W. N. 870 **371**

——— ——— ——— ——— *Land on which fruit trees stand—Evidence of possession—Enjoyment of usufruct of trees, if sufficient—Evidence.*

The only way of proving possession and enjoyment of the land out of which no profit is derived other than the usufruct of the fruit trees which stand thereon, is by proving the enjoyment of the trees as in such cases the enjoyment of the usufruct cannot be separated from the enjoyment of the sites on which the trees stand. **M.** SIVAPURAM VENKATESAM CHETTY *v.* GONUGUNTLA SUBBIAH, 2 L. W. 257 **266**

——— ——— ——— *Land let out on* purakudi *service—Tenancy, determination of—Transfer of Property Act (IV of* 1882), *s.* 111—*Notice, whether necessary.*

Section 111 of the Transfer of Property Act has no application to lands held on *purakudi* service. It is the refusal or neglect to perform such service that determines the tenancy and the tenants render themselves liable to be evicted without any notice.

A notice given after the harvest of the year is completed is not an improper notice and cannot be objected to on the ground that it was given in the middle of the harvest season. **M.** S. R. M. A. R. RAMASAMI CHETTIAR *v.* KATHAN AMBALAGARAN **915**

Lease of agricultural land—Failure of source of irrigation—Remission of rent—Burden of proving warranty—Rebate by guardian—Guardians and Wards Act (VIII of 1890), *s.* 27—*Discretion—Ratification.*

Landlord and tenant—concld.

A tenant cannot claim remission of rent on failure of rain or other source of irrigation in the absence of any stipulation in the lease or of any express or implied warranty.

Where the Deputy Commissioner acting as guardian of the minor co-sharer and agent of the major co-sharer granted a remission of rent of the defendant, a lessee of agricultural land, as he could not raise crops owing to scarcity of water in the canal by which the land was to be irrigated:

Held, that the defendant had no legal right to remission of rent but the Deputy Commissioner had a discretion in the matter under section 27 of the Guardians and Wards Act and as the plaintiffs did not repudiate his acts there was an implied ratification of his acts by them.

Per *Fawcett, J. C.*—The burden of proving such warranty is on the tenant who alleges it.

When the law creates a duty and a party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him, but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. **S.** GHULAM MAHOMED *v.* SAHEBSINGH, 8 S. L. R. 222 **5**

——— ——— ——— *Occupancy right, nature of —Burden of proof—Facts negativing right.*

The claim of an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character, and as such it is one which the party seeking to derogate from the ordinary incidents of property is bound to establish.

Where the defendants had been accepting leases from the plaintiff in respect of the suit lands and when the crops were attached and the defendants' claim was rejected they brought no suit to establish their claim to an occupancy right:

Held, that the defendants had failed to make out their right and that the plaintiff as *pattadar* was entitled to recover possession. **M.** ANANTHA PADMANABHA PILLAI *v.* GOPALAKRISHNAIER, (1915) M. W. N. 277 **916**

——— ——— ——— *Permanent occupancy—Uniform rate of rent for 80 years—Presumption.*

Long possession for a period of 80 years at a uniform rate of rent raises a clear presumption of a permanent right of occupancy. **M.** PALANIANDI MALAVARAYAN *v.* VADAMALAI ODAYAN **956**

——— ——— ——— Tenant paying rent to one out of several joint landlords, effect of **141**

Lease—Condition that lessee shall have no right to transfer his interest, validity of—Assignee, right of **904**

——— *Document not giving right to sell property for recovery of money advanced, whether usufructuary mortgage—Madras Hereditary Village Offices Act (III of 1895), s. 13—Alienations by way of lease—Adverse possession, whether can be acquired by lessee.*

A document securing re-payment of a debt out of the rent of the service *inam* lands taken together with another document—a deed of lease—does not create an usufructuary mortgage where no authority is given to bring the properties to sale for recovery of the money advanced. The documents are only instruments creating a lease and creating an ordinary simple money debt.

Lease—concld.

Madras Hereditary Village Offices Act III of 1895 does not prohibit alienations by way of leases.

Where, therefore, the suit lands formed the emoluments of the office of village blacksmith and defendants Nos. 1 and 2, the holders of the office, gave possession of the lands to the plaintiffs as lessees:

Held, that the plaintiffs' possession was only permissive and could not become adverse to the possession of the holder of the office. **M.** KAMARA PEDA SUBBAYYA *v.* KAKERLA CHENNAPPA, 28 M. L. J. 303 **842**

———, meaning of—Compulsory registration—Unregistered deed, admissibility in evidence of—Petition of compromise, how far admissible in evidence—Conveyance, effect of—Lands not assessed by Government, effect of—Consideration—Court's duty **879**

——— of "old waste" for three years—Expiry of lease on date the Madras Estates Land Act came into force—Lessee, tenancy of, nature of—Suit to eject such a lessee—Jurisdiction of Civil or Revenue Court—Transfer of Property Act (IV of 1882), s. 116—Lessee holding over—Nature of his right **252**

———, terms of—Lease, termination of—Notice of ejectment, validity of **929**

Legal necessity—Money borrowed for Government revenue, whether for legal necessity **21**

——— ——— ——— Sale-deed, necessity not mentioned, effect of **825**

Legal practitioner *changing sides in connected cases—Professional misconduct—Practice.*

A professional gentleman should as far as possible stick to the side who first employed him. It might be a very good practice if when gentlemen were offered instructions by the opposite side in any connected case that they should at least in the first place inform their first clients. **A.** AMBA PRASAD, *In the matter of*, 16 CR. L. J. 420 **956**

Legal Practitioners Act (XVIII of 1879)—*Legal Practitioners Act (XI of 1896)—Admission of person as tout, whether sufficient to declare him as such—Proof, necessary*

In order to declare a person a tout it is necessary to have some evidence of the facts required by section 3 of the Legal Practitioners Act XVIII of 1879, as amended by Act XI of 1896.

A person, although admitting himself to be a tout, cannot be declared as such when there is nothing to show that he intends to admit that he has been receiving remuneration from Legal Practitioners for procuring employment. **M.** JOUNALAGEDDA SAMBAYYE, *In re* **918**

——— ——— ——— **S. 13 (f)**—*Reasonable cause—Scope—Misconduct—Open letter by Pleader concerning Head of District—Its nature and manner of circulating—Improper—Liability of Pleader—Litigation between parties—No excuse—Pleader offering bribe to local Commissioner in a case to secure decision in favour of his client—Evidence Act (I of 1872), s. 47—Opinion as to handwriting of one's clerk —Relevancy.*

Section 13, clause (*f*), of the Legal Practitioners Act is not confined to misconduct of a practitioner in his professional capacity.

Legal Practitioners Act—(1879)—concld.

An open letter containing passages of a highly improper nature concerning the Head of a District (Deputy Commissioner) and addressed to him and circulated to all and sundry is grossly improper at any time, whatever the position of the writer may be, and especially a Pleader cannot be permitted to misconduct himself in this serious manner.

The fact that the Pleader was a litigant against the Deputy Commissioner, will not enable him to escape liability in his capacity as Pleader and there is grave aggravation if the letter is sent to the presiding Officer of the Court in which the suit by the Pleader against the Deputy Commissioner is pending.

Where a Pleader, who had been engaged for the defendant in a case, sent a letter to the local Commissioner appointed therein asking him to report in favour of the dismissal of the plaintiff's claim without fail, and making an alternative suggestion which could not be read as anything else than a direct offer of a bribe:

Held, that the Pleader was guilty of gross misconduct.

The opinion of a person as to the identity of handwriting of his clerk is relevant under section 47 of the Evidence Act. **P.** CHANDA SINGH, *In the matter of*, 18 P. R. 1915; 12 P. W. R. 1915 CR. **722**

Legal Practitioners Act (XI of 1896) 918

Legal representative—Execution of decree—Death of judgment-debtor prior to decree—Legal representatives not brought on record in Appellate Court—Appellant one of legal representatives in possession of part of deceased's estate—Right to object **925**

Legitimacy. *See* HINDU LAW.

Letters Patent (Mad.), s. 15 733

——— **s. 15**—*Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 18, 19—Rules of Practice—High Court Appellate Side Rules 48 (a), 75—Case posted before single Judge in admission Court for orders—Non-appearance—Dismissal of appeal by Judge—Application to restore dismissed appeal to file—Dismissal of application—Appeal against order—Practice—Procedure—Limitation Act (IX of 1908), s. 14.*

A single Judge sitting in the admission Court can, under rule 75 of the Rules of Practice of the High Court, Appellate Side, only post an appeal to a Bench for disposal and cannot himself dismiss it.

Where, therefore, he so dismisses an appeal, for non-appearance of the appellant, and an application to restore the dismissed appeal to file is also dismissed, the proper course is to appeal against the order dismissing the appeal, and not against the order refusing to restore the dismissed appeal to file.

An appeal filed against the order dismissing the application for restoration cannot be treated as an appeal against the order dismissing the appeal if it is beyond time, nor can any question as to deduction of time, under section 14 of the Limitation Act, arise when no appeal against that order is before the Court.

Per *Tyabji, J.*—(dissenting)—Both orders can, for the purpose of this appeal, be treated as one, and an Appellate Court can itself pass the order which the Court of first instance should have passed.

Letters Patent (Mad.)—concld.

The words "failing to satisfy the Court that there was just and reasonable cause" include also a case where there is no appearance of the party himself. **M.** SRINIVASA RANGA ROW *v.* RAJA OF KARVETINAGAR, 28 M. L. J. 61; (1915) M. W. N. 101 **64**

——— **s. 15**—*Criminal Procedure Code (Act V of 1898), ss. 117, 118, orders under, nature of—Criminal trial—Revisional order of single Judge, appeal from, maintainability of—Right of appeal, how conferred.*

Proceedings taken for binding over persons to keep the peace under Chapter VIII of the Criminal Procedure Code are criminal trials within the meaning of section 15 of the Madras Letters Patent and no appeal lies under the Letters Patent from an order of a single Judge dealing with a revision petition.

Rights of appeal do not exist unless specially conferred by Statute.

The portion of the Letters Patent commencing with section 22 dealing with criminal jurisdiction gives no right of appeal against the order of a single Judge acting as a Court of Revision. **M.** ADUR DESIKACHARI *v.* EMPEROR, 28 M. L. J. 307; (1915) M. W. N. 224; 16 CR. L. J. 303 **527**

Limitation, *plea of, whether can be raised in second appeal—Admissibility of document not proved—Court justified in refusing to consider it.*

A plea of limitation can be allowed to be raised in second appeal only if it is certain that its legitimacy can be determined on the pleadings and that it depends on no possible question of facts regarding which the party adversely affected might have adduced evidence.

A Court is justified in refusing to consider a document when there is neither evidence on the record to justify its admission nor is any application made to take fresh evidence as to its admissibility. **M.** PERUMA GOWNDAR *v.* RAMA GOWNDAN, 28 M. L. J. 115 **378**

——— Pre-emption — Suit by preferential claimant brought after decree obtained by remote claimant **651**

——— *Review—Time spent in review, when allowed in calculating period for limitation in appeal—Admitting fresh evidence in appeal interest not promised, when allowed.*

The claim was for recovery of a certain amount, principal and interest, for work done. The first Court held that the whole of the work had been paid for and dismissed the suit. The plaintiffs applied for review of judgment on the ground that they had found a certain document which they had supposed was lost, but which had come to light. The Court issued notice on the petition for review and heard the case argued again, but it came to the conclusion that there was no sufficient ground for altering the decision, and dismissed the petition for review. The plaintiffs appealed. The appeal was under the ordinary law long time barred and the question was whether the time spent in review should be allowed in calculating the period for limitation in appeal. The Appellate Court held that there were excellent grounds for the review application and it admitted the appeal, and reversed the decision of the first Court. On further appeal to the Chief Court:

Limitation—concld.

Held, (1) that the lower Appellate Court did not accept an appeal against the order in review, but admitted an appeal against the original judgment and decree, and in hearing it admitted authentic fresh evidence for the late production of which plaintiff had satisfactorily accounted;

(2) that there was nothing illegal or irregular in the procedure.

Where there was no promise to pay interest on overdue payments, nor was there any indication in the evidence that any such promise was implied, nor was any notice given by plaintiff to defendant threatening to charge interest, no interest could be allowed. **P.** WINKLEY *v.* WASAWA SINGH, 55 P. L. R. 1915; 50 P. W. R. 1915 **926**

—— —— Suit for pre-emption—Sale to subsequent vendee **695**

—— —— Time spent in revision applied for by judgment-debtor, whether to be allowed in extending period of limitation for execution **282**

Limitation Act (XV of 1877), Sch. II, Art. 182—*Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 47—Conciliator's certificate—Civil Procedure Code (Act XIV of 1882), s. 248—Notice, effect of.*

An application for execution which is otherwise in accordance with law, is an application in accordance with law within the meaning of Article 182 of the Indian Limitation Act even though it is not accompanied with the Conciliator's certificate as required by the Dekkhan Agriculturists' Relief Act.

If an application for execution is presented and a notice is issued by the Court as provided by the Civil Procedure Code, the applicant is entitled to take advantage of the fact of the issue of such notice even though the application may be defective owing to the absence of a Conciliator's certificate. **B.** SADASHIV VENKAJI JOSHI *v.* NARSINGRAO KONHERRAO, 17 BOM. L. R. 203 **493**

Limitation Act (IX of 1908), s. 5—*Appeal filed beyond time—Judicial discretion of Court—Negligence of Barrister in filing appeal, whether sufficient cause—Liability.*

The neglect of the Legal Practitioner engaged is not to be deemed a sufficient reason for admitting an appeal or application after the time prescribed by law.

Where an appeal was filed to the District Judge 37 days beyond time and no explanation was given of the delay except that instructions had been given in time to a Barrister together with Rs. 40 for the purposes of filing the appeal, but he failed to file, and the District Judge admitted the appeal:

Held, that the Judge had not exercised a judicial discretion in allowing the appeal to be filed after time.

Per *Richards, C. J.*—If it is shown that an Advocate who is a Barrister or other professional gentleman received and accepted instructions to file an appeal or make an application and the client lost his right to appeal or make the application as the result of the negligence of the Barrister or Practitioner to file the appeal or application within time, such Barrister or Vakil is liable to his client in a Court of Law. **A.** BUDHU *v.* DEWAN, 13 A. L. J. 286; 37 A. 267 **265**

Limitation Act—(1908)—contd.

—— —— —— —— **ss. 5, 14, Sch I, Art. 181**—*Transfer of Property Act (IV of 882), s. 89—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5 (2)—Application to make decree absolute, limitation for—Court, duty of, to pronounce judgment—S. 14 of Limitation Act, whether applicable to appeals.*

Where a decree on a mortgage was passed on the 28th July 1905, fixing 28th January 1906 as the date for payment and no payment having been made an application was made on the 31st May 1909 to make the decree absolute:

Held, that the application to make the decree absolute was barred by Article 181 of the first Schedule to the Limitation Act.

Article 181 of the first Schedule to the Limitation Act applies to an application under section 89 of Act IV of 1882.

Applications under Order XXXIV, rule 5, clause 2, come within the scope of Article 181.

A Court is bound to dispose of a pending suit, whether any application is made to it or not asking it to proceed to judgment.

Where an appeal was preferred to the High Court against a lower Appellate Court's order of remand but the proceeding continued in the first Court and was disposed of on the 19th September 1910, and on the 21st April 1911, the High Court dismissed the appeal, and on the 6th May 19 1, the plaintiff appealed to the lower Appellate Court, against the order of the 19th September 910:

Held, that the appeal to the lower Appellate Court was barred by limitation, as section 14 of the Limitation Act had no application to appeals and the case did not come under section 5 of the Act. **C.** BENI SINGH *v.* BARHAMDEO SINGH, 19 C. W. N. 473; 22 C. L. J. 66 **211**

—— —— —— **s. 5**—*Mistake of fact—Sufficient cause.*

An appellant seeking to take advantage of section 5 of the Limitation Act, on the ground of a mistake of fact, is bound to show that there has been no negligence, inaction or want of *bona fides* before he can claim an extension of time.

Where, therefore, the appellant's Pleader was misled as to the date of the decree, the uncertified copy obtained by the appellant being wrongly dated, and the appeal was consequently filed out of time:

Held, that there was no "sufficient cause" within the meaning of the section. **S.** KARACHI TRADING CO. *v.* FIRM OF TEJBHANDAS, 8 S. L. R. 235 **82**

—— —— —— —— **ss. 6, 8, 9, 22. Sch. I, Art. 91**—Minority, insanity and idiocy—Limitation, disqualifications to save—Court of Wards, position of—Suit, right of—Representative capacity, suit in—Plaint, amendments made in—Properties belonging to idols, transfer of, by Court of Wards—Court of Wards Act (IX of 1879), section 18, scope of **818**

—— —— —— —— **ss. 8, 9** **818**

—— —— —— —— **s. 12 (3)**—*Appeal from decree—Computation of period of limitation—Exclusion of time spent in obtaining copies of both judgment and decree.*

Where after a copy of the judgment had been obtained, an application for a copy of the decree based upon that judgment was made beyond the

Limitation Act—(1908)—contd.

period of limitation allowed for appeal from that decree, but within such period, if the time taken in obtaining the copy of the judgment was excluded in computing that period, and an appeal was filed on obtaining the copy of the decree:

Held, that the appeal was filed within time. **O.** DIN DAYAL *v.* RAMESHAR, 2 O. L. J. 159; 18 O. C. 74 **366**

——————— **s. 12**—Application for copy of judgment mislaid **524**

——————— **s. 14** **64, 211**

——————— **s. 14**—*Time spent in prosecuting suit in another Court—Good faith—Due diligence.*

On the 25th October 1912, the plaintiff lodged his suit in the Munsif's Court claiming a sum of money over Rs. 500. On 22nd July 1913 he learnt that the amount due to the insolvent firm, whose assets he had purchased, was less than Rs. 500. He applied for the return of his plaint and filed the amended plaint on 30th July 1913 in the Munsif's Court, reducing the claim to Rs. 438-9-6. On 7th August 1913, the plaint was returned to be filed in the proper Court and on 11th August 1913 the plaint was filed in the Court of Small Causes:

Held, that the plaintiff acted in good faith and with due diligence up to 22nd July 1913 and was entitled to deduct that period only. **P.** RADHA KISHEN *v.* LADHA MAL-RAM CHAND, 51 P. L. R. 1915; 54 P. W. R. 1915 **347**

——————— **s. 14, Sch. I, art. 120**—*Religious endowment—Advances made by trustee—Suit for recovery—Charge in favour of trustee of charitable trust.*

The plaintiff was appointed by the District Judge as trustee of a mosque during the minority of the defendants. The first defendant on attaining majority on 27th February 1900 sued to recover possession and obtained a decree on 26th April 1902, but the plaintiff did not surrender possession till February 1905. The plaintiff sued for recovery of the sums advanced by him to the trust and not recovered before he gave up possession:

Held, (1) that the suit was governed by Article 120 and not by Article 132 of the Limitation Act;

(2) that limitation began to run from the date of the dispossession, as till then no right accrued to the trustee to bring a suit to enforce his claim against the trust properties;

(3) that the plaintiff was entitled to his out of pocket expenses for the purposes of the trust till 20th April 1902 when his right to continue in possession was negatived by a Court of law;

(4) that the time spent by the plaintiff in defending the previous suit could not be deducted under section 14 of the Limitation Act as his claim was not founded upon the same cause of action.

Per *Sadasiva Aiyar, J.*—The charge created in favour of a trustee of a religious or charitable trust enables him to take the sums he has expended on behalf of the trust only from the rents and profits of the trust estate (except in very exceptional cases) and cannot entitle him to put an end to the trust itself by bringing the *corpus* of the religious or charitable trust properties to sale. **M.** KALIBA MAVULVIJA *v.* SARAN BIVI SAILA, 28 M. L. J. 347; 38 M. 260 **290**

Limitation Act—(1908)—contd.

——————— **s. 18** **708**

——————— **s. 19** **69**

——————— **s. 19**—*Award directing parties to share assets and liabilities equally, acceptance of, whether amounts to acknowledgment.*

An acceptance of an award directing the parties to share equally the outstandings and "amounts payable" found in the accounts of the partnership is not an acknowledgment of liability for the purposes of section 19 of the Limitation Act. **M.** SUBRAMANIA PILLAI *v.* SANKARALINGAM CHETTIAR **864**

——————— **ss. 19, 20**—*Endorsement of payment on note—No payment made, if valid as an acknowledgment.*

Where on a promissory note, dated 24th January 1911, there was an endorsement as follows:—"On the 22nd January 1914, the amount paid towards this promissory note in ready money is Rs. 10, in words rupees ten." And the defendants pleaded that no payment of Rs. 10 was made by them and that the endorsement was not sufficient to save limitation:

Held, that the endorsement would be sufficient as an acknowledgment of liability and would save limitation even if no payment was made.

An endorsement which is not good as a payment under section 20 of the Limitation Act might still be sufficient as an acknowledgment under section 19 of the Act. **M.** RAMAKRISHNA CHETTY *v.* VENKATASUBBIAH CHETTY, 17 M. L. T. 139 **15**

——————— **s. 20** **15**

——————— **s. 20**—*Agent, "duly authorised in that behalf," meaning of—Payment by partner in charge of branch of business, whether effective.*

The mere fact of a partner being in charge of a branch of the partnership business does not authorise him to bind the firm by a payment or acknowledgment. He must be specially authorised to do so in order to bring the payment within section 20 of the Limitation Act. **M.** VEERAPPA CHETTY *v.* CHIDAMBARAM CHETTY **845**

——————— **s. 22** **210, 818**

——————— **s. 22** — Defendant made plaintiff—Limitation, starting point of **45**

——————— **s. 26,** application of **894**

——————— **s. 28** **22**

——————— **s. 29,** scope of **241**

——————— **Sch. I, art. 2** **45**

——————— **art. 7**—*Cook, whether domestic servant—Suit to recover wages—Limitation.*

A cook is a domestic servant although he may be an expert in cooking, and a suit by him to recover wages due is governed by Article 7 of Schedule I of the Limitation Act, 1908. **M.** KUPPU RAO *v.* NARASIER **956**

——————— **art. 10**—Pre-emption, suit for—Sale, subject to mortgage—Possession, physical, property incapable of — Mortgagee in possession- Vendee subsequently taking possession from mortgagee -Registration of sale-deed, date of, limitation starting from **208**

Limitation Act—(1908)—contd.

——————— **Sch. I, arts 11, 13**—*Order on claim petition by single Judge on original side—Appeal—Suit to set aside order—Starting point of limitation "Order," meaning of—Civil Procedure Code (Act V of 1908), O. XX, r. 63—Civil Procedure Code (Act XIV of 1882), ss. 283, 591—Letters Patent, s. 15.*

Where the order on a claim petition passed by a single Judge of the High Court sitting on the original side was appealed against and was confirmed and where within one year from the date of the appellate order but more than one year from the order of the first Court, a suit to set aside that order was filed:

Held, that the suit was within time under Article 11, Schedule I, of the Limitation Act and that Article 13 of the Limitation Act had no application to such a case.

Neither section 283 nor section 591 of the old Civil Procedure Code takes away the right of appeal conferred by section 15 of the Letters Patent.

The word "order" used in Article 11 of Schedule I of the Limitation Act refers only to a subsisting order. Where, therefore, there was an appeal against the order of a single Judge, it is the date of the order of the Appellate Court, that gives the starting point of limitation. **M.** VENUGOPAL MUDALI *v.* VENKATASUBBIAH CHETTY. 17 M. L. T. 208 (1915) M. W. N. 211 **367**

——————— **art. 13** **367**

——————— **art. 29** **463**

——————— **art. 36** **452**

——————— **arts. 44, 144,** *applicability of—Hindu Law—Minority—Alienation by guardian of minor's property—Suit for possession of alienated property by ward on attaining majority.*

A suit brought by a ward, who has attained majority, for possession of properties alienated by his guardian during his minority is governed by Article 44 of the Limitation Act, 1908, and not by Article 144.

Such a sale does not become void merely by reason of inadequacy of consideration. **M.** KOPPARTI SURYANARAYANA *v.* CHIKKALA NARAYANASWAMY, 2 L. W. 365 **704**

——————— **art. 57**—*Suit for money advanced in payment of goods to be delivered—No date fixed for delivery—Enquiry as to date of delivery—Limitation—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision.*

In a suit for the balance of money advanced in payment of goods to be delivered where no time is fixed for delivery, the Court ought to consider whether, by reason of trade custom or some established usage well understood by both parties, any particular period can be laid down as the time when the goods required in the particular case ought to have been delivered, failing this, it should fix some reasonable time after the advance of the money, having regard to all the circumstances of the case.

If a Court without making such inquiry as to the time of delivery of goods dismisses the suit as barred by time holding that the date of payment must be taken to be the date of delivery of the goods, the High Court would interfere in revision under section 25 of the Small Cause Courts Act. **A.** SHANKER SINGH *v.* REKHA, 13 A. L. J. 394 **969**

——————— **Sch. I, art. 60**—*Suit to recover money deposited with firm—Limitation—Time runs from demand.*

A suit to recover money deposited on interest with a firm is governed by Article 60 of the Limitation Act and the time runs from the date of demand. **A.** JUGGI LAL *v.* KISHEN LAL, 13 A. L. J. 402; 37 A. 292 **949**

——————— **art. 62** **442**

——————— **arts. 62, 115**—*Mortgage in name of* benamidar—*Money received by* benamidar, *suit by real owner to recover—Limitation—Suit, nature of.*

The plaintiff's predecessor obtained a mortgage bond executed *benami* in the name of the defendant's predecessor, on the understanding that the latter should have nothing to do with it and that the former should conduct all necessary proceedings in the latter's name and that after the amount was collected and got into the latter's hand, the latter should hold it at the former's disposal and act according to his directions. This amount was received from the Court at the instance of the latter's Vakil on the 3rd February 1908, who paid it to the latter on the 10th. The plaintiff filed a suit to recover the amount on the 6th February 1911:

Held, that the suit was governed by Article 62, Schedule I, of the Limitation Act, and that as it was brought more than three years after the amount was received, it was barred.

Such a suit is neither one to follow trust property within the meaning of section 10 of the Limitation Act, nor is it a suit for damages for breach of contract under Article 115 of Schedule I, of the Limitation Act, as it cannot be said that receipt of money of itself evidences a contract to re-pay without further consideration. **M.** NARAYANAN *v.* RANGASAMI CHETTY, (1915) M. W. N. 215 **495**

——————— **arts. 89, 36**—*Money received and not accounted for—Misappropriation by servant—Limitation—Civil Procedure Code (Act V of 1908), O. XX, r. 16—Preliminary decree in suit for accounts, when to be passed.*

Money received and misappropriated by a servant is covered by Article 89 and not by Article 36 of the Limitation Act. It is immaterial in a civil action whether the misappropriation charged is criminal or not. If there is no misappropriation but money is payable by the defendant to the plaintiff for money received by the defendant and not accounted for, Article 89 still applies.

Under Order XX, rule 16, Civil Procedure Code, it is clear that it is not in every suit for accounts that a preliminary decree directing such accounts to be taken as the Court thinks fit, is necessary. It is only where it is necessary in order to ascertain the amount of money due to or from any parties that an account should be taken, and that the Court should before passing the final decree pass a preliminary decree directing such accounts to be taken as it thinks fit. **C.** SEOSARAN LAL *v.* HARIHAR PRASAD SINGH **452**

——————— **art. 91** **818**

Limitation Act—(1908)—contd.

——— **Sch. I, arts. 109, 120**—*"Wrongfully received," meaning of—Suit for profits of immoveable property—Wrongful possession by decree-holder—Restitution—Appeal—Possession taken during appeal, nature of, if appeal successful—Civil Procedure Code (Act V of 1908), s. 144.*

A suit for profits of immoveable property by a person who was dispossessed in execution of a decree which was reversed in appeal and who was subsequently restored to possession, is governed by Article 109 of Schedule I of the Limitation Act, 1908.

The words "wrongfully received" in Article 109 of Schedule I of the Limitation Act include receipt of profits under a claim or title that cannot be legally substantiated.

An appeal is only a continuation of the original proceedings and the appellate judgment dates back to and stands in the place of the original judgment for all legal purposes. Therefore possession taken by a person pending an appeal is subject to the result of the appeal and must be deemed to have been without legal title if the original decree or order is reversed and is in this sense "wrongful" as against the person dispossessed. **M.** RANGASWAMI KAVUNDAN *v.* ALAGAYAMMAL, 2 L. W. 169; 17 M. L. T. 168 **85**

——— **art. 115** **495**

——— **art. 120** **85, 290, 600**

——— **art. 120** — *Partition, suit for—Property, specific, of members of Hindu family, managed by one member—Receipt of amounts invested by manager—Suit to recover, nature of.*

N made a Will in which he divided up his property between his three sons, *R*, *V* and *P* but urged them to continue to live together in an amicable and friendly way. The property was managed by one member of the family *P*. He received the rents and profits of the immoveable property and invested them in the ordinary course of business. He had invested a considerable sum of money in Railway Debentures and more than three years after he received the money from Government in redemption of the Debentures, the widow of a son of one of the brothers claimed to be put into possession of a third of specific portions of the property:

Held, that the suit was in reality a suit for partition of the moveable and immoveable property and was governed by Article 120 of Schedule I of the Limitation Act. **A.** PARSOTAM RAO TANTIA *v.* RADHA BAI, 13 A. L. J. 407; 37 A. 318 **953**

——— **art. 120,** whether governs claims of executors for moneys spent on behalf of estate—Limitation law, if applicable to administration actions **221**

——— **arts. 131, 120**—*Suit to establish right to recover rent—Periodically recurring right.*

A right to recover rent is a periodically recurring right and a suit to establish such a right is governed by Article 131 of the Limitation Act, and not by Article 120. **A.** MOHAMMAD HUSAIN *v.* MOHAMMADI BIBI, 13 A. L. J. 333 **600**

——— **art. 132** — *Mortgage-deed—Instalment—Construction—Money, when becomes due—Limitation.*

Limitation Act—(1908)—contd.

A mortgage-deed executed in 1890 provided that the mortgagors should pay the principal amount secured in ten years by instalments of Rs. 625 yearly together with interest and further provided as follows: "If we (mortgagors) fail to pay the interest aforesaid in any month or the principal by the end of the stipulated period as specified above, or no payment is made in a year, the mortgagee shall, under all these circumstances, be at liberty to realize the entire amount with the interest aforesaid in a lump sum through Court by means of a suit....If the mortgagee in order to get interest does not bring a suit in default of payment of any instalment and we are unable to pay the money, the interest should continue up to the stipulated period of ten years and also after it up to the date of realization etc." No payment was ever made upon foot of either principal or interest up to the date of the institution of the suit in 1912:

Held, [*Banerji, J.*, dissenting] that the money under the bond "became due" within the meaning of Article 132 of the Limitation Act when the first default was made in 1890 and accordingly the suit was barred by limitation.

Per *Richards, C. J.*—Money under a bond "becomes due" as soon as it is legally recoverable, quite irrespective of when the suit is instituted.

Per *Banerji, J.*—Upon a true construction of the bond in this case the money secured by it became due on the expiration of ten years from the date of the bond and the claim was not barred by limitation. **A.** GAYA DIN *v.* JHUMAN LAL, 13 A. L. J. 510 **910**

——— **Sch. I, arts. 142, 144**—*Suit to recover possession—Defendant in possession.*

Every suit for possession of immoveable property in which the plaintiff alleges that he has had possession falls under Art. 142 of the Limitation Act, and not under Art. 144. **B.** SUBAPPA SHENKAREPPA *v.* VENKAPPA GOLAPPA, 17 BOM. L. R. 141; 39 B. 335 **24**

——— **art. 144** **24, 704**

——— **art. 158** **427**

——— **art. 181** **211**

——— **art. 182** **478**

——— **art. 182 (5)**—*Execution—Step-in-aid of execution—Date of application or date on which Court takes step—Time from which limitation runs—Agreement not to arrest judgment-debtor, validity of—Agreement, whether stops running of time.*

Under Article 182 (5) of the Limitation Act, the period of limitation begins to run from the date on which application is made to take a step-in-aid of execution and not from the date on which the Court actually takes the step.

A judgment-debtor applied to be declared an insolvent. In the course of the proceedings the Pleader for the decree-holder, who was one of the creditors, stated that if the judgment-debtor would withdraw his application in insolvency he would guarantee not to apply for his arrest in execution of his decree for a period of two years. To this the judgment-debtor consented and the application was struck off. A warrant of arrest was, however, issued by the Court, but was returned unserved as the necessary diet money was not paid.

S. N. DAR, B. A. LL. B.
Vakil High Court.
SRINAGAR (Kashmir)

Limitation Act—(1908)—concld.

Held, that the agreement could not save the period of limitation from running against the judgment-debtor, inasmuch as the decree-holder did not abide by the agreement and neither there was any order suspending the execution or injunction nor did the agreement prevent the decree-holder from applying for execution. **A.** IBRAHIMJI *v.* HASANUDDIN KHAN, 13 A. L. J. 305 **381**

Liquidation. *See* COMPANIES ACT (VI OF 1882), s. 58.

Lis pendens, *doctrine of, scope of—Civil Procedure Code (Act XIV of 1882), ss.* 248, 313—*Notice—Sale—Auction-purchase by executor of deceased judgment-debtor—Personal capacity, application in.*

The doctrine of *lis pendens* rests on the principle that the law does not allow litigant parties to give to others, pending the litigation, rights over the property in dispute so as to prejudice the opposite party.

The doctrine of *lis pendens* applies to sales *in invitum.*

Non-service of notice under section 248 of the Code of Civil Procedure of 1882 vitiates the sale.

Where an auction-purchase is made by an executor of the deceased judgment-debtor in his personal capacity, he should not be debarred from applying under section 313 of the Code of Civil Procedure of 1882 in this capacity. **C.** MAHARAJ BAHADUR SINGH *v.* SURENDRA NARAIN SINGH, 19 C. W. N. 152 **898**

Locus penitentiæ and rei interventus, doctrines of **930**

Madras Civil Courts Act (III of 1873), s. 14—*Suits Valuation Act (VII of* 1887), *s.* 8—*Court Fees Act (VII of* 1870), *s.* 7 (4)—*Suit to redeem mortgage—Amount due under mortgage determines jurisdiction—Lower Court erroneously putting higher value—High Court, power of, to revise.*

In a suit to redeem a mortgage, it is the amount of the principal debt that should be taken into account in determining the jurisdiction under the Civil Courts Act.

The fact that the lower Court has fixed a particular valuation and levied Court-fee on it, does not prevent the High Court from revising it and fixing the proper valuation. **M.** MAHAMAD JALLALDEEN *v.* VIJAYASWAMI, (1915) M. W. N. 239; 29 M. L. J. 142 **624**

Madras District Limits Act (I of 1865)—*Madras Estates Land Act (I of* 1908), *ss.* 192, 209 (1)—*Civil Procedure Code (Act V of* 1908), *ss.* 150, 158—*General Clauses Act (X of* 1897), *s.* 18—*Revenue Division*—Venue, *transfer of, from one Revenue Division to another—Jurisdiction of new Court over suits pending in old division—Transfer, formal, of suit, if necessary.*

Where, by a notification published by the Government in the Local Official Gazette under and by virtue of the powers vested in it by the Madras District Limits Act, I of 1865, the *venue* was changed by the transfer of the area from one Revenue Division to another:

Held, that on the publication of the notification in the Gazette, the Collector of the new Revenue Division acquired jurisdiction over all revenue suits then pending in respect of holdings

Madras District Limits Act—concld.

situated in or connected with the area so transferred and that no formal transfer of the suits from the old to the new Court was necessary to give such jurisdiction. **M.** KAJANA VENKOBA RAO *v.* SASTHA AIYAR, 2 L. W. 255; 17 M. L. T. 190 **269**

Madras District Municipalities Act (IV of 1884), s. 196 (3)—*Private market—License, application for—Discretion, whether absolute.*

Under section 196 (3) of the Madras District Municipalities Act, IV of 1884, a Municipality has absolute discretion to refuse to grant a license. **M.** NAGALINGA THEVAN *v.* MUNICIPAL COUNCIL, KUMBAKONAM, 17 M. L. T. 311; 2 L. W. 368 **709**

——————— **s. 261,** *applicability of—Suit to recover compensation for breach of contract—Notice under s.* 261, *whether necessary—Plaint, amendment of—Defendant made plaintiff—Limitation, starting point of—Limitation Act (IX of* 1908), *s.* 22, *Sch. I, Art.* 2—*Contract entered into by one member of joint undivided family, suit on—Other members, whether necessary parties.*

Section 261 of the Madras District Municipalities Act (IV of 1884) does not apply to suits for compensation for breach of contract.

Therefore, as an interference by Municipal servant with a contractor to remove rubbish gives rise to a claim for compensation for breach of contract, a suit to recover such compensation need not be preceded by a notice prescribed by section 261 of the Madras District Municipalities Act.

Where the really contracting party, though at first made a defendant, is afterwards added as plaintiff, whatever defect there may originally be in the suit as at first instituted, it is cured by such subsequent amendment.

Article 2 of Schedule I of the Limitation Act does not apply to suits founded on contract. Section 22 of the Limitation Act, 1908, has no application to a case where a defendant is made a plaintiff, and the starting point of limitation as against him is not, therefore, the date on which he is so made a plaintiff.

In a suit on a contract entered into by a member of a joint Hindu family the other members of the family are not necessary parties. **M.** MUNICIPAL COUNCIL OF KUMBAKONAM *v.* VEERAPERUMAL PADAYACHI, 28 M. L. J. 147; (1915) M. W. N. 143 **45**

Madras District Police Act (XXIV of 1859), ss. 45, 53—*Receiving unauthorised fee or recompense—Prosecution after three months, if barred—Application for certified copies of depositions for cross-examination—Copies not granted—Adjournment, refusal of—Grave prejudice—Conviction, legality of.*

The object of section 53 of the Madras District Police Act, XXIV of 1859, is to impose a bar of limitation against actions and prosecutions against officers for acts done or purporting to be done in pursuance of their official powers, and to impose further restrictions on such proceedings in respect of notice, tender and costs.

The prosecution of a Police constable for receiving an unauthorised fee or recompense is not barred by limitation owing to the fact that the offence complained of was committed more than three months before the prosecution was launched.

Madras District Police Act—concld.

The words "under the provisions of this Act or under the general Police powers," occurring in section 53 of the Madras District Police Act (XXIV of 1859) apply to the phrase "anything done or intended to be done" occurring in the same section, and do not qualify "actions or prosecutions against any person."

An accused who had applied for copies of the depositions of prosecution witnesses to instruct a Vakil to cross-examine them, did not get the copies in spite of reminders. He applied for the adjournment of the case on the hearing day, but the adjournment was refused and he was convicted:

Held, that the adjournment had been improperly refused and that the accused had, in consequence, been gravely prejudiced thereby and had no fair chance of defending himself and that the conviction could, therefore, not be supported. **M.** MURUGESA NAIDU, *In re*, 2 L. W. 348; 17 M. L. T. 260; (1915) M. W. N. 254; 16 CR. L. J. 334 **670**

——— ——— ——— **s. 53** **670**

Madras Estates Land Act (I of 1908), s. 3 (2)—*Village site—Right of landlord to evict tenants.*

A village not lying within the ambit of an "estate", as defined in section 3 (2) of the Estates Land Act, is no part of an estate and the Estates Land Act (I of 1908) cannot apply.

A landlord is entitled to evict tenants let by him into possession even if the land is classed as "village site." **M.** CHILAMAKURTI NAGANNA *v.* KAVIPURAPU RAMA ROW **836**

——— ——— ——— **ss. 3 (7) (I), 6, 45, 46, 153, 154, 163**—*Lease of "old waste" for three years—Expiry of lease on date the Estates Land Act came into force—Lessee, tenancy of, nature of—Suit to eject such a lessee—Jurisdiction of Civil or Revenue Court—Transfer of Property Act (IV of 1882), s. 116—Lessee holding over—Nature of his right.*

Land once classed as "old waste" does not cease to be such on the date of its *last letting*, merely because it was preceded by another lease when the Act requires a tenant to do something to convert "old waste" into "*ryoti*" land and which the tenant has not done.

Per *Oldfield, J.*—Suits to eject tenants holding under such a lease lie in a Revenue Court.

A tenant holding over under a time-expired lease is a non-occupancy tenant, for he cannot acquire under section 6 of the Madras Estates Land Act an occupancy right in the land by being in possession on the date the Act came into force; that section being applicable only to "*ryoti* land" and not to "old waste." Nor can payment of rent, after the expiry of the lease, make him a tenant, for such payment cannot be said to be under the lease.

Though the proviso to section 153 of the Act (added by Act IV of 1909) makes the section inapplicable to "old waste," still the first portion of the section which prescribes the Courts in which the suits ought to be filed, remains unaffected: the proviso refers rather to the various clauses of that section enumerating the reasons for which a tenant may be ejected, and not to that portion of the section which points out the Courts in which such suits should be instituted.

Madras Estates Land Act—contd.

A person continuing in possession under a time-expired lease is not a person coming into it "otherwise than by inheritance or legal transfer" within the meaning of section 163 of the Madras Estates Land Act.

Questions of jurisdiction, even if decided by a Subordinate Court, can be resuscitated in second appeal.

A tenant of "old waste" continuing in possession after the expiry of the lease is not a "non-occupancy *ryot*" within the meaning of section 46 of the Madras Estates Land Act, and he cannot, by payment of 2½ times the rent acquire occupancy right therein, as that section applies to lands other than "old waste."

Per *Tyabji, J.*, (dissenting).—A suit to eject such a tenant will lie only in a Civil Court.

A lessee who holds over after the expiry of his lease does not belong to any class of tenants dealt with by the Act. The provisions of the Act have reference to the relationship of landlord and tenant during the continuance of the tenancy, and not after its close. When once a tenancy is determined neither the person holding under the lease is a tenant nor the lessor a landlord. A person cannot be said to be holding under a time-expired lease.

Where a suit has been instituted in a Revenue Court it is for the plaintiff to make out that the Civil Court has no jurisdiction.

The proper construction of section 153 is to make clauses (*a*) to (*d*) applicable to rights of parties during the continuance of the tenancy, and clause (*e*) to their relationship after that date; there is no reason why the addition should not apply to all the clauses.

The words "liability to be ejected" in the new proviso to section 153 of the Act make it clear that it applies both to substantive rights and to the forum in which the suit ought to be instituted, and the effect of the addition is to alter the forum and to take away the jurisdiction of Revenue Courts. **M.** SANKARA VENKATARATNAM *v.* VARADARAJA APPARAO, (1915) M. W. N. 192; 29 M. L. J. 185 **252**

——— ——— ——— **ss 3 (11), 74, 77**—*"Water supplied or taken for cultivation of the land," meaning of—Water coming on to one's own land without any application—Water rent, liability to pay.*

Water flowing over a *ryot's* land on account of its favourable situation without benefiting the cultivation is not water "supplied or taken for the cultivation of the land" within the meaning of section 3 (11) of the Madras Estates Land Act and no water-rate is chargeable on lands cultivated with the aid of such water. **M.** RAMARAZA THEVAR *v.* VELUSAMI THEVAR **449**

——— ——— ——— **s. 6** **252**

——— ——— ——— **s. 6**—*Sub-lessee of a* kudivaram *tenant, if acquires occupancy rights by virtue of statutory provision.*

Under section 6 of the Madras Estates Land Act I of 1908, the sub-lessee of a *kudivaram* tenant does not acquire occupancy right in the holding, even though he was granted a *patta* direct by the *zemindar*. **M.** KAKARAPALLI POTHURAJU, *In re*, 2 L. W. 270 **277**

Madras Estates Land Act—concld.

——— ——— ——— ——— **s. 13 (3),** *applicability of—Payment of rent—Enhanced rate—Previous agreement—Payment for 7 years, whether proves agreement or contract—Consideration.*

An *inamdar* cannot take proceedings under the Estates Land Act and say at the same time that his *inam* is not an "estate" under the Estates Land Act.

A *ryot* will become disentitled to the benefit of section 13 (3) of the Estates Land Act only if he had contracted himself out of his rights by a contract actually in force.

Payment of rent for seven years at the enhanced rate proves merely an agreement, and not a contract, when there is no consideration in support of it.

From a previous payment no presumption as to the fairness of rent can be raised under sections 27 and 28 of the Estates Land Act, when it is inequitable to do so. **M.** DEVI BHUKNOJI KASIDOSS *v.* ALLAMADUGU NARAYANA REDDI, (1915) M. W. N. 209 **492**

——— ——— ——— ——— **ss. 45, 46 252**

——— ——— ——— ——— **ss. 74, 77 449**

——— ——— ——— ——— **ss. 153, 154, 163 252**

——— ——— ——— ——— **ss. 164, 166 97**

——— ——— ——— ——— **ss. 192, 209 (1) 269**

Madras Hereditary Village Offices Act (III of 1895), s. 13 842

——— ——— ——— **s. 13**—*Village headman, office of—Emoluments, when become attached to office of village headman—Board of Revenue making the office a salaried one—Suit for declaration of right to office filed after date of Board proceedings—Jurisdiction.*

Where the Board of Revenue in virtue of the powers conferred upon them by section 32 of Madras Act II of 1894 made the office of village headman a salaried one:

Held, that the emoluments became attached to the office within the meaning of section 13 of Madras Act III of 1895 from the date of the issue of the Board's proceedings.

Where, therefore, after that date a suit was instituted in a Civil Court for a declaration of the plaintiff's right to the office of village headman:

Held, that the Civil Court had no jurisdiction to entertain the suit after that date. **M.** BHAGAVATULU SESHAYYA *v.* VEDANTAM MALLESAM, 2 L. W. 172 **88**

Madras High Court Appellate Side Rules, Rules 48 (a), 75 64

Madras Regulation (XXV of 1802), s. 4—*Service* inam—Lakhiraj *grant—Right of Government to impose assessment—Limitation Madras Regulation (XXXI of* 1802) *s.* 2.

Lakhiraj grants made before the Permanent Settlement and not confirmed under Regulation XXXI of 1802 are liable to full assessment at the opinion of the Government and there is no period of limitation for the exercise by the Government of its right to impose such assessment. **M.** SUBRAMANIAM CHETTIAR *v.* SECRETARY OF STATE **639**

Madras Regulation (XXXI of 1802), s 2 639

Maintenance. *See* HINDU LAW.

Malabar Law—"*Vilakku* money," nature of **8**

Malabar Compensation for Tenants' Improvements Act (Mad. Act I of 1900)—*Improvements—Tenant's right to compensation—Contract restricting that right, whether binding.*

A tenant is entitled to compensation for improvements according to the provisions of Madras Act I of 1900 and any contract restricting that right is not binding upon him. **M.** VADAKKE ITIVETTIYAKATH *v.* PALLITHANAKATH BERRANKUTTI **679**

——— ——— ——— **ss. 3 (3), 4, 9, 10, 19**—*Increase in net annual value of land, after mortgagee was let into possession—Presumption—Improvement—Compensation, when allowed.*

Where the net annual value of a mortgaged land has increased since the mortgagee came into possession, it may be inferred that it was due to such works or products of works as are referred to in sections 3 (3) and 4 of the Malabar Compensation for Tenants' Improvements Act, unless referable to some other causes.

To entitle a person to compensation for improvements under section 9 of the Malabar Compensation for Tenants' Improvements Act, he must show that either he or his predecessors-in-title effected the improvements. **M.** THIRUVATIYAL VATTATH *v.* VISHNU BARATHIKAL **389**

——— ——— ——— **s. 9**—*Valuation of improvements not to be arbitrary—Governing principle.*

Where it is not possible to calculate the exact cost of improvements effected by a tenant, the Court should, instead of arriving at an arbitrary estimate, follow the principle laid down in section 9 of Act I of 1900 and should base its calculation on the increase in the annual produce of the land. **M.** PONNIATH AKATHOOT *v.* KRISHNA KAYIL **850**

Malicious prosecution—*False information to Police, whether commencement of prosecution—Suit for damages, whether maintainable*—Quantum *of damages—Second appeal.*

A prosecution cannot be said to commence on presentation of a complaint nor upon the giving of a piece of information to the Police. But the mere fact that a prosecution may not have commenced does not conclude the matter against the plaintiff in a suit for damages for malicious prosecution.

In a suit for damages for malicious prosecution the plaintiff's allegations were that by a trick on the part of the defendants he took over a parcel, in which, among other things there was some opium the existence of which was not known to him, that the defendants informed a Police constable that plaintiff was in unlawful possession of opium and, so got him arrested and that for three days the Police kept plaintiff with them and made investigations and then found he was innocent. It appeared that no process was issued by a Magistrate in the case and the plaintiff was not formally put under arrest or detained in the lock-up:

Malacious prosecution—concld.

Held, (1) that the plaintiff had suffered definite and tangible injury in consequence of the defendants' wrongful and wilful act and was, therefore, entitled to damages;

(2) that the Court may on second appeal go into the matter of the *quantum* of damages. **P.** GODHA RAM *v.* DEVI DAS, 1 P. R. 1915 **273**

Marriage. *See* DAMAGES; MUHAMMADAN LAW.

——— Change of religion, effect of—Presumption **201**

Marshalling. *See* MORTGAGE.

Mercantile Law—*"Shipment," meaning of—Bill of lading, date on,* prima facie *evidence of shipment—Contract Act (IX of* 1872*), s.* 73*—Aggrieved party, liability of.*

Where a contract provided "shipment" in February and the bill of lading was dated the 28th February although the ship actually sailed many days later:

Held, that, as "shipment" is equivalent to "putting on board" and as in the ordinary practice a bill of lading is not prepared till after the goods have been received on board and bears the same date as that of the mate's receipt, it was sufficiently proved (by production of the bill of lading) that the goods in question were actually shipped in February and that there was, therefore, no late or improper shipment to entitle the defendant to rescind the contract.

A party who has already put himself in the wrong by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party. That party can be expected only to use ordinary and reasonable diligence. **S.** MESSRS. GIBBON & CO. *v.* KUNDANMAL RAMNATH **196**

Merger. *See* MORTGAGE.

———, *applicability of doctrine of—Land tenures in India—English doctrine of merger, how far applicable in India—Equity—Transfer of Property Act (IV of* 1882*), s.* 111 *(d) (f).*

Where two leases in favour of the same person for the same land are not conterminous and the lessors of the two leases have different rights and the leases have different lives although some part of their existence be co-existent, the different interests do not merge either under the provisions of the Transfer of Property Act or the general law of merger.

The English doctrine of merger does not apply in its entirety to land tenures in India.

In deciding whether there is a merger in equity, what must be first looked is the intention of the parties and if that be not expressed, then the Court looks to the benefit of the person in whom the interests coalesce. **C.** AMATOO *v.* MUKSUD ALI, 19 C. W. N. 435 **314**

Mesne profits, decree for **343**

———, *suit for—Tortious act, liability for—Damages, measure of—Possessory suit, claim for mesne profits in, not allowed—Fresh suit for mesne profits, whether barred*—Res judicata—*Cause of action—Civil Procedure Code (Act V of* 1908*), s.* 11*, Expl. V, O. II, r.* 2*—Specific Relief Act (I of* 1877*), s.* 9.

Mesne profits—concld.

A plaintiff is entitled to recover the loss sustained by him through the defendant's tortious acts of having kept him out of possession of a certain land. The damage sustained in such a case is the profit which the plaintiff would have naturally got from the land if the land had not been wrongfully retained by the defendant in the beginning of the cultivation year.

A claim for mesne profits ought not to be made in a suit for possession under section 9 of the Specific Relief Act, as the question of title cannot be directly decided in such a suit and, therefore, a relief which depends upon title, considered apart from possession, cannot be given in such a suit.

The words "relief claimed in the plaint" in Explanation V to section 11 of the Civil Procedure Code, 1908, do not include a relief which, though claimed in the plaint, cannot be granted as of right, assuming the defence fails.

Therefore, a claim for mesne profits claimed in a former possessory suit but not allowed is not barred either by section 11 or Order II, rule 2, of the Civil Procedure Code. **M.** THAVASI *v.* ARUMUGAM, 2 L. W. 157 (1915 M. W N. 170 **1**

Mining rights, *transfer of—Rent-free*—Brahmottar, *grant of, nature of, before Permanent Settlement—Mining rights, how far affected*—Zemindar *presumed owner of underground rights.*

A grant of a rent-free *brahmottar* of the whole of a *mouza* made before the Permanent Settlement by the *zemindar* did not transfer any mining rights to the grantee.

On the title of the *zemindar* being established, he must be presumed to be the owner of the underground rights thereto appertaining, in the absence of evidence that he ever parted with them. **C.** GANGA NARAIN SINGH *v.* SHASI BHUSAN RAI, 19 C. W. N. 375 **811**

Minor. *See* MUHAMMADAN LAW.

———, suit against—Minor's age, proof of—Statement by minor's aunt as to date of birth in application to be appointed his guardian, if admissible in evidence—Relationship **595**

Mirasi office—Temple—Worship, right of—Right to form *Vedic goshti* before and behind—Interference by other sects—Rights in Conjeevaram temple **604**

Misconduct. *See* LEGAL PRACTITIONERS ACT, s. 13.

Misjoinder of Charges. *See* CRIMINAL PROCEDURE CODE, s. 233.

Mortgage—Adverse possession—Mortgagor dispossessed—Third party, possession of, if adverse as against mortgagee **917**

———, *anomalous*—Post diem *interest—Construction of document.*

Where a mortgage-deed provided that the mortgage was made for three years bearing interest at 2 per cent. per mensem payable every six months and in default mortgagees were entitled to charge compound

Mortgage—contd.

interest and to make realization by a suit or in any other way that they might wish, that the mortgagor would redeem at the expiration or before the close of the fixed period by paying off the total amount due thereon and in the event of the mortgage not being redeemed within the fixed period the mortgagor undertook to place the mortgagees in possession for a period of four years, and during possession the profits were to be taken in lieu of interest, the mortgagor reserving the right to redeem at any period during these four years by paying up the amount due and that if the mortgage was not redeemed on or before expiration of the said four years, complete proprietary title should pass to the mortgagees:

Held, that the document was an anomalous mortgage, being a combination of a simple mortgage, a usufructuary mortgage and a mortgage by conditional sale.

Held further, that the terms of the deed evidenced an intention that interest would not run after expiration of the four years and, therefore, interest could not be allowed after that date. **O.** SUNDAR DEI *v.* BALDEO BAKHSH SINGH, 18 O. C. 10; 2 O. L. J. 165 **161**

——— *Covenant to compensate—Bhagdari and Narwadari Act (Bom. Act V of 1862), s. 3—Unrecognized sub-division of bhag, mortgage of—Illegal mortgage—Mortgagee, right of, to compensation—Contract Act (IX of 1872), s. 65—Limitation Act (IX of 1908), Sch. I, Art. 62.*

The house in suit and certain other properties were, by a registered deed of 1897, mortgaged to the plaintiff's father by defendants Nos. 1 and 2 and the deceased husband of defendant No. 3, these mortgagors having purchased the properties from the *bhagdar* owner in 1893. In 1901 on accounts being taken between the mortgagors and the mortgagee, part of the property was sold to pay a part of the mortgage-debt, while the balance of the debt was secured by a fresh mortgage of the house in suit. The mortgagors remained in possession of the house as plaintiff's tenants under yearly rent-notes. The last rent-note was passed in 1908. On the defendants' refusing to surrender possession the plaintiff sued for possession averring that in case he was held not entitled to recover possession, he was in any event entitled, under a covenant contained in the deed of mortgage, to compensation. The defendants admitted the mortgage-deed and rent-notes, but contended that they were void under the Bhagdari and Narwadari Act and also pleaded limitation:

Held, (1) that under section 3 of the Bhagdari and Narwadari Act both the mortgage and the rent-notes were void;

(2) that so far as the contract of mortgage was concerned, the consideration unquestionably failed *ab initio*, and the money advanced by the plaintiff's predecessor-in-title was money received by the defendants for the plaintiff's use, within the meaning of Article 62 of the Limitation Act, and the suit having been brought beyond the period of limitation was barred by time;

(3) that the covenant to compensate contained in the mortgage-deed was collateral and not merely

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dependent upon the mortgage contract and that under the circumstances of the case though the main contract was wholly null and void by the Statute, the plaintiff was entitled to claim under the covenant. **B.** JAVERBHAI JORABHAI *v.* GORDHAN NARSI, 17 BOM. L. R. 259; 39 B. 358 **442**

——— *decree on—Payment by mortgagee to set aside sale of mortgaged property in rent decree—Mortgagor and mortgagee, relationship of—Mortgagee, right of—Lien—Contract—Remedy provided in mortgage-deed, nature of—Transfer of Property Act (IV of 1882), s. 73—Civil Procedure Code (Act V of 1908), O. XXI, r. 89.*

The fact that a mortgagee's rights under a mortgage-deed have merged in his rights under the decree obtained on the mortgage does not put an end to the relationship of mortgagor and mortgagee.

A mortgagee is entitled to add the amount deposited by him to set aside a sale in execution of a rent decree, under Order XXI, rule 89, of the Code of Civil Procedure, and acquires a lien for that deposit on the mortgaged property, which is not discharged by the mere payment of the sum due under the preliminary decree. That payment satisfies the decree, but leaves the lien (acquired subsequent to the decree) outstanding.

The inclusion in the deed of a remedy which the mortgagee already has by law (section 73 of the Transfer of Property Act) cannot debar the mortgagee from pursuing any other remedy which may be open to him. **C.** AMBICA CHARAN DUTT *v.* RAMGATI GUHA, 21 C. L. J. 284 **571**

——— *Equity of redemption, purchaser of, liability of—Attachment of equity of redemption, effect of.*

H executed a mortgage in favour of *G* in 1898. *B* had a decree against *H* in execution of which he attached the equity of redemption of *H* in that mortgage in 1907 and purchased it himself in 1911. In the meantime a suit had been brought under the foot of the mortgage of 1898 and a compromise decree was passed in 1910:

Held, that in a redemption suit brought by *B* against *G*, the former was bound to pay the amount decreed in favour of the mortgagee under the decree of 1910 and that the attachment of the equity of redemption in 1907 had no effect in determining the amount which *B* had to pay to the mortgagee at the time of the redemption.

Semble:—An attachment of a property does not confer an estate. It merely operates to keep the property in the custody of the law until such time as a sale can be had to satisfy the decree by virtue of which the attachment is issued. **A.** BHARAT INDU *v.* GOBARDHAN DAS **901**

——— *Extension of time—Civil Procedure Code (Act V of 1908), s. 148, O. XXXIV, r. 8—Suit for redemption—Preliminary and final decree, passing of.*

A suit for possession of mortgaged property brought by a puisne mortgagee against the prior mortgagees was compromised. It was agreed that the claim for possession should be allowed on condition of the puisne mortgagee paying a certain

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amount by a fixed date. In default of payment on the date mentioned, the prior mortgagees were to be allowed to take possession. On the date fixed for payment the puisne mortgagee applied for extension of time which was granted by the lower Court:

Held, that no extension of time could be granted either under section 148, Civil Procedure Code, or Order XXXIV, rule 8, Civil Procedure Code.

The power to enlarge time by the proviso to rule 8 of Order XXXIV, Civil Procedure Code, can be exercised only in cases to which the rule strictly applies, namely, to cases in which a suit has been brought for redemption and in which both a preliminary and a final decree for redemption have been passed. **O.** NIRANJAN SINGH *v.* JAGAN NATH, 18 O. C. 58 **862**

——— Minor, purchase for—Purchase beneficial—Mortgage, whether binding on minor—Minor, whether can retain property and avoid attendant liability to pay mortgage amount **714**

——— *Moveable property—Subsequent incumbrancer with possession preferred to prior incumbrancer, if* bona fide *without notice—Burden of proof.*

A *bona fide* incumbrancer without notice who is in possession of moveable property is to be preferred to an incumbrancer whose security is of prior date.

The person alleging notice must prove it. **L. B.** MANACKJEE PALLANJEE *v.* MEYAPPA CHETTY, 7 L. B. R. 336 **462**

——— Post diem *interest—Fixed rate—Improvements, nature of—Interest on costs of improvements—Interpretation of deed.*

Where from the terms of a mortgage-deed the intention of the parties appears to be that on redemption the mortgagor would have to pay interest on the mortgage money not merely for the period for which the mortgage is made but also for the period during which the mortgage would remain unredeemed, the mortgagee is entitled to get full interest upto the time of redemption at the agreed rate.

Where a mortgage-deed provided that before redemption takes place the mortgagor would be liable to pay to the mortgagee the entire cost of improvements, of whatever nature, and that the money thus expended on improvements would carry interest:

Held, that the intention of the parties was that reasonable interest should be charged, and not at the rate at which it was to be paid on the principal.

Where under the terms of a mortgage-deed the mortgaged house is re-built, the price of the old materials should be deducted from the costs of improvements allowed to the mortgagee. **P.** THAKAR DAS *v.* NANDI BAI, 39 P. W. R. 1915; 105 P. L. R. 1915 **375**

——— *Prior mortgagee acquiring equity of redemption—Puisne mortgagee, whether entitled to bring property to sale—Transfer of Property Act (IV of* 1882), *s.* 56, *scope of—Marshalling.*

A puisne mortgagee is not bound to redeem a prior mortgagee who has acquired the equity of redemption of the mortgagor in legal proceedings to which the puisne mortgagee was not a party. He is entitled to bring the property to sale without redeeming, subject, however, to the prior mortgage.

Section 56 of the Transfer of Property Act is

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limited in its operation to cases in which the party claiming the marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. **S.** HIROMAL *v.* TAHILIOMAL, 8 S. L. R. 257 **49**

——— *Purchasers under different mortgage decrees—Right to possession—Priority—Suit by first mortgagee—Right of puisne mortgagee to redeem.*

Where mortgages are without possession, the right to possession of purchasers under different mortgage decrees depends upon priority of purchase and not priority of mortgage.

A puisne mortgagee is entitled to redeem the prior mortgage whether or not he is made a party to a suit by the first mortgagee.

There can be no merger unless the holder of the incumbrance becomes absolutely entitled. The purchaser at a first mortgagee's sale can always use the first mortgage as a shield against the puisne mortgagee. **S.** CHANDULBAI *v.* BASARMAL TOPANMAL, 8 S. L. R. 264 **67**

——— *suit on—Auction-purchaser of the rights of mortgagor party to suit—Original mortgagor, whether necessary party—Marshalling—Property not mortgaged—Mortgagee, whether compelled to realise his mortgage-money from such property first.*

A puisne encumbrancer cannot, on the principle of marshalling, compel a prior encumbrancer to proceed against properties not mortgaged to the former, when the latter could not, by the conduct of the puisne encumbrancer himself, include it in the suit and obtain an order for sale as against it.

Where an auction-purchaser of the rights of an original mortgagor effectively represents him in a mortgage suit and when the opposite party cannot show how his interest can be affected by the absence of the original mortgagor from the suit, the original mortgagor is not a necessary party to the suit. **M.** MULLA VEETTIL SEETHIKUTTI *v.* KUNHI KOYAMUTTI NAHA **386**

——— **Redemption** **624**

——— *Mortgage split up—Co-mortgagor, right of, to redeem his share and to take possession—Possession, nature of.*

Where a mortgage has been split up by the acts of the mortgagors or mortgagees or both, a co-mortgagor is entitled to a decree for redemption of his undivided share and to be placed in possession of that share as a tenant-in-common with the other sharer or sharers. **M.** PALOTT CHANDU *v.* KOLATHUM KARAMMAL CHAPPILLA, (19.5) M. W. N. 189 **248**

——— *not allowed before* 59 *years—No clog on equity of redemption.*

Where a mortgage-deed ensured to the mortgagee possession for 59 years before the mortgagor was entitled to redeem:

Held, that the mortgage could not be redeemed before the expiration of that period. **A.** DULARI *v.* LAL BAHADUR SINGH **129**

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—— —**Redemption** *out of Court—Accounts, adjustment of—Suit for surplus profits, maintainability of.*

Where redemption takes place privately or out of Court, it is at the option of the parties to adjust the accounts and settle their differences amicably or to allow redemption to be effected on payment of the principal money secured by the mortgage under protest, leaving the other matters in difference between them to be adjusted thereafter through Court.

Where redemption had taken place out of Court and there was nothing to indicate that any adjustment of accounts had been made or that the payment had been accepted in full satisfaction of all liabilities arising out of the mortgage:

Held, that a suit for surplus profits was maintainable. **O.** RAJ RAGHUBAR SINGH *v.* BIKRAMAJIT SINGH, 18 O. C. 30 **171**

——— **Sale**—*Sale-deed of mortgagee rights—Consideration, whether mortgagor can question the passing of—Sale-deed, necessity not mentioned in, effect of.*

If the assignee of a mortgagee right brings a suit on the basis of the mortgage, the mortgagor or his transferees cannot question the passing of the consideration of the assignment between the mortgagee and the plaintiff.

The absence of any mention of necessity in the bond on which the loan is taken is no ground for holding that the transaction is fictitious. **A.** MUHAMMAD HAMID ALI KHAN *v.* MUHAMMAD ASGHAR ALI KHAN **825**

——— Sale subject to mortgage—Prior mortgagee, right of, to question validity of subsequent mortgage **360**

——— **Subrogation**—*Earlier mortgage paid off partly by subsequent mortgagee's money and partly by mortgagor—Priority, right of, extent of.*

It is not only when the person claiming subrogation discharges the entire debt that he is so entitled.

Therefore, where an earlier mortgage-debt was discharged partly by the money advanced by a subsequent mortgagee and partly by the mortgagor himself, the subsequent mortgagee is entitled to priority to the extent to which his money was applied to pay off the earlier debt. **M.** SWAMINATHA PILLAI *v.* KRISHNA IYER, 28 M. L. J. 484 **966**

——— **-decree**—Property formed into new *mahal*—New description not given in decree—Amendment of decree—Failure of justice **304**

——— **-deed**—*Provision for compound interest on default, whether penal.*

A provision for compound interest on default is not penal by itself, but a provision for compound interest at an appreciably higher rate than the rate mentioned as payable till default may be penal. **M.** GHANTASALA SESTHARAMIAH *v.* TADEPALLI PITCHAYYA **860**

Mortgagee from maintenance-holder, right of **529**

Mortgagor allowed to redeem in part—Contract—Integrity of mortgage, if broken—Co-heirs redeeming a mortgage—Charge—Dispossession by other co-heirs—Suit for possession, maintainability of **679**

——— *inheriting interest in prior mortgage—Extinguishment of prior mortgage—Merger—Subsequent mortgagee, right of.*

Where a mortgagor inherits the interest of the mortgagee under a prior mortgage, the prior mortgage is extinguished, and the mortgagor cannot set it up against a subsequent mortgagee.

Acquisitions by a mortgagor enure as a rule for the benefit of his mortgagee, thereby increasing the value of his security. **A.** RADAN *v.* MURARI LAL, 13 A. L J. 397; 37 A. 309 **973**

——— , *when entitled to redeem—Contract, enforcement of—Notice for payment within the term—Interest for whole term, whether can be realised.*

A mortgagor is not entitled to redeem before the debt becomes due, even though he may offer to pay interest for the whole period.

If the mortgagee makes a demand for payment within the term and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term.

Where the mortgagee has given notice requiring payment within the term, he cannot withdraw it without the consent of the mortgagor. **C.** PROKASH CHANDRA GHOSE *v.* HASAN BANU BIBI, 19 C. W. N 389 **450**

Mortgagor and mortgagee—*Benami* transaction—Mortgage executed to defraud creditors—Claim petitions filed by mortgagee dismissed—Subsequent suit upon mortgage—Mortgagor, if can plead invalidity of mortgage for want of consideration—Estoppel **702**

——— Compromise—Equity of redemption, agreement to release **930**

——— *Rights of mortgagor over mortgaged property pending suit on mortgage—Right of lessee under mortgagor—Transfer of Property Act (IV of 1882), ss. 8, 36, 44, 52, 73, application of, to execution sales—Substitution, doctrine of.*

Where a lease of the mortgaged lands was made by the mortgagor for one year from July 1907 to July 1908 and the plaintiff purchased in Court auction in November 1907 in execution of a mortgage-decree not only the lands but also the crops standing thereon and the sale was confirmed in December 1907 and the crops harvested in January 1908:

Held, that a decree for sale, and the Court auction-sale held in pursuance thereof, will not affect the rights of the defendant lessee to the beneficial enjoyment of the crops, and that the purchase of the crops by the plaintiff in the Court auction did not give the plaintiff a title to the crops but only to what took the place of the right to the crops which would have vested in the mortgagor judgment-debtor if he had not parted with such right.

Yearly leases and such other acts as are either necessary or the ordinary reasonable incidents of an *interim* beneficial enjoyment are not affected by Court auction-sale though they are made *pendente lite*.

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A purchaser gets title not only to the property purchased but also to whatever has been lawfully substituted for the whole or part of the property sold to him. The larger right of the owner of a land to the profits and crops growing on that land includes the smaller right to the rent reserved to him in consideration of his having parted with the right to the crops themselves in favour of lessees.

Neither section 8 nor section 36 of the Transfer of Property Act applies to transfer of rights by execution sale. Section 36 of the Act about the daily accrual of rent applies only in the absence of a contract to the contrary.

Sections 44 and 73 of Act IV of 1882 lay down the principle of the substitution of properties and securities in favour of persons who, through no fault of their own, are deprived of the original rights and securities. **M.** PENUMETA SUBBARAJU *v.* VEEGESENA SEETHARAMARAJU, 17 M. L. T. 57; (1915) M. W. N. 174 **232**

——————Usufructuary mortgage—Consideration, portion of, unpaid—Unregistered letter passed, undertaking to give credit for interest, admissibility of—Registration Act (XVI of 1908), s. 49—Mortgagee admitting non-payment but contending that separate suit ought to be brought—Plea, if valid—Decree, if to be given for full amount of mortgage—Litigation expenses, liability for—Burden of proof **186**

Mosque. *See* MUHAMMADAN LAW.

Muhammadan Law—Dower — *Shia School — Deferred dower, widow's claim for, as against other heirs of her late husband—Estate, widow's possession of—Decree for dower, enforcement of—Estate, Court's possession of, if necessary—Proper procedure in such cases—Administration suit, nature of—Childless widow, right of, to share.*

Where in the face of an agreement for payment of the dower at a very large sum at the marriage of a Muhammadan lady, it is contended that neither the husband intended nor the wife expected that the dower should actually be paid at that sum:

Held, that before the contention could prevail it must be established that the sum named was so extravagant and beyond the means of the bridegroom to satisfy and the agreement for its payment could not have been intended by either party thereto to be operative and must be deemed merely as security for an adequate provision for the wife.

Under the Muhammadan Law, when a widow is in possession of the undistributed property of her deceased husband, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower-debt is paid, provided that her possession was obtained lawfully and without force or fraud.

But in such a case the widow may be required to account for the profits received by her; but she would be entitled to have set off against the sum received by her the income she might have made from her dower-money if it had been paid to her immediately on the death of her husband.

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The claim for dower is a debt due from the entire estate of the deceased, and ranks equally and rateably with the claims of other creditors.

Consequently, the share taken by the widow, by right of inheritance, is liable proportionately for the satisfaction of her dower-debt in the same way as the shares taken by the other heirs and the liability of each heir is limited to the extent of assets in his or her hands.

Thus where the widow has obtained and retained possession of the entire estate, she has no cause of action for a money decree against the other heirs, a decree made against them being incapable of execution as, *ex hypothesi*, no portion of the estate sought to be pursued is in their hands.

In a case of this description, if the widow desires to have the question of her dower settled, the proper course for her to follow is to institute an administration suit, in which the property can be placed in the hands of the Court, the amount of her claim, if disputed, investigated, and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise.

In a case in which the widow is in possession of no portion of the estate, she may sue the persons in possession to enforce her claim, obtain a decree for the entire amount and realize the sum due out of the assets in their hands.

In the case where the widow is in possession of a portion of the estate and the other heirs have possession of the remainder, she can seek to recover her dower by way of an administration suit or by a suit against the other heirs, provided she offers to surrender possession of the property in her hands. If she adopts the latter alternative, the litigation really assumes the character of an administration suit.

A childless widow, under the Shia Law, takes no share in her husband's land, but she is entitled to her share in the value of the buildings created therein, as well as in his moveable property. **C.** MOHAMMAD SHARAFAT *v.* WAHIDA SULTAN BEGUM, 19 C. W. N. 502; 21 C. L. J. 319 **191**

——————**Gift** *made in lieu of dower—Death-bed illness—Gift, principles of, applicability of.*

The provisions of the Muhammadan Law applicable to gifts made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of a dower-debt which is really of the nature of a sale. **C.** ESAHUQ CHOWDHURY *v.* ABEDANNISSA BIBI, 19 C. W. N. 325; 42 C. 361 **692**

——————**Inheritance**—*Suit by one heir against another for his share of property of deceased—Partial partition, principle of—Proper mode of relief.*

Under Muhammadan Law the estate of a deceased person devolves on his death on his heirs, each of whom becomes entitled to his definite fraction of every part of the estate. Therefore a suit in which one heir claims to receive his share of the property of the deceased from another heir is not a suit for "partial partition," as understood in Hindu Law. Such a suit is legally maintainable though it ought, as a rule, to take the form of a suit for the administration of the estate of the deceased. **M.** MOIDEENSA ROWTHEN *v.* MAHAMMAD KASIM ROWTHEN **895**

Muhammadan Law—contd.

——— ——— ——— **Marriage**—*Consent or ratification of grandfather—Repudiation—Puberty.*

According to Muhammadan Law the marriage of a minor girl with the consent or ratification of her grandfather is valid and she has no option to repudiate it on attaining majority, whether the marriage has been consummated or not.

A Muhammadan girl over 15 years of age is to be presumed adult in default of any other evidence to the contrary. **P.** KHAIR DIN *v.* HAKIM BIBI, 29 P. W. R. 1915: 97 P. L. R. 1915 **421**

——— ——— ——— **Minor** — *Father-in-law, whether legal guardian of his minor daughter-in-law—De facto guardian, power of, to mortgage minor's property to purchase other properties for her—Purchase beneficial—Mortgage, whether binding on minor—Minor, whether can retain property and avoid attendant liability to pay mortgage amount.*

Under the Muhammadan Law, a father-in-law is not a legal guardian of his minor daughter-in-law.

A *de facto* guardian of a Muhammadan minor is not entitled to mortgage the minor's properties for purchasing other properties for her, even though the same may be beneficial to her.

Therefore, a mortgage so executed is not binding on her but if she disclaims liability to pay the mortgage amount, she must give up her rights to the property purchased. **M.** RABIA BI *v.* ANGAPPAN, 2 L. W. 369 **714**

——— ——— ——— **Religious office,** *suit for possession of—Functions must be recognised by Muhammadan Law—Test—Civil Procedure Code (Act V of 1908), s. 9.*

The existence of an office involves the existence of some duties to be performed by the holder of the office.

Therefore a suit for the possession of an alleged hereditary office, the functions appurtenant to which are the digging up and burying up a pot, distributing *sherbet*, collecting money and distributing a small portion of the collection and reciting portions of the Koran is not maintainable as it is not for a religious office and a claim in regard thereto is not a suit of a civil nature cognisable by a Civil Court.

A religious office as known to Muhammadan Law must in its nature be for the performance of certain functions which are recognised by the Muhammadan Law as necessary or at any rate as proper to be performed in connection with the religion of Islam. **M.** MAHOMED SAHIB *v.* SYED SAHIB, 17 M. L. T. 256 **459**

——— ——— ——— **Waqf property**—*Resumption by Government—Property given back to grantor—Grantor issuing* inam *deeds in favour of* mutwalli—*Inference*—Mutwalli, *subject to* waqif—*Removal of* mutwalli—*Resumption of* inam *by Sovereign—Courts, jurisdiction of—Mosque, object of—Succession to office of mosque, principle of—Kazi, power of—Age of majority, whether applicable to offices involving performance of religious duties—Right to collect Government Revenue, suit for—Certificate - Pensions Act (XXIII of 1871), s. 6.*

Sadasiva Aiyar and Napier, JJ.—Where the villages granted by the Muhammadan Government as *inam* or carrying on the religious worship in a mosque, were resumed by the British Government and given back to the grantors, but the *inam* title-deeds were issued in the name of the *mutwalli* for the time being to be nominated by the grantors:

Held, that the intention was to make a grant of the villages an *inam* to the original *waqif* or founder of the endowment and not to the *mutwalli* himself personally.

Where the *mutwalli* of a mosque has to be recognised and re-appointed at each succession by the *waqif* the former cannot claim a hereditary right in such office nor can a Will made by his father in his favour enhance his right in this respect.

A *mutwalli* of a mosque is entirely subject to the control of the *waqif* and is removeable by him at his will for proper reasons.

Where a *mutwalli* defies the authority of the *waqif* and fails to submit accounts when required to do so, a proper reason exists for his removal.

A resumption by the Sovereign of an *inam* is an act of sovereignty which cannot be questioned by Municipal Courts.

Sadasiva Aiyar, J.—No distinction should be drawn between mosque and mosque, and all mosques should be treated as being intended for use of the Mussalman public in the same degree.

A determination of the question of succession to an office in a mosque endowment depends not on the general law of property, but upon the rules which the founder of the endowment established.

Ordinarily under the Muhammadan Law the power of the removal of the *mutwalli* is vested in the *Kazi* but if under the original scheme, settled by the *waqif*, the grantor reserved to himself and to his heirs the power of removing the *mutwalli* and of making nominations from time to time, such a power would not be illegal, provided it is not detrimental to the interests of the mosque.

The age of majority fixed by the Indian Majority Act does not apply to offices which involve the performance of religious duties.

A right to collect Government Revenue from the villages granted as an endowment to a religious office, cannot be sued for in a Civil Court, unless upon a certificate obtained under section 6 of the Pensions Act (XXIII of 1871). **M.** MAHOMED KADIR *v.* GHULAM MAHOMED ALI **934**

Mulgeni lease—*Transfer of Property Act (IV of 1882), applicability of—Registration, whether necessary.*

The Transfer of Property Act does not apply to *mulgeni* leases. Where the defendant has been asserting for 40 years that he has *mulgeni* rights over a land the only inference is that the defendant had such rights. No registered document is necessary to prove such a lease. **M.** RAGHAVA CHARLU *v.* SECRETARY OF STATE, (1915) M. W. N. 271 **599**

Mutation register, what is **695**

Mutt. *See* HINDU LAW; RELIGIOUS ENDOWMENT.

Nattukottai Chetties—Trade assets—Presumption—Private right in property, how claimed **260**

Negotiable Instruments Act (XXVI of 1881)—Hundi—*Consideration—Plaintiff giving evidence for consideration—Presumption, whether arises.*

Under the Negotiable Instruments Act it must be presumed that when a *hundi* was drawn some consideration did pass, unless rebutting evidence is given as to its failure. But if the plaintiff himself chose to give evidence at the first instance as to consideration which was disbelieved by the Court, no such presumption arises. **A.** KISHEN BALLABH *v.* GHURE MAL, 13 A. L. J. 322 **390**

——— ——— ——— **s. 90**—*Promissory note, suit on—Executant, whether can plead payee to be only* benamidar—*Conditional endorsement of promissory note to another—Failure of condition—Possession of note not parted with—Note not re-endorsed—Payee, right of, to sue—Endorsement in favour of one of the debtors, effect of—Holder not in his own right for consideration—Debt, whether discharged.*

The executants of a promissory note cannot plead that the payee named therein, is only a *benamidar* for another.

A mere conditional endorsement of a promissory note in favour of another when not followed up by delivery up of the note, does not vest the title in the note in the endorsee and no re-endorsement is necessary to vest the title back in the original payee to entitle him to sue on it.

An endorsement on a promissory note in favour of one of the debtors does not discharge the debt when the debtor is not a holder in his own right for consideration. **M.** PASUPATHY IYER *v.* RAMAN CHETTY, (1915) M. W. N. 227 **501**

——— ——— ——— **s. 118**—*Promissory note—Presumption as to consideration*—Onus.

Under section 118 of the Negotiable Instruments Act the initial presumption is that a promissory note was executed for consideration and the onus lies on the executant to prove that no consideration passed.

Where the consideration of a promissory note was stated to be the sum of Rs. 30,000 *borrowed in cash* by the defendant executant and in the course of the pleadings the plaintiff was constrained to admit that the consideration *as stated in the promissory note* did not pass, the initial presumption is rebutted and the onus is shifted on the plaintiff to prove affirmatively that the pro-note was executed by the defendant for full consideration. **P.** ZOHRA JAN *v.* RAJAN BIBI, 62 P. W. R. 1915; 48 P. R. 1915; 146 P. L. R. 1915 **402**

Non-occupancy right, *extinction of—Relinquishment.*

Where the worship of the *thakur* is a necessary condition of a tenancy, the entire neglect to take possession and carry on the worship amounts to evidence of relinquishment and repudiation. **C.** MOHAN DAS *v.* JAGABANDHU RAUT **430**

Notice. *See* TRANSFER OF PROPERTY ACT, s. 111.

——— Burden of proof **462**

Nuisance. *See* CRIMINAL PROCEDURE CODE, s. 133.

Objection to finding not filed within time allowed, effect of—Appellate Court, power of, to go behind finding **597**

Occupancy holding, mortgage of **343**

Occupancy right. *See* AGRA TENANCY ACT, s. 11.

——— ——— ———, acquisition of—*Mokarari* right, extinguishment of **374**

——— ——— ———, nature of—Facts negativing right **916**

Onus. *See* BURDEN OF PROOF.

Opium Act (I of 1878), s. 3—*Investiture of powers—Criminal Procedure Code (Act V of 1898), s. 39—Magistrate—'Specially empowered'—'Generally empowered'—Notification by Government empowering all second class Magistrates to try cases under Opium Act, if amounts to 'specially empowered'—Jurisdiction.*

The word 'specially' in 'specially empowered' occurring in section 3 of the Opium Act, 1878, is used in speaking of individuals and in contrast with the word 'generally.'

When by a notification of the Government a class of officials is invested with powers to try certain offences, such officials are only 'generally empowered' and not 'specially empowered.'

The language of section 39 of the Criminal Procedure Code explained.

Per *Seshagiri Aiyar, J.*—A notification empowering all second class Magistrates to try such offences under the Opium Act is *ultra vires* of the powers given by the Act, as its effect is to enlarge the definition of Magistrate as given therein. **M.** MAHOMED KASIM *v.* EMPEROR, 2 L. W. 233; 17 M. L. T. 191; (1915) M. W. N. 269; 16 CR. L. J. 268 **156**

Oudh Rent Act (XXII of 1886), s. 52 **929**

——— ——— ——— **s. 107H**—*Perpetuity, land acquired in, at favourable rent—Presumption, legal—Lease, perpetual and heritable—Construction of document—Compromise and lease, interpretation of—Enhancement of rent after lessee's death, condition as to, effect of.*

Section 107 *H*, second clause, of the Oudh Rent Act does not require that the land should have been acquired in perpetuity at a favourable rate of rent, provided that the rate of rent is now favourable; *i. e.*, it requires simply that the original acquisition ought to have been in perpetuity.

The law cannot presume a lease to be perpetual and heritable unless it does say so clearly and definitely.

Where in compromising a suit the landlord granted the opposite party some land on lease at a fixed rent on condition that after that party's death he might raise the rent entered in the lease:

Held, that the land was not "acquired in perpetuity" within the meaning of the second clause of section 107 *H* of the Oudh Rent Act. **U. P. B. R.** JANGI *v.* SYED MUHAMMAD NASIM, 2 O. L. J. 395 **471**

——— ——— ——— **s. 108 (10)**—*Declaration that plaintiff is not tenant but under-proprietor, suit for, maintainability of—Jurisdiction of Civil and Revenue Courts.*

Section 108 (10) of the Oudh Rent Act applies not

Oudh Rent Act—concld.

only to under-proprietors whose rights as such have been declared by a competent Court or admitted by the superior proprietor, but also to persons who claim to be under-proprietors but are asserted by the superior proprietor to be tenants. And such persons cannot sue in a Civil Court for declaration of their title to under-proprietary rights until they have instituted a suit in the Revenue Courts under section 108 (10) of the Oudh Rent Act. **O.** LALTA SINGH *v.* HUMAYUN QADAR, 2 O. L. J. 145 **303**

——————**s. 108, cl. (10)**—*Rival tenants, contest to cultivate same land between.*

Section 108, clause (10), of the Oudh Rent Act, has no application where the contest is one between rival tenants claiming to cultivate the same land. **O.** KALAP NATH *v.* MATA DIN, 18 O. C. 48 **859**

——————**s 126 (1)** **236**

Ouster. *See* ADVERSE POSSESSION.

Pandarasannadhi. *See* HINDU LAW.

Pardon. *See* CRIMINAL PROCEDURE CODE, s. 337.

Parsi Intestate Succession Act (XXI of 1865), ss. 3, 5, 6, 7—*Succession Act (X of 1865), ss. 72, 80—Direction in Will excluding particular heir or next of kin, how far effective—Construction of Will—Canons of construction—"Without any qualifying terms" in s. 80 of Succession Act, meaning of.*

N, a Parsi, died leaving a son, *J*, two daughters and heirs of a predeceased daughter. By his Will *N* directed his executors to hold the residue of *N*'s estate upon trust to pay the net income thereof to his son, *J*, during his life-time. In the event of *J* dying without leaving any issue but only a widow, the executors were directed to pay her rupees ten thousand (Rs. 10,000) absolutely and after providing for *J*'s funeral expenses to appropriate half of the balance of the residuary estate to specified charitable objects and *to divide the other moiety amongst the heirs according to the law of intestate succession amongst Parsis, but excluding the widow of J from getting any share in such distribution.* *J* died leaving only a widow *D*, who claimed as an heir of *J* contending that though the above direction excluded her as an heir of *N*, it did not exclude her as an heir of *J*:

Held, that upon a reasonable construction of the above clause, the testator intended that *J*'s widow should be entirely excluded from any share in the distribution, whether as an heir of *J* or otherwise.

The words "without any qualifying terms" in section 80 of the Succession Act refer to the heirs, and not to the bequest. **S.** DINBAI *v.* NUSSERWANJI R. MEHTA **481**

Partition. *See* BUDDHIST LAW; HINDU LAW; MUHAMMADAN LAW; U. P. LAND REVENUE ACT, ss. 118, 233.

——————Effect of perfect partition—No new *wajib-ul-araiz* for new *mahals* framed—Custom or contract—Proof—Claim by a sharer in one of the new *mahals* to pre-empt property in another of those *mahals* in which he was not a sharer, maintainability of **34**

——————Hindu Law—Joint family—Preliminary decree for partition, whether effects severance of co-parcenary—Holder of preliminary decree for partition, death of—Widow, whether proper legal representative **543**

Partition—concld.

——————, suit for—Property, specific, of members of Hindu family, managed by one member—Receipt of amounts invested by manager—Suit to recover, nature of **953**

——————**of land**—*Trees go with land.*

Trees growing upon land, the subject of a partition by the Revenue Authorities, go with the land and if not excluded must be deemed to have been allotted to him to whom the land was allotted. **A.** SUNDER LAL *v.* DHARAM PAL **878**

Pauper application—*Power to extend time—Presumption when Court-fee paid and accepted by Court—Conversion of pauper application into regular suit—Relinquishment of part claim, effect of.*

As a general rule when once a Court has admitted and registered a plaint, it cannot subsequently reject it; and a Court may be taken to have extended the time and to have treated the time when the Court-fees were actually paid as the time fixed for payment when it accepts them on that date.

The mere relinquishment of a portion of the relief claimed in a plaint does not make it a new one.

A pauper suit can be converted into a regular suit and limitation reckons from the date when the pauper petition was filed. **M.** MARIA THANGATHAMMAL *v.* IRAVATHESWARA IYER, (1915) M. W. N. 228 **504**

Penal Code (Act XLV of 1860), ss. 82, 83, 354, 376—*Rape by boy of tender age—Presumption.*

The presumption of English Law against the possibility of the commission of the offence of rape by a boy under the age of 14 years has no application in India. Such a question is a question of fact only. **A.** EMPEROR *v.* PARAS RAM DUBE, 13 A. L. J. 254; 37 A. 187; 16 CR. L. J. 322 **658**

——————**s. 83** **658**

——————**ss. 102B, 115** **738**

——————**ss. 148, 149, 395, 326**—*Evidence judicially recorded—Judge's duty to believe or disbelieve witness before him—Finding, when irrelevant.*

It is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to statements made to the Police which are not judicially recorded.

It is the Judge's duty to make up his mind while the witness is before him whether he is a witness of truth or falsehood; and it is only when the Judge sees any reason to distrust his evidence that omissions in a Police record can become of any importance.

Such findings as this: "It is not clear whether the name of Mahabir appears in the Police papers or not," are wholly irrelevant. **C.** JANG RAI *v.* EMPEROR, 19 C. W. N. 217; 16 CR. L. J. 313 **649**

——————**s. 149** **649**

——————**ss. 182, 211**—*"Charge," what amounts to—Prosecution for giving false information, where can be instituted—Criminal Procedure Code (Act V of 1898), ss. 195, 203—Right of complainant to produce witnesses.*

A mere suggestion to the Police that certain houses should be searched because there is reason to suspect the conduct of the owners of those houses does not amount to a "charge" within the meaning of section 211 of the Indian Penal Code.

Penal Code—contd.

A prosecution under section 182 of the Indian Penal Code can be instituted only after sanction has been obtained under section 195 of the Criminal Procedure Code or on the complaint of the public servant to whom the false information is given.

A Magistrate should not dismiss a complaint under section 203 of the Criminal Procedure Code without giving the complainant an opportunity of proving his complaint. **M.** SOLAIMUTHU PILLAI *v.* MURUGAIH MOOPAN, (1915) M. W. N. 272; 16 CR. L. J. 423 **999**

——— **s. 199**—*False declaration before* Mamlatdar *to obtain certificate of solvency for purposes of Abkari license—Offence.*

A false declaration made to a *Mamlatdar* in the hope of obtaining a certificate of solvency for the purpose of securing a license from the Abkari officials, is not such a declaration as a Court of Justice or any public servant or any person is bound by law or authorised by law to receive, and hence does not come within the purview of section 199 of the Penal Code. **B.** EMPEROR *v.* RAJAPPA RAMAPPA KALAL, 17 BOM. L. R. 222; 16 CR. L. J. 309 **645**

——— **s. 209**—*Criminal Procedure Code (Act V of* 1898), *s.* 195—*Sanction to prosecute—High Courts Act,* 24 & 25 *Vic., C.* 104, *s.* 14—*High Court's jurisdiction—Delay in applying*—Mala fides.

The orders of a Munsif and an Additional District Judge refusing to grant an application for sanction to prosecute are not orders of a Criminal Court and, therefore, cannot be revised by the High Court under section 439 of the Code of Criminal Procedure.

Under section 14 of 24 and 25 Vic., C. 104, the High Court in its criminal jurisdiction has power to deal with such orders under section 115 of the Civil Procedure Code and section 15 of 24 & 25 Vic., C. 104.

Where a prosecution is undertaken by the Government, mere delay in applying for the sanction to prosecute cannot be taken as suggesting *mala fides.* **C.** DEPUTY LEGAL REMEMBRANCER AND PUBLIC PROSECUTOR *v.* RAM UDAR SINGH, 19 C. W. N. 447; 21 C. L. J. 198; 16 CR. L. J. 286 **334**

——— **ss. 211** **999, 108**

——— **s. 215,** *applicability of—Thief himself taking gratification to restore stolen property—Conviction, legality of.*

Section 215, Indian Penal Code, is not intended to apply to the thief himself, and, therefore, where a man is convicted of theft, he ought not to be also convicted under section 215 of taking a gratification to restore the stolen property. **U. B.** EMPEROR *v.* NGA NYAN, U. B. R. (1914) II, 43; 16 CR. L. J. 421 **997**

——— **s. 235**—*Possession of instruments for counterfeiting coin—Accused's knowledge, if material—Criminal Procedure Code (Act V of* 1898), *s.* 103 (2)—*Search—Procedure.*

For a conviction under section 235 of the Indian Penal Code, it is not only necessary that the accused should be in possession of the instruments or materials for counterfeiting coin but it should also be proved that the possession was within the accused's knowledge.

In conducting searches the provisions of section 103 (2) of the Criminal Procedure Code should be strictly complied with. **L. B.** NGA SAN NYEIN *v.* EMPEROR, 16 CR. L. J. 264 **152**

Penal Code—contd.

——— ——— **ss. 247, 352,** *scope of—Complainant absent—Accused, acquittal of—Death of complainant—Substitution of name of legal representative—Compoundable offence.*

Where the man on whose complaint a prosecution under section 352 of the Indian Penal Code was started, died, and on his death, his nephew applied to be substituted in place of his deceased uncle:

Held, that no substitution should be allowed and an order should be passed under section 247 acquitting the accused on the failure of the complainant to appear at the hearing of the case, unless for some reason the Magistrate thought proper to adjourn the case to some other day. **C.** PURNA CHANDRA *v.* DENGAR CHANDRA, 19 C. W. N. 334; 16 CR. L. J. 322 **658**

——— ——— **ss. 302, 304A**—*Administering poison as a love potion—Rash and negligent act—Criminal Procedure Code (Act V of* 1898), *ss.* 236, 237, 307—*Trial for murder—Charge under s.* 304*A not framed—Conviction under s.* 304*A.*

Where arsenic oxide was deliberately administered to a man as a love potion by his wife with the connivance of her mother who had procured the stuff in some way and given it to her daughter:

Held, that as to deal in this way as a love potion with a most deadly form of poison is to act both rashly and negligently in whatever walk of life the person so doing may be, an offence under section 304A of the Indian Penal Code was clearly made out against the wife, and the mother was guilty of abetment:

Held further, that although no charge under section 304A is framed at the trial for murder, on reference under section 307 of the Criminal Procedure Code the High Court is competent under sections 236, 237 of the Code to record conviction under section 304A. **B.** EMPEROR *v.* RAMAVA CHENNAPPA, 17 BOM. L. R. 217; 16 CR. L. J. 305 **641**

——— **ss. 302, 102B, 109, 115**—*Conspiracy—Murder—Sedition—Charge not specifying date agreed on to commit murder etc., whether vague—Evidence Act (I of* 1872), *ss.* 10, 114, 133—*Scope of s.* 10—*Illustration to s.* 10—*Interpretation of Statute—Illustration, whether express provision of law—Acts done by co-conspirators, when evidence against others—Approver, evidence of, value of—Conviction based on such evidence, legality of—Corroboration, necessity of—Criminal Procedure Code (Act V of* 1898), *ss.* 337, 364—*Pardon, grant of—Magistrate, power of—Accused charged of one conspiracy, whether can be found guilty of another—Conspiracy, member of, liability of—Conspiracy to commit murder—Offence, nature of—Punishment, considerations in—Members joining before and after murder—Deposition of witness, weight of—Deficiencies, effect of—False denial by accused—Presumption—Confession, recording of—Confession retracted, evidentiary value of—Contempt of Court—Newspaper Article.*

Where a charge of criminal conspiracy to commit the offence of murder omits to specify (*a*) the date on which the accused persons are alleged to have agreed *inter se* to commit the murder, (*b*) "the other places" in British India where they are said to have so agreed, and (*c*) the person or persons whom they are alleged to have agreed to murder:

Penal Code—contd.

Held, (per *Johnstone, J.*) that the charge is not vague, inasmuch as

(1) it is not necessary for the prosecution to attempt to fix a precise date for the inauguration of the conspiracy; it is sufficient if they state and prove that between certain dates a conspiracy was in existence;

(2) the accused have not been in any way prejudiced by the use of the phrase "other places" and nothing has been unfairly sprung upon them under cover of that phrase;

(3) the omission to specify the person or persons could not in fact mislead the accused and has not occasioned a failure of justice and cannot be regarded at any stage of the case as material.

Held, (per *Rattigan, J.*) that these omissions in no way prejudiced the accused, who were all defended by Counsel, and were fully cognizant of the nature and particulars of the case which each of them had to meet and that even if it be assumed that the particulars referred to should have been set forth in the charge, the defect was cured by sections 225 and 587 of the Criminal Procedure Code; and that it was not incumbent upon the prosecution to specify any such particulars in the charge.

Semble:—It would make it impossible for the prosecution to succeed on a charge of conspiracy if such a charge could not be substantiated without proving the exact date on which each alleged conspirator entered into the conspiracy.

Per *Court*.—Section 10 of the Evidence Act is wider than the English Law and the words "reasonable ground to believe" in the section are not equivalent to proof and where the prosecution have produced *prima facie* proof of a conspiracy to commit murder and where the accused were one and all members of that conspiracy, anything said, done or written by any one of the conspirators, whether accused or not, in reference to the said common intention, after that intention was first entertained by any of them, is a relevant fact under the said section against each and all of the accused, as well for the the purpose of proving the existence of the conspiracy as for the purpose of showing that "any such person" was a party to it.

The illustration to section 10 of the Evidence Act is inconsistent with the section. The way that the words "and to prove *A*'s complicity in it" come into the illustration are not quite in accordance with common sense or with the section but where the fact from the nature of things cannot of its own force help towards the conviction of *A*, it does not matter much whether it is technically relevant against *A* or not.

Per *Rattigan, J.*—In order to decide whether any act done or statement made or thing written by an alleged co-conspirator is admissible in evidence against any of the conspirators, the test is to see in the first place, whether there is a reasonable ground to believe that a conspiracy existed between him and any such person, and in the second place whether such act, statement or writing had reference to their common intention.

"Illustrations" appended to sections of an Act of the Legislature are not to be taken as ex-

Penal Code—contd.

press provisions of law or as binding on the Court.

Per *Court*.—Under section 133 of the Evidence Act approvers are competent witnesses against the accused persons, and a conviction based on the uncorroborated evidence of an approver would not be illegal "merely" because of want of corroboration.

Notwithstanding section 114 and illustration (*b*) the Courts are not tied down in any technical way; but it is their duty when deciding (*i*) whether any corroboration of a particular accomplice is required, (*ii*) what amount or kind of corroboration is required, to look at the question as a prudent man, desiring to avoid error and to arrive at the truth, would look at it. As to the extent and nature of such corroboration no hard and fast rule can be stated.

Therefore, where the Court while keeping in view the presumption that an accomplice is unworthy of credit unless he is corroborated in material particulars and after making due allowance for the considerations which render the evidence of an accomplice untrustworthy, nevertheless comes to the conclusion that it is true although uncorroborated and that it establishes the guilt of the accused it is its duty to convict.

Per *Rattigan, J.*—It is not necessary that the evidence of an accomplice should be corroborated in every detail, if taken in its entirety, it is found to be confirmed by the testimony of independent witnesses or by circumstantial evidence which strongly supports it.

Per *Court*.—Under the provisions of section 337, Criminal Procedure Code, it is permissible to the Magistrate inquiring into any offence triable exclusively by the Court of Session or High Court to tender a pardon to any person supposed to have been directly or indirectly concerned in, or privy to, such offence.

Where, therefore, the offence in respect of which the accused are tried, is one triable exclusively by the Court of Session or High Court the Magistrate is not precluded from tendering the pardon because at the same time he is inquiring into another offence not so triable.

Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another, and that any accused not shown to be a member of the conspiracy charged is entitled to demand an acquittal, however bad his records may be, and however much he may be suspected of another offence not actually charged.

But where there was really one conspiracy, though it may have had two objects, *viz.*, to commit murder and to cause disaffection by circulation of seditious literature, the conviction of the person accused for different offences committed in pursuance of the conspiracy at one trial is not illegal.

A member of the conspiracy cannot be allowed to escape responsibility merely because an act, fully in keeping with the aims of the conspiracy, was done in his absence.

A conspiracy to commit murder was an offence under the law of abetment before the passing of section 120B, Indian Penal Code. The new section was enacted merely to make the law clearer and more readily available in all possible circumstances.

Penal Code—contd.

Per *Rattigan, J.*—In a case where the prosecution allege that there was an agreement between the accused persons and others to commit murder and to abet the commission of murder but being unable to give direct proof of any such agreement, ask the Court to deduce the existence and nature of the agreement from the facts that certain members of the conspiracy actually did commit a murder:

Held, that if the facts alleged are established it would be a fair and justifiable inference that the alleged agreement between the parties accused did in fact exist, that each and every member of the conspiracy is responsible for an offence committed in pursuance of the conspiracy and that it is not necessary to show that a particular member actually concerted the offence with the member who committed it.

In inflicting punishment a distinction must be drawn between the case of a person who joins a conspiracy before the actual crime which is the object of the conspiracy, is committed, and the case of a person who joins it subsequently to the commission of such a crime.

Therefore, where two persons *A* and *B* conspire to commit murder, and *B* subsequently does commit murder, *A* is punishable as if he had abetted that murder but if *B* has already committed a murder before *A* conspires with him to commit murder, *A* is liable to be punished only to the extent provided in section 115, Indian Penal Code. But in every such case the offence committed by a member or members of the conspiracy prior to the entry of *A* into the conspiracy would be a relevant fact as indicating the nature and objects of the conspiracy.

The fact that a member of the conspiracy was not admitted to the full dignity of membership of the committee but was treated more as a tool than as a colleague is no ground for showing leniency in punishment to that member.

Per *Court.*—There is a kind of falsehood that damns the whole deposition and there is a kind that does not. The mere omission by an approver of names of persons upon whom he does not want to bring possible trouble is not such a falsehood as to damn the whole deposition.

The mere deficiencies in the statement of an approver, made at an early stage unexamined by an advocate, are not specially important.

Where an accused falsely denies a fact, the inference is that the object of the denial is to hide something extremely unfavorable to himself.

In recording a confession the important thing is not the formal writing down by the Magistrate that the confession was voluntarily made but it should be made clear to a Court using a confession as evidence that the recording Magistrate applied his mind to the question whether it was being voluntarily made and decided that question in the affirmative.

The procedure of section 364, Criminal Procedure Code, of recording questions and answers in full is of no great importance and a confession is not vitiated by this informality.

Per *Rattigan, J.*—A confession though subsequently retracted, if found to be true and voluntarily made, is admissible in evidence.

Per *Court.*—The publication of a letter in a newspaper adversely criticising the findings of a Judge while the case is still *sub judice*, amounts to a gross violation of the accepted canons of respectable journalist and is a very bad case of contempt of Court. **P.** BALMOKAND *v.* EMPEROR, 11 P. W. R. 1915 CR.; 16 CR. L. J. 354; 17 P. R. 1915 CR. **738**

——— ——— **s. 304A** **641**

——— ——— **ss. 322, 325** — *Voluntarily causing grievous hurt—Magistrate, duty of.*

A Magistrate or Court dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has been caused, but if it has been caused, whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under section 325. **U. B.** NGA TUNE *v.* EMPEROR, U. B. R. 1914, II, 35; 16 CR. L. J. 431 **1007**

——— ——— **s. 325** **1007**

——— ——— **s. 326** **649**

——— ——— **ss. 330, 348**—*Direct evidence disbelieved, effect of—Conviction, legality of.*

It is a dangerous precedent to convict a man on evidence of people who are found to be untruthful without any corroboration. **C.** HARE KRISHNA *v.* EMPEROR, 19 C. W. N. 330; 16 CR. L. J. 411 **795**

——— ——— **ss. 341, 447**—*Conviction for two charges—Acquittal on one—Sentence unaltered, effect of—Enhancement of sentence—Criminal trespass, offence of, when complete—Charge under s.* 447, *essentials for.*

When a Subordinate Magistrate convicts an accused of two charges and the Magistrate on appeal reverses the conviction on one and confirms that on the other, without at the same time reducing the sentence, it is in effect an enhancement of the sentence and the conviction should, on that ground, be set aside.

A charge of criminal trespass will not stand unless the Court finds that that trespass was committed with intent to commit a criminal offence, etc. Mere entry upon the land by an accused with a view to remove crops planted by him does not amount to an offence under section 447. **M.** APPANDA NATHA NAINAR, *In re*, (1915) M. W. N. 275; 16 CR. L. J. 271 **159**

——— ——— **s. 348** **795**

——— ——— **ss. 352, 354, 376** **658**

——— ——— **s. 377**—Unnatural offence—Uncorroborated testimony of complainant, whether sufficient—Prosecution, when not bound to produce all witnesses—Evidence **154**

——— ——— **s. 395** **649**

——— ——— **s. 401**—*Belonging to a gang of thieves—Convictions prior to formation of gang and orders under s.* 110 *of Criminal Procedure Code, admissibility of evidence as to—Limitation Act (IX of* 1908), *s.* 12—*Application for copy of judgment mislaid—Limitation.*

In a trial under section 401 of the Penal Code evidence of the previous convictions of some of the accused for offences of theft, house-breaking and receiving or concealing stolen property both prior and subsequent to the year when the nucleus of the gang was for the first time formed, is admissible as proving habit.

Penal Code—concld.

Orders passed from time to time against the accused under section 110 of the Criminal Procedure Code demanding from them security for good behaviour are also relevant evidence against them for the purpose of proving association and intention to habitually commit theft within the meaning of section 401 of the Penal Code.

Where in an appeal filed through the jail authorities it appeared that the application for a copy of the judgment of the Magistrate was made within the period of limitation but was somehow mislaid and a second application had to be sent after the period presented for the appeal had expired:

Held, that the appeal must be treated as filed within time. **P.** HIDAYATA *v.* EMPEROR, 3 P. R. 1915 CR.; 16 CR. L. J. 300 **524**

——— ——— **s. 447,** charge under, essentials for **159**

——— ——— **s. 457** **155**

——— ——— **ss. 463, 464** **643**

——— ——— **s. 464**—*"Dishonestly and fraudulently," meaning of—Forgery—Alteration in document—Intention.*

An intent to defraud means something more than mere deceit. The object for which the deceit is practised must be considered. The advantage intended to be secured must be something to which the party perpetrating the deceit is not entitled either legally or equitably.

Where, therefore, the accused made an alteration in a document intending thereby to secure a certain plot of land to which he *bona fide* believed himself to be entitled and of which he was in possession at the time:

Held, that his act did not constitute the offence of forgery as no wrongful result was intended or could have arisen. **M.** MANIKA ASARI *v.* EMPEROR, (1915) M. W. N. 278; 16 CR. L. J. 246 **102**

——— ——— **ss. 471, 474**—*User, meaning of—Offence—Sanction, if required—Criminal Procedure Code (Act V of 1898), ss. 195, 476.*

Prosecution under section 474, Indian Penal Code, requires no sanction.

In a rent suit filed by the petitioners the complainant was summoned to produce a *kabuliyat* and an *amalnamah*. The documents were produced not by the complainants but by the petitioners themselves as coming from the custody of the complainant:

Held, that the facts constitute a user within the meaning of section 471, Indian Penal Code, and for prosecution for this offence sanction under section 195 or an order under section 476, Criminal Procedure Code, is necessary. **C.** ASRABUDDIN SARKAR *v.* KALI DOYAL, 19 C. W. N. 125; 16 CR. L. J. 309 **645**

——— ——— **s. 474** **645**

——— ——— **s. 498**—*Enticing away married woman from her husband's house for marriage—Offence.*

A person enticed away a married woman from her husband's house with intent that he might dispose of her in marriage to some one else:

Held, that he committed an offence under section 498 of the Penal Code. **A.** NAULANG *v.* EMPEROR, 13 A. L. J. 251; 16 CR. L. J. 315 **651**

Pensions Act (XXIII of 1871), s. 6 **934**

——— ——— **s. 6** — Saranjam—*Presumption—Grant of land revenue and not of soil—Collector's certificate, necessity of—Admission by Pleader—Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Suit dismissed on preliminary point—Appeal—Remand, when possible.*

In the absence of evidence to the contrary, the grant of a *saranjam* must be presumed to be a grant of land-revenue and not of the soil.

Where a Pleader in the lower Court makes an admission upon an issue regarding which evidence might be, but is not, given; in arguing the appeal the client will be bound by the admission.

Where the lower Court has disposed of a suit upon a preliminary point, the Appellate Court will not set aside the decree and remand the case without a particle of documentary evidence, without any statement based upon affidavit, to induce the Court to hold that evidence is forthcoming which ought to have been produced in the lower Court in the interest of the plaintiff, and which would have been produced but for some grave error on the part of his Pleader. **B.** DATTAJIRAO SHIDHOJIRAO *v.* NILKANTRAO SANTAJIRAO, 17 BOM. L. R. 187; 39 B. 352 **485**

Permanent tenure, transfer of. *See* BENGAL TENANCY ACT, s. 56 (3).

Perpetuities, rule against. *See* TRANSFER OF PROPERTY ACT, s. 14.

Personation. *See* ELECTION.

Plaint, amendment of—Defendant made plaintiff—Limitation, starting point of **45**

——, *amendment of—New cause of action set up—Amendment not allowed—New relief but on facts already alleged, ground for amendment.*

An amendment of a plaint should not be permitted when it entirely changes the cause of action and when the suit, if brought on the plaint as amended, would be barred by limitation. But there is no bar to an amendment where it does not set up a new cause of action but prays only for an additional relief, based on facts already alleged in the plaint. **M.** NARAYANAN CHETTIAR *v.* RATNASABAPATHY AIYAR **828**

Pleader. *See* LEGAL PRACTITIONERS ACT, s. 13.

Pleadings — *Appeal — Ground not taken before first Court—Compromise of criminal case—Consideration.*

An Appellate Court is not competent to decide a case in favour of a person on a plea not raised by him before the first Court.

Surrendering a disputed title is a good consideration for a compromise of a criminal case. **P.** MURAD ALI *v.* CHIRAGH DIN, 40 P. W. R. 1915; 104 P. L. R. 1915 **550**

——— ——— ——— *Issues—Evidence, opportunity to produce—Appellate Court, duty of—Second appeal.*

The plaintiff sued for a declaration that a house belonged to him. His claim was dismissed on the ground that he was estopped from denying having sold away the house. On appeal the Appellate Court decided in his favour on the ground that the plaintiff had proved his title by adverse possession:

Pleadings—concld.

Held, that the Appellate Court should not have decreed the claim without allowing an opportunity to the defendant to produce evidence on the question of adverse possession, for no issue had been framed on the question of adverse possession. **P.** KAISTH BANK, LTD., *v.* IQBAL HUSSAIN, 21 P. L. R. 1915 **50**

Police diaries, evidentiary value of **329**

Possession, *presumption of—Submersion—Re-appearance.*

The plaintiff came into possession of the land in dispute, before its submersion, on a partition with the defendant. A survey was made during the period of submersion and the land was recorded in the name of the plaintiff. After the re-appearance of the land the defendant took possession of it:

Held, that under the circumstances possession during the period of submersion should be attributed to the plaintiff.

The mere fact that the defendant leased out the fishery rights during the period of submersion, is not sufficient to show actual possession by the defendant of the land in dispute which belonged to the plaintiff. **C.** MAHADEO PRASAD *v.* SHEONANDAN KOER **426**

——— ———, *suit for—Decree, barred by time—Regular suit, to eject judgment-debtors, whether maintainable.*

When the execution of a decree for possession of a piece of land is barred by the Law of Limitation, a regular suit lies to eject the judgment-debtor on the basis of the decree. **L. B.** ABDUL SHAKUR *v.* SHWE YAUK KE **851**

——— ———*—follows title—Trespasser, no presumption of possession in favour of—Possession, presumption of, while land under water.*

Where possession in fact is undetermined, possession in law follows the right to possession: in other words, possession follows title.

No presumption of possession can be raised in favour of a trespasser.

Where the plaintiffs' title to the land in suit was acknowledged and it was found that the land was under water for sometime during 12 years before suit:

Held, that the presumption as to possession must be in favour of the plaintiffs, even though the defendants were in actual possession immediately before and after the period during which the land was under water. **O.** BRIJRAJ SINGH *v.* GANGA BAKHSH SINGH, 18 O. C. 43; 2 O. L. J. 346 **855**

Possessory suit, claim for mesne profits in, whether allowed **1**

Post Office Act (VI of 1898), ss. 19, 20, 61, 70—*Sending of cocaine by post, whether offence under Post Office Act.*

Cocaine not being an "explosive" or a dangerous, filthy, "noxious" or "deleterious substance" within the meaning of section 19 of the Post Office Act, the sending of it by post is not an offence under section 61 of the Post Office Act. **A.** ISMAIL KHAN *v.* EMPEROR, 13 A. L. J. 356; 16 Cr. L. J. 319 **655**

Practice—Appeal against minor—Costs incurred by guardian *ad litem*—Appellant to pay costs of guardian **852**

Practice—concld.

———*Appellate Court, pronouncement of—Subordinate Court, duty of, to follow—Subordinate Court acting otherwise—Procedure, legality of.*

It is the duty of a Subordinate Court to accept a pronouncement made by an Appellate Court which the parties have chosen not to appeal against and have acted upon.

A Judge acts illegally in acting upon documents which have been pronounced by the Court to which he is subordinate as not binding on the parties. **M.** PARASU PATTAR *v.* VENKATACHALA PATTAR **982**

——— Death of respondent before date of hearing—Legal representative of deceased not brought on record—Appellant, whether entitled to re-hearing of appeal **83**

——— Finding of fact—Second appeal—High Court, power of, to interfere **245**

——— Legal practitioner changing sides in connected cases—Professional misconduct **996**

——— Letters Patent (Mad.), s. 15—Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 18, 19—Rules of Practice—High Court Appellate Side Rules 48 (*a*), 75—Case posted before single Judge in admission Court for orders—Non-appearance—Dismissal of appeal by Judge—Application to restore dismissed appeal to file—Dismissal of application—Appeal against order—Practice—Procedure—Limitation Act (IX of 1908), s. 14 **64**

———*Pleading in first Court—Defendant, whether allowed to change it in appeal—Agra Tenancy Act (II of 1901), s. 202—Transfer of Property Act (IV of 1882), s. 106.*

In an ejectment suit in the Civil Court, the defendant pleaded that he was an agricultural tenant of the plaintiff. The Munsif acting under section 202 of Act II of 1901, asked the defendant to establish his plea in the Revenue Court within three months. The defendant failed to institute this suit within time in the Revenue Court. The suit was, therefore, decreed. The Appellate Court finding that the defendant was the tenant of the plaintiff and no notice of the termination of his tenancy had been given to him under section 106 of the Transfer of Property Act dismissed the suit:

Held, that having regard to the pleading of the defendant in the first Court it was not open to the lower Appellate Court to find as it had done. **A.** NARAIN SARUP *v.* NANDA, 13 A. L. J. 249 **568**

——— *Redemption suit—Mortgage not proved—Adverse possession—High Court, power of, to remit issue to find if plaintiff in possession himself or through others.*

Where the lower Appellate Court has found in a redemption case that the mortgage is not proved, a Judge of the High Court is not entitled to remit an issue to enquire whether the mortgagor has been in possession either personally or through others within 12 years. **A.** ANAND SARUP *v.* ASAD ALI, 13 A. L. J. 342 **602**

Pre-emption. *See* GIFT.

———*Appeal from order passed on application for payment of pre-emptive money—Civil*

Pre-emption—contd.

Procedure Code (Act V of 1908), s. 47, O. XXII, r. 14 (1)—Deposit of pre-emptive money after fixed period, when good—Court's error, effect of.

An order passed on an application for payment of pre-emptive money in compliance with a decree under Order XXII, r. 14 (1), Civil Procedure Code, is not appealable under section 47, Civil Procedure Code, but can be set aside in revision.

Where an application for payment of pre-emptive money was made on the last day of the period fixed by the Court, and the Court permitted the money to be accepted, but the money could not owing to the laxity of the Court be deposited until after the expiry of the fixed period:

Held, that the deposit of the money was good as the applicant could not be prejudiced by an error of the Court. **O.** GAYA BAKHSH SINGH *v.* TILAK SINGH, 2 O. L. J. 151 **379**

——— *Custom—Co-sharer, prior right of, to purchase—Offer of sale—Co-sharer refusing to give more than a specified sum—Conduct—Vendor, right of, to sell to strangers—Fair opportunity of purchase*—Bona fides *of vendor.*

Where in pursuance of the custom of pre-emption providing that a co-sharer wishing to sell must first offer the property to his co-sharers, the vendor offered the property to the plaintiff his co-sharer, who offered only Rs. 160 and refused to give more, and then sold the property to the vendee for Rs. 235:

Held, that under the circumstances the conduct of the plaintiff amounted to a refusal to purchase the property when it was offered to him.

Semble—In a case where the custom of pre-emption exists the vendor must act *bona fide*, and the pre-emptor must have a fair opportunity of purchasing the property. **A.** INDRAJ *v.* BROTHER CLEMENT, 13 A. L. J. 288; 37 A. 362 **272**

——— *Custom*—Kucha *Dalo—Lahore City.*

The custom of pre-emption prevails in *Kucha* Dalo, Lahore City, irrespective of the fact that it is called Wachhowali or Kanjar Phala. **P.** GOBIND RAM *v.* BASHESHAR DAS, 9 P. R. 1915 **957**

——— *—Origin and growth of right of pre-emption*—Wajib-ul-arz, *evidentiary value of—Suit for pre-emption—Custom—Perfect partition of* mahal—*Effect of perfect partition—No new* wajib-ul-araiz *for new* mahals *framed—Custom or contract—Proof—Claim by a sharer in one of the new* mahals *to pre-empt property in another of those* mahals *in which he was not a sharer, maintainability of.*

Pre-emption in village communities in British India had its origin in the Muhammadan Law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan Law of pre-emption; and in such cases the custom of the village follows the rules of the Muhammadan Law of pre-emption. In other cases where a custom of pre-emption exists, each village community has a custom of pre-emption, which varies from the Muhammadan Law of pre-emption and is peculiar to the village in its provisions and incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the share-holders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Legislature and rights of pre-emption have also been created by contract between the sharers in the village. But in all cases the object is as far as possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

A *wajib-ul-arz* containing statements as to rights of pre-emption which are not in contravention of Muhammadan, Hindu or other law, is by itself good *prima facie* evidence of a custom of pre-emption which is stated in it and though such evidence may be rebutted by other evidence, the *wajib-ul-arz* does not require to be corroborated by evidence of instances in which the custom has been enforced.

In a pre-emption suit the question of the existence of the right must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence in the case.

Where a *mouza* constituting one *mahal* has been perfectly partitioned into separate *mahals* and no new *wajib-ul-araiz* are framed at partition it does not follow, as a matter of law or principle, that the custom or contract as to pre-emption in force before partition is no longer to have effect or operation, but the question whether there is such a custom or contract in each case is that of the construction of the nature of the particular custom on which the claim for pre-emption is based and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected.

Where after the perfect partition of a *mouza*, constituting one *mahal*, into separate *mahals* for which no *wajib-ul-araiz* were framed on partition, a sharer in one of the new *mahals* claimed the right to pre-empt property in another of those *mahals* wherein he was not sharer:

Held, that it was not sufficient to entitle the claimant to a decree to prove that prior to the partition of the *mouza* the custom of pre-emption existed amongst the sharers thereof, but that it was necessary for him to show, either on the construction of the *wajib-ul-araiz* for the *mouza* framed prior to the partition thereof or by other evidence, that the custom of pre-emption which obtained in the unpartitioned *mouza* survived a partition of the *mouza* into separate *mahals* so as to give the claimant the right claimed in the altered state of things which came into existence when the partition was effected. **P. C.** DIGAMBAR SINGH *v.* AHMED SAYEED KHAN, 13 A. L. J. 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 C. L. J. 237; 28 M. L. J. 556; 17 Bom. L. R. 393 **34**

——— *Suit by preferential claimant brought after decree obtained by remote claimant—Limitation.*

A lease of some property was executed on 27th June 1910. A remote pre-emptor brought a suit on the 31st of March 1911 and obtained a decree on 18th of September 1911. After the decree a preferential

Pre-emption—concld.

claimant brought a suit for pre-emption, against the defendant who had obtained the decree, on 31st May 1912.

Held, that the suit was barred by limitation. **A.** MEHDI HASAN *v.* BACHA PANDE, 13 A. L. J. 383 **691**

——— ———, *suit for—Sale, subject to mortgage—Possession, physical, property incapable of—Mortgagee in possession—Vendee subsequently taking possession from mortgagee—Registration of sale-deed, date of, limitation starting from—Limitation Act (IX of* 1908*), Sch. I, Art.* 10.

Where a certain *zemindari* property in possession of mortgagees and incapable of physical possession at the time of sale is transferred by a registered sale-deed subject to the mortgage, the limitation for a pre-emption suit runs from the date when the sale-deed is registered, and not from the date when the vendee takes possession of the property from the mortgagees. **O.** NARENDRA BAHADUR SINGH *v.* WALI MUHAMMAD, 2 O. L. J. 109 **208**

——— ———, *suit by one co-sharer against another—Custom, proof of—Burden of proof*—Wajib-ul-arz *entry, production of, whether sufficient*—Karibi *and* baidi, *meanings of.*

In a suit for pre-emption against another co-sharer it lies upon the plaintiff to prove not only that a custom of pre-emption exists, but that there is a custom under which he has a right to pre-empt as against another co-sharer.

Therefore, in such a case the mere production of an entry in a *wajib-ul-arz* the meaning of which is more than doubtful, is not sufficient to discharge the onus which lies on the plaintiff.

The expressions *karibi* and *baidi* are ambiguous expressions and they may refer to nearness or distance in space or nearness or distance in relationship. **A.** DIN DAYAL *v.* RAMDHAN **306**

——— ——— **decree**—*Extension of time fixed by decree for payment of purchase-money—Civil Procedure Code (Act V of* 1908), *s.* 148.

A Court cannot extend the period granted by a pre-emption decree for the payment of the purchase-money, even if the application for extension of time be made before the expiry of the said period, inasmuch as the provisions of section 148, Civil Procedure Code, apply only to acts prescribed by the Code and not to acts prescribed by decrees which have become final. **O.** KANIZ KUBRA *v.* BANDE HUSSAIN, 2 O. L. J. 162 **458**

Preliminary decree. *See* APPEAL.

——— ——— ——— Preliminary decision as to *res judicata*—Appeal **461**

——— ——— ——— Suit for rendition of accounts and winding-up of partnership—Appeal—Court-fees to be *ad valorem* **262**

Presidency Small Cause Courts Act (XV of 1882), ss. 41, 43 1000

Presidency Towns Insolvency Act (III of 1909), s. 36 (4), (5), *applicability of—Summary procedure—Contentious matter.*

An order under section 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent.

Presidedcy Towns Insolvency Act—concld.

Section 36 (4) and (5) is intended to provide a summary procedure for ordering payment of debts due, and delivery of property belonging to an insolvent when there is no dispute; it is never intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment. **C.** J. M. LUCAS, *In re*, 42 C. 109 **469**

Press Act (I of 1910), ss. 4 (1) (c), 17, 19, 20—*Order of forfeiture—"Disaffection," meaning of—High Court, power of—Motive or intention of writer—"Government established by Law in British India," meaning of—Supplementary paper-book, relevancy of—Seditious intentions—Truth of statement, when not sufficient justification.*

The words " 'disaffection' includes disloyalty and all feelings of enmity" in section 4 of the Press Act are wide words, and the duty of a High Court under section 19 of the Act is strictly limited to consideration of the question whether the Government order of forfeiture of an article is justified by the words and tendencies of the article.

The writer's intentions or motives in writing an article are irrelevant and even if the article be unobjectionable in itself, it is the possible results and not the intentions which have to be considered.

In order that an application under section 17 of the Press Act be successful, it is necessary for the petitioner to show that the article in question did not as a matter of fact contain "any words, signs or visible representations" likely or having a possible tendency to excite disaffection towards His Majesty or the Government established by law in British India.

A supplementary paper-book, prepared under section 20 of the Press Act, is irrelevant when the subject-matter re-printed lies outside the scope of section 20.

The Supreme Government in India is in the last resort the Government in England. Therefore, anything which tends in India to excite disaffection against the Government as represented by the British Cabinet must be taken as tending to excite disaffection against the Government established by law in British India.

Word "disaffection" explained.

Per *Johnstone, J.*—The truth of a statement regarding the Government is not sufficient justification for the statement in all circumstances nor is an honest belief on the part of a writer in the truth of what he is saying in all cases sufficient justification.

Therefore even if the destruction of the tomb of *Mahdi* at *Khartum* carried out by British Government was an unnecessary sacrilege, it is extremely improper for any newspaper in India at such a time as the present, after the lapse of 15 years, to say so. **P.** FAROOQ ALI *v.* EMPEROR, 16 CR. L. J. 274; 21 P. W. R. 1915 CR. **322**

——— ——— ——— **ss. 17, 19, 20 322**

Presumption. *See* BENGAL TENANCY ACT, s. 20 (7); GRANT.

——— ———Adverse possession—Joint tenancy—Co-sharer, adverse possession of—Possession of one co-sharer—Ouster—Burden of proof **276**

——— ——— Consideration—Plaintiff giving evidence for consideration **390**

——— ———False denial by accused **733**

Presumption—concld

———Grant—Right of way—Enjoyment for over 70 years—Limitation Act (IX of 1908), s. 26, application of—Grant or legal origin **894**

———Improvements—Compensation **389**

——— Interpretation of Statutes—Change of language in the same Act **105**

———Landlord and tenant—Permanent occupancy—Uniform rate of rent for 80 years **956**

——— Legitimacy disputed—Parents, lawful union between, shown to be impossible—Treatment as legitimate son, evidence as to, force of **201**

——— Nattukottai Chetties—Trade assets—Private rights in property, how claimed **260**

———Partition, evidence of **817**

——— Possession — Submersion — Re-appearance **426**

——— Possession follows title—Trespasser, no presumption of possession in favour of—Possession, presumption of, while land under water **855**

——— *Possession goes with title—Evidence equally unworthy of credit on either side—Presumption, whether raised.*

Where the evidence of possession is equally unworthy of credit on either side, the presumption that possession goes with title does not apply. **C.** LALA SINGH *v.* LATIF HOSSEIN, 21 C. L. J. 480 **477**

———Promissory note—Consideration—Onus **402**

——— Rape by boy of tender age **658**

———Record of Rights recently published—Factum of possession **651**

———Retrospective effect of acts **95**

———*Saranjam*—Grant of land revenue and not of soil—Collector's certificate, necessity of—Admission by Pleader—Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Suit dismissed on preliminary point—Appeal—Remand, when possible **485**

——— Settlement paper, entries in, whether correct **239**

———Transfer of title *by benamidar* **205**

Primogeniture. *See* CUSTOM.

Principal and Agent—*Contract of sale—Notice to agent calling upon his principal to take delivery—Failure to do so, effect of.*

The plaintiffs sued the defendants for Rs. 2,031-12-6 made up of earnest money on a contract for the supply of wheat by the defendants and of damages for non-delivery. The defendants repudiated the liability, on the ground that the plaintiffs had failed to take delivery although a notice had been served upon their agent calling upon them to do so:

Held, that notice to the agent was sufficient notice to the plaintiffs and as they had failed to take delivery when offered, the defendants were not liable. **P.** NIAMAT RAI *v.* KALU RAM, 70 P. W. R. 1915; 15 P. L. R. 1915 **488**

Principal and agent—concld.

———*Loans advanced by agent beyond authority—Ratification by principal—Suit for damages, whether maintainable.*

Where the principal not only did not object to the propriety of his agent advancing certain loans and did not tell him that he would hold him responsible for any loss that he might sustain thereby, but even interfered with the collection of the debts, dictated his own terms and allowed with full knowledge of the circumstances the agent's successor to take the debts at a certain valuation, after which it was no longer open to the first agent to collect the debts himself:

Held, that the principal was precluded by his acquiescence from questioning the validity of these transactions and could not hold the agent liable for damages sustained. **M.** RAMASWAMY CHETTY *v.* ALAGAPPA CHETTY, 28 M. L. J. 199 **135**

Privacy, right of—Intervention of space between two houses **674**

Privilege, absolute. *See* DEFAMATION.

Probate. *See* WILL.

———Will disposing of joint Hindu family property in favour of survivors—Duty payable—Party, whether can go behind Will **473**

——— **of Will,** *grant of—Citation, issue of—Revocation, application for—Minor—Burden of proof—Party cognizant of proceedings for Probate, when can come in for revocation—Sound and disposing mind—Court, duty of.*

A person affected by a Will was the infant son of the testator, and his mother was a minor, incompetent in law to act as his guardian, and his (infant's) three uncles were named as successive executors in the Will. One of the uncles applied for Probate. Citations were issued upon the other uncles as also upon the minor and his mother but there was no opposition and the Probate was granted. The minor applied for revocation of the Will:

Held, that the principle that a party who is cognizant of the proceedings and might have intervened is bound by their result and cannot be allowed to re-open them, has manifestly no application to this case and the infant is entitled to have the proceedings re-opened.

The object of the issue of a citation is that all persons, whose interests are or may be adversely affected by the decree of the Probate Court, should have notice of the proceedings, and, an opportunity, should they choose to avail themselves of it, of intervening for the protection of their interests. This purpose is clearly not achieved merely by issue of citations to infants. The proper course for the propounder of the Will to follow is to have a guardian *ad litem* appointed for the infant concerned.

Where on an application by a minor to revoke a probate the District Judge did not revoke the grant but called upon the executor to prove the Will:

Held, that the only defect in his order is one of form and not of substance.

The *onus* is upon the executor to establish that the deceased had sound and disposing mind at the time when he is said to have executed the Will.

Probate—concld.

The Court, before pronouncing for the Will, must be satisfied beyond all reasonable doubt that the testator was fully cognizant of its contents and in a condition to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing. **C.** DWIJENDRA NATH *v.* GOLOK NATH SARMA, 21 C. L. J. 287; 19 C. W. N. 747 **574**

Probate and Administration Act (V of 1881), ss. 82, 92, *applicability of, to cases not governed by Hindu Wills Act (XXI of 1870) —Mofussil Will—Joint executors—One executor taking Probate—Another executor, if disentitled to act without Probate—Executor, if can renounce for consideration—Compromise between co-executors, if valid—Retainer, executor's right of, if exists even though claim is barred—Limitation Act (IX of 1908), Sch. I, Art. 120, whether governs claims of executors for moneys spent on behalf of estate—Limitation law, if applicable to administration actions.*

An executor has only a right of retainer and no charge on the properties not in his possession, which at one time formed part of the estate. Such a claim is governed by Article 120 of the Limitation Act.

In an administration action the law of limitation is of no avail. So long as the liability to account subsists, limitation cannot be pleaded to defeat an adjustment which the right to account gives, but the party liable to account is entitled to all the equities flowing from the taking of the account, the right and liability being inseparable.

Where during the pendency of a petition for grant of joint Probate in favour of a person who had been appointed co-executor under a Will, in which petition allegations of mismanagement had been made against the other executor who had taken out Probate of the Will, the executors compromised the matter whereby it was agreed that in consideration of the former executing a mortgage of the trust estate in favour of the latter or his nominee the latter should renounce his executorship in favour of the former:

Held, in a suit instituted by the latter against the former on a mortgage so executed, that the transaction was not *bona fide* and that the mortgage was invalid.

Held, further, that in a suit under section 92, Civil Procedure Code, the executor, who had thus renounced his executorship, was entitled to a decree against the estate for the amounts legally spent by him on its behalf, even though the claim thereto might have become barred by limitation, as his liability to account did not cease and his right to be reimbursed could not, therefore, be lost by lapse of time.

Per *Wallis, C. J.*—Section 82 of the Probate and Administration Act applies to all Hindus and is not confined in its scope to such of them as are governed by the Hindu Wills Act (XXI of 1870).

On a petition for the grant of Probate to an additional executor, the Court has no jurisdiction to sanction a compromise between the executors, imposing a heavy burden on the estate.

Quære.—Whether an executor can at all enter into a compromise with his co-executor?

Per *Seshagiri Aiyar, J.*—Under the Probate and Administration Act, it is not competent to one executor to compound the claim of his co-executor.

The language of sections 82 and 92 of the Probate and Administration Act, does not render it obligatory on one of two co-executors to apply for Probate of the Will before exercising his powers as executor, even though his other co-executor has obtained Probate of the Will. Section 92 of the said Act should be confined to cases where Probate is compulsory before dealing with property.

Although a trustee can be removed from his office for good cause shown, it is not competent to a trustee to purchase his co-trustee out.

An executor-creditor, in possession of the estate, can claim a right of retainer and a lien upon it. **M.** CHIDAMBARA MUDALIAR *v.* KRISHNASWAMI PILLAI, 2 L. W. 241; 28 M. L. J. 285 **221**

——— ——— ——— **s. 92** **221**

Procedure—Appellate Court, pronouncement of —Subordinate Court, duty of, to follow—Subordinate Court acting otherwise—Procedure, legality of **982**

——— ——— Approver resiling from his evidence in Sessions Court—Forfeiture of pardon—Evidence before Committing Magistrate, relevancy of **993**

——— ———Nuisance—Conditional order—Objection—Proper procedure—Magistrate's duty **799**

——— ———Registration—Presentation of document—Defect—Presence of executant—Mortgage-deed—Power-of-attorney **422**

——— ——— Search under section 103 (2), Criminal Procedure Code **152**

——— ———Sessions case—Inquiry before Magistrate—Summoning of witnesses on date of committal **799**

——— ——— ———Substantial error—Findings of fact—Second appeal—High Court, power of, to interfere **921**

———Succession (Property Protection) Ac (XIX of 1841), ss. 3, 4, 5—Appointment of Curator, necessary conditions for **248**

———, summary. *See* PRESIDENCY TOWNS INSOLVENCY ACT, s. 36.

Promissory note—*Payable otherwise than on demand—Stamp Act (II of 1899), ss. 2 (22), 35, Sch. I, Arts. 13, 49—Agreement—Court Fees Act (VII of 1870), s. 13—Court-fees, refund of.*

A document by which the executant undertakes to make certain specified payments towards the sum due and agrees that his failure to do so shall render him liable to forfeit any payments he may already have made, is not a promissory note payable otherwise than on demand but only an agreement and is stampable with 8 annas only. **L. B.** KATCHI ROWTHER *v.* NAINA MOHAMED **300**

——— ——— ——— ———Presumption as to consideration—Onus **402**

———*Signature as agent—Inference—Agent, if personally liable.*

Where an executant of a promissory note describes himself as an agent both in its body and in its signature portion, it is a clear indication that he did not intend to make himself personally liable and he cannot, therefore, be made personally liable on such a note. **M.** SUNDARESA GURUKKAL *v.* SAMBASIVA AIYAR, 2 L. W. 188 **93**

Promissory note—concld.

——— ——— ———, suit on—Executant, whether can plead payee to be only *benamidar*—Conditional endorsement of promissory note to another—Failure of condition—Possession of note not parted with—Note not re-endorsed—Payee, right of, to sue—Endorsement in favour of one of the debtors, effect of—Holder not in his own right for consideration—Debt, whether discharged **501**

Property, self-acquired, how to be proved **195**

Provincial Insolvency Act (III of 1907), s. 13—*Receiver—Sale-proceeds realized before adjudication of judgment-debtor as insolvent—Claims of Receiver on such sale-proceeds.*

Where the sale-proceeds in execution of a decree are realized before the judgment-debtor is adjudicated insolvent, the *interim* Receiver has no claim to such proceeds. **A.** BADRI DAS *v.* SHEO NATH SINGH, 13 A. L. J. 359 **816**

——— ——— ——— ——— **s. 36**—*One creditor challenging another's debt—Judge, jurisdiction of, to inquire.*

Where in a proceeding under the Insolvency Act one of the creditors challenges the mortgage-debt of another on the ground that the mortgage-deed was fictitiously executed by the insolvent to prejudice other creditors, the Judge is bound to enquire into the question. **A.** KHUSHHALI RAM *v.* BHOLAR MAL, 13 A. L. J. 270; 37 A. 252 **573**

Provincial Small Cause Courts Act (IX of 1887), s. 25 **969**

——— ——— **Sch. II, Art. 41**—*Decree for arrears of rent against joint tenants, realized from one tenant only—Tenants in possession of separate fields in joint* khata—*Suit for contribution, whether maintainable.*

Where a decree for arrears of rent against several tenants occupying separate fields in one and the same *khata* has been realized from one of them, a suit for contribution as against others, at the instance of one who had paid the decree, is barred by Article 41 of the Provincial Small Cause Courts Act. **A.** FATIMA BIBI *v.* HAMIDA BIBI, 13 A. L. J. 452 **587**

Public document. *See* EVIDENCE ACT, s. 63.

Public nuisance—Gambling on public highway—Conviction—Currency notes not traced to any person—Ownerless property **110**

Public policy—Agreement among intending purchasers not to bid against each other, whether legal **40**

Punjab Colonization of Government Lands Act (V of 1912), s. 21—*Deed of tenant before commencement of Act—Payment of necessary sums for acquisition of proprietary rights.*

Where on the death of a tenant the tenancy was mutated in the names of his son's widow and his son's son's widow, who paid the necessary sums to the Government for the acquisition of proprietary rights, and the original tenant's reversioners claimed the property:

Held, (1) that section 21 of the Act did not apply as the tenant died before the Act came into force;

(2) that the defendants, when they had paid in full the necessary sums to Government, became *ipso facto* owners in their own right of the land in suit. **P.** MALAP KUAR *v.* HAKIM SINGH, 8 P. R. 1915 **441**

Punjab Courts Act (XVIII of 1884), s. 40—*Value of suit under Rs. 1,000—Further appeal, whether competent—Plaintiff, whether estopped from raising point of valuation—Punjab Courts Act (I of 1912), applicability of—Further appeal, whether alterable for second appeal or revision.*

In a suit for declaration that a sale-deed executed in favour of the defendant shall not affect the plaintiff's reversionary rights after the death of the executant, and for an injunction restraining the executant from alienating the property, the plaintiffs put the following valuation on the suit for purposes of jurisdiction:

	Rs.	a.	p.
(1) Land at 30 times the revenue	130	5	0
(2) House	450	0	0
(3) Injunction	500	0	0
Total ...	1,080	5	0

But for Court-fee purposes they put a value of Rs. 130 only on the injunction. Both the lower Courts having decreed the claim, the defendants came up to the Chief Court in further appeal:

Held (1), that the value of injunction being only Rs. 130, the total value of the suit fell under Rs. 1,000 and, therefore, no further appeal lay under section 40 of the Punjab Courts Act 1884;

(2) that the plaintiffs were not estopped from contending that the value of the suit was really less than what they had put it at;

(3) that an appeal filed as a "further appeal" under the Punjab Courts Act of 1884 could not be altered after the coming into force of the new Act into a second appeal or a revision under section 70 (1) (*b*) of the old Act. **P.** SUKH RAJ *v.* KANHAYA LAL, 2 P. R. 1915 **113**

Punjab Courts Act (I of 1912) **113**

Punjab Municipal Act (XX of 1891), s. 92—*Punjab Municipal Act (III of 1911), s. 3 (5) (a)—Building—Erection without sanction of Municipality—Notice ordering demolition—Additions for which sanction was not obtained.*

The plaintiff had asked the Municipality for permission to build a *saiban*, the plan showing eight gaps or open spaces between the supports of the roof; subsequently the plaintiff made additions by filling these gaps with frames of wood and glass, some of which were doors and some windows. On the Municipality issuing a notice to the plaintiff to demolish the additions, the plaintiff sued for an injunction restraining the Municipality from demolishing the additions. The suit was dismissed on appeal. On second appeal it was urged—

(1) that the plan had shown the position of the doors and windows, (2) that no material alteration to the building was made by the additions, (3) that the Municipality's action was arbitrary and unreasonable and (4) that the notice was illegal:

Held, that the plan showed only gaps, but no doors and windows, (2) that the opening of doors and windows constituted a 'material alteration' of the building within the meaning of section 3 (5) (*a*) of the Punjab Municipal Act, 1911, (3) that the Municipality's action was justified, one of its objects being to vindicate its authority and (4) that the notice was not illegal. **P.** MADAN MOHAN LAL *v.* MUNICIPAL COMMITTEE, DELHI, 58 P. L. R. 1915; 49 P. W. R. 1915 **341**

Punjab Municipal Act (III of 1911), s. 3 (5) (a) 341

——— ——— ——— **ss. 172, 195, 219**—*Encroachments upon public street—"Notice within reasonable time" to remove them—Encroachments not recent—Penal sections, construction of.*

Where the Municipal Committee of Amritsar filed a complaint under sections 172, 195 and 219 of the Municipal Act against the petitioner alleging that he had erected certain *chhappars* which encroached upon a public street and had failed to remove them in spite of a notice given by the Committee, it being found as a fact that the alleged obstructions had been in existence for many years:

Held, (1) that section 195 of the Act was inapplicable as it could not be said that the Committee had delivered the notice to the petitioner "within reasonable time" within the meaning of the section;

(2) that section 172 was also inapplicable as it refers to encroachments or overhanging structures newly made and without permission.

The penal sections of the Act must be construed strictly and with due regard to the ordinary meaning of the words used. **P.** KIRPA RAM *v.* MUNICIPAL COMMITTEE, 2 P. R. 1915 Cr.; 16 Cr. L. J. 350 **734**

——— ——— ——— **ss. 195, 219** **734**

Punjab Pre-emption Act (II of 1905), s. 11, proviso—*"Agnate," meaning of—Joint sale by two vendors, divisibility of—Vendee showing right equal to pre-emptor as to portion, right of.*

Where a pre-emption suit is brought in respect of a sale by two vendors jointly and where there is no specification of the shares of the price payable to each, the vendee is entitled to retain that portion of the property in regard to which he can show that his rights are equal to those of the pre-emptor.

The word "agnate" in the proviso to section 11 of the Pre-emption Act, 1905, is not limited to a deceased agnate to whom the vendee has succeeded by inheritance. **P.** DULLA *v.* HARI KISHEN DAS, 6 P. R. 1914 **213**

——— ——— ——— ——— **s. 11, proviso**—*Sale to subsequent vendee—Limitation—Record—Mutation register—*Arora *tribe—Residence in the same village not a* sine qua non *for success.*

The period of limitation in a pre-emption suit against the subsequent vendees is six years from the date of the sale in their favour.

Under the proviso to section 11 of the Punjab Pre-emption Act, 1905, the law does not make residence in the same village a *sine qua non* for success in a pre-emption suit and hence, in the case of a sale by one *Arora*, another *Arora* residing in a different village may be regarded as a member of the same tribe with the vendor.

A mutation register is a record within the meaning of the proviso to section 11 of the Punjab Pre-emption Act, and where a *jamabandi* has been destroyed, the Court will presume, under section 114 of the Indian Evidence Act, that proper entries in pursuance of the mutation order must have been made in the *jamabandi*. **P.** HARI RAM *v.* ALLAH DITTA, 17 P. R. 1915 **695**

Purdah, *observance of—Right of privacy common in United Provinces—Intervention of space between two houses—Privacy, right of, effect on.*

Purdah—concld.

In the United Provinces the custom of *purdah* has for centuries been strictly observed by all Hindus and Muhammadans except the poorest.

The intervention of a space between two houses cannot affect the right of privacy if, as a matter of fact, that right is invaded by the new constructions complained of. **A.** JAMILUDDIN *v.* ABDUL MAJID 13 A. L. J. 361 **674**

Putni Regulation (VIII of 1819), s. 11—Putni *tenure, sale of—Purchaser of* putni *tenure, rights of—Encumbrance, adverse possession when—Avoidance of encumbrance—"Defaulting proprietor" in s.* 11, *meaning of*—Res judicata—*Bengal Tenancy Act (VIII of* 1885), *s.* 10—*Admission, admissibility of.*

Where a decree-holder purchaser causes a number of plots to be described in the sale proclamation as *milik* of his judgment-debtor and after the sale they are described as such in the sale-certificate, it is in the nature of an admission and as such cannot be used as evidence on behalf of the purchaser or his successor-in-interest.

A *putni* can only be sold for rent under Regulation VIII of 1819 and the fact that the sale-certificate was given on a printed form for certificate-sales will not convert the *putni* sale into a certificate-sale.

A purchaser of a *putni* tenure at a sale under Regulation VIII of 1819 is not privy in estate to the defaulting proprietor and he does not derive his title from him as under section 11 of the Regulation he acquires the property free of all incumbrances. A claim by such purchaser, therefore, is not barred by *res judicata* by reason of the failure of suit by the previous *putnidar* and he is entitled to avoid all incumbrances upon the property.

An encroachment by a trespasser and adverse possession against the defaulting *putnidar* is an incumbrance within the meaning of section 11 of Regulation VIII of 1819.

The expression "defaulting proprietor" in section 11 of Regulation VIII of 1819 means the proprietor of the tenure in default, and these words are not intended to be restricted to the particular proprietor for whose default the *putni* is brought to sale. **C.** JOYMONGALA DEBI *v.* SHILLINGFORD **173**

Railways Act (IX of 1890), s. 75, Sch. II—*Parcel containing silk of more than Rs.* 100 *not declared or insured—Railway Company, liability of, for loss—Silk, meaning of—Finding of fact—Second appeal—High Court, power of, to interfere—Practice.*

After there has been a decision of fact in the two Courts of original and first appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court.

The question whether silk in manufactured or unmanufactured state is to be treated as silk within the meaning of Schedule II of the Railways Act is a question of fact.

Where, therefore, a Court has adopted a fair test and where upon that test it has found that the article is silk within the meaning of section 75 of the Railways Act that is a clear finding of fact

Railways Act—concld.

and the High Court cannot go behind it in second appeal.

Where a parcel consigned to a Railway Company contains silk, in a manufactured or unmanufactured state and whether brought up or not brought up with other materials of the value of Rs. 100, the Railway Company are not responsible for anything contained in it on loss of it if the silk were not declared or insured under section 75 of the Railways Act. **C.** EAST INDIAN RY. CO. *v.* CHANGA KHAN, 19 C. W. N. 1034; 22 C. L. J. 212 **245**

Rangoon Police Act (IV of 1899), s. 31 **155**

Receiver. *See* PROVINCIAL INSOLVENCY ACT, s. 13.

——, appointment of, ground for—Just and convenient—Judgment-debtor will be reduced to poverty if his properties are sold, if ground for appointment of Receiver **505**

——, appointment of—Execution—Property sold—Receiver, right of—Suit between decree-holder and auction-purchaser, separate, maintainability of **551**

——*Adjustment of accounts—Receipts by minor for sums in excess of the sanction of Court, whether valid discharges—Money paid as bribe to Police for release of minor—Receipt taken from minor, validity of—Liability of person through whom bribe alleged to have been paid—Litigation expenses—Details necessary—Allowance for unavoidable waste of money in conducting litigation—Appointment of persons in excess of sanction of Court, whether permissible—Improper claim of Receiver—Money deposited accordingly—Interest allowed in excess deposit—Payment of high rate of interest on account of Receiver's improper conduct—Separate suit.*

In proceedings for the adjustment of the accounts of a Receiver appointed for the estate of an infant, receipts granted by the infant for payments of money made to him in excess of the amount sanctioned by the Court and not shown to have been applied for the benefit of the infant, are not valid discharges, and the infant or his representative is not liable to be charged with the money thus paid.

Any money paid by a Receiver as bribe to the Police in order to obtain release of the infant from custody must be deemed wholly unauthorised and disallowed. The Receiver is not entitled to credit the amount even as against the person to whom it is alleged to have been made over for the purpose, after the Receiver has credited the money in the minor's accounts and as a matter of fact has taken receipt for it from the minor.

It is not sufficient for a Receiver merely to show that he had paid certain sums to a Vakil for the purposes of a certain litigation, and unless details are furnished, the items will be disallowed. In adjusting small sums spent for the purposes of litigation, however, it must be borne in mind that a certain amount of money is unavoidably wasted when a suit is instituted and conducted, and the Receiver cannot be expected to do better in this respect than an ordinary prudent man. The Receiver is not entitled to credit the salaries of persons appointed by him in excess of the sanction allowed by the Court.

Receiver—concld.

Where a Receiver improperly puts forward a claim for an amount which accordingly is deposited in Court, the Receiver must be held liable, when his accounts are adjusted, for interest upon the excess deposit. But whether or not the minor or his representatives were obliged to raise money for the deposit at a higher rate of interest than usual, by reason of the improper conduct of the Receiver, is foreign to the proceedings for adjustment of accounts, and the rights and liabilities of the parties in this connection must be determined in a separate suit. **C.** BARODA KANTA SARKAR *v.* RASHMANI DASI, 20 C. L. J. 113 **25**

——, surety of—Extent of liability—Principal—Test—Surety's remedy **31**

Record of Rights—Conclusive proof **241**

Redemption. *See* MORTGAGE.

Reference. *See* CRIMINAL PROCEDURE CODE, s. 438.

Registration, compulsory—Gift, deed of—Subsequent deed executed and registered by donor—Prior gift revoked **271**

——Document effecting severance in status, if requires registration **625**

——Transfer of Property Act (IV of 1882), ss. 54, 60—Restriction on redemption—Revenue Surveyor's register—Custom of reporting mortgages as sales **264**

Registration Act (III of 1877), ss. 3, 17 **879**

——**ss. 17, 32, 33, 34, 35, 49, 87**—*Transfer of Property Act (IV of 1882), s. 59—Presentation of document—Defect—Procedure—Presence of executant—Mortgage-deed—Power-of-attorney.*

Where mortgage-deeds were presented by agents who held powers-of-attorney which did not authorize them to present the deeds for registration on behalf of the mortgagee, the mortgagor duly appearing at the registration office and admitting execution:

Held, that there was no proper presentation of the deeds for registration as required by the Registration Act, III of 1877, sections 32 and 33, and that want of proper presentation was not a mere defect in procedure under section 87, but rendered the deeds invalid, and that the object of sections 32, 33, 34 and 35 of Act III of 1877 was to prevent fraud by means of registration under the Act and, therefore, the provisions were imperative.

The jurisdiction of a Sub-Registrar only comes into force if and when a document is presented to him in accordance with law by a person who has executed or claimed under it or by the representative or assign of such person or by an agent of such person, representative or assign, duly authorised by a power-of-attorney executed and authenticated in manner prescribed by section 33 of the Act and the mere admission of execution by executants is not proper presentation by them. **P. C.** JAMBU PARSHAD *v.* MUHAMMAD NAWAB AFTAB ALI, 19 C. W. N. 282; 13 A. L. J. 129; 17 M. L. T. 148; 21 C. L. J. 218; 2 L. W. 277; 37 A. 49; 28 M. L. J. 577; 17 BOM. L. R. 413; (1915) M. W. N. 592 **422**

Registration Act—(1877)—concld.

——— ——— ——— ss. 32, 33, 34, 35 422
——— ——— ——— s. 47 879
——— ——— ——— ss. 49, 87 422
——— ——— (XVI of 1908) 577
——— ——— ——— s. 17 (1) (A) 180
——— ——— ——— s. 17 (2) (v)—*Agreement by vendee to re-convey, whether compulsorily registrable.*

An agreement by which a vendee undertakes to re-convey the property to his vendor when called upon to do so, is nothing more than an ordinary agreement to sell and is not compulsorily registrable. **B.** MIR GAZI *v.* MIA ALI, 16 BOM. L. R. 582; 38 B. 703 **132**

——— ——— ——— s. 49 186

——— ——— ——— s. 75—*Deed found to be forged—Burden of proof—Specific Relief Act (I of 1877), s. 39—Cause of action.*

Where a lower Appellate Court clearly finds that a deed of sale registered under section 75 of the Registration Act, 1908, is forged, no question of the burden of proof arises.

Where a plaintiff has some interest in the land in suit, he has clearly a cause of action as is required by section 39 of the Specific Relief Act. **C.** BADRI NARAIN SINGH *v.* KODO SAH **138**

Religious endowment—Advances made by trustee—Suit for recovery—Charge in favour of trustee of charitable trust **290**

——— ——— ——— *Head of a* mutt—*Succession—Custom of election to be definitely proved.*

There is no presumption with regard to the properties in the possession of the head of a *mutt* either that they are or are not *mutt* properties.

In order to succeed in a suit for declaration that the plaintiff is the properly elected *matadhipathi* of a *mutt* the custom of election for the office must be definitely established. **M.** PARAMAHAMSA PRASAMAYA *v.* YAVADRAKSHAKI AMMAL **829**

Religious Endowments Act (XX of 1863), s. 3—*Temple committee, power of, to appoint additional trustees—Power, when liable to be questioned.*

A temple committee appointed under Act XX of 1863 has a discretionary power to appoint additional trustees to a temple under its superintendence, and such appointments can only be questioned on the ground that the power was not exercised reasonably and in good faith. **M.** TIRUMALAIYAPPA PILLAI *v.* VENGU AIYAR, (1915) M. W. N. 280 **556**

——— ——— ——— s. 3—*Trustee, nomination of, by head of* Thiruvaduthurai Mutt—*Recognition of appointment by Government and Committee—Accounts, submission of, to Government and Committee, whether evidence of right of appointment of trustee in Committee.*

In a suit by a Temple Committee for a declaration that the suit temple was subject to its control and should be managed by a trustee appointed by it, the plaintiff Committee must prove that the right of appointing the trustees was vested in it. Merely showing that the Government officials exercised supreme control over the management of the temple would not be enough.

Religious Endowments Act—concld.

In the absence of other evidence, the fact that the Government have appointed trustees is insufficient to prove the right of appointment.

A wrongful assumption by the Government of the power to appoint a trustee is not sufficient to bring a temple within section 3 of Act XX of 1863.

The mere fact that a man styled himself a trustee is no evidence of management by him. **M.** PIRAMANAYAGAM PILLAI *v.* AMBALAVANA PANDARA SANNADHI AVERGAL, 2 L. W. 371 **833**

——— ——— ——— s. 18—*Sanction to institute suit—Discretion, extent of—Revision, interference in, if justifiable—Costs of applicant, when to be disallowed—Civil Procedure Code (Act V of 1908), s. 115—Mere failure to exercise judicial discretion, if can be interfered with in revision.*

Section 18 of the Religious Endowments Act gives a very wide discretion to the District Judge in regard to matters coming under the section and the mere fact that some serious allegations contained in the petition for sanction had not been considered by the Judge and the possibility of the Judge sitting in revision coming to a different conclusion, are not sufficient reasons for interfering with the order of the District Judge in revision.

In the absence of anything to show that the charges were unfounded and the petitioner acted negligently or inconsiderately, with a view to annoy or harass, and not prudently and *bona fide*, in applying for the sanction, the petitioner will be entitled to be paid his costs out of the trust property.

A mere failure to exercise a judicial discretion will not justify interference under section 115, Civil Procedure Code. **M.** SHANMUGA OTHUVAR *v.* VEERAVAGHU PILLAI, 2 L. W. 346; (1915) M. W. N. 274 **637**

Relinquishment, evidence of — Non-occupancy right **430**

Remedy—Different remedies open to party—Adoption of one, effect of **318**

Rent. *See* LANDLORD AND TENANT.

———, enhancement of. *See* BENGAL TENANCY ACT, s. 30.

Res judicata. *See* CIVIL PROCEDURE CODE, s. 11; U. P. LAND REVENUE ACT, s. 233 K.

——— ——— *Company in liquidation—Contributories, settling list of—Question, whether can be re-opened.*

An order of a Court bringing the name of a person on the list of contributories if not appealed against, becomes final and operates as *res judicata* and the question as to the liability of such person as contributory cannot be re-opened. **P.** KANSHI RAM *v.* PESHAWAR BANK, LTD., IN LIQUIDATION, 4 P. L. R. 1915 **95**

——— ——— Court not actually deciding point **217**

——— ——— *Ejectment suit in Revenue Court—Question of proprietary title decided—Appeal not filed in Civil Court—Finality of decision—Subsequent suit in Civil Court, maintainability of.*

Where in an ejectment suit in a Revenue Court the defendants raise a plea of proprietary title and

Res judicata—concld.

the Revenue Court decides the question itself and the plaintiff fails to appeal to the District Judge, the decision of the Revenue Court becomes final and bars any subsequent suit in the Civil Court. **A.** SUNDAR KUNWAR *v.* DINA NATH, 13 A. L. J. 326; 37 A. 280 **432**

——— ——— Hindu Law—Debt—Decree against father—Liability of son—Sons at first impleaded as parties to suit but claims against them subsequently withdrawn—Effect of such withdrawal on sons' liability **593**

——— ——— ——— Matter directly and substantially in issue **580**

——— ——— ——— Putni Regulation (VIII of 1819), s 11—*Putni* tenure, sale of—Purchaser of *Putni* tenure, rights of—Encumbrance, adverse possession when—Avoidance of encumbrance—"Defaulting proprietor" in s. 11, meaning of—Bengal Tenancy Act (VIII of 1885), s. 10—Admission, admissibility of **173**

Restitution. *See* CIVIL PROCEDURE CODE, s. 144.

Resulting trust, whether can be implied—Deposit receipt, transfer of—Transferee becomes owner of the money mentioned therein **114**

Resumption. *See* GROVE.

——— ——— ——— by Government—Property given back to grantor—Grantor issuing *inam* deeds in favour of *mutwalli*—Inference **934**

——— ——— ——— **suits**—*Grantor and grantee, suit between—Mortgagee from grantee, whether necessary party—Mortgagee, if impleaded, right of.*

In resumption suits a mortgagee from the grantee is not a necessary party and is bound by the decision arrived at in such suits if the proceedings are fairly conducted between the grantor and the grantee; but where the proceedings are not fairly conducted between the grantor and the grantee, and the mortgagor impleads the mortgagee, the latter has the right to have his pleas fully heard and determined. **U. P. B. R.** MADARI LAL *v.* PAHALWAN SINGH, 2 O. L. J. 161 **440**

——— ——— ——— of *inam* by Sovereign—Courts, jurisdiction of **934**

Review—Limitation—Time spent in review, when allowed in calculating period for limitation in appeal **926**

———, order granting, when appealable—Grounds stated in r. 7, exhaustive—Appeal, entertainment of, without jurisdiction—Revision. **707**

Reversioner. *See* HINDU LAW.

Revision. *See* CRIMINAL PROCEDURE CODE, s. 439.

——— ——— Award—Limitation Act (IX of 1908), Sch. I, Art. 158—Objectons raised more than ten days after award is submitted—Notice of submission necessary—Civil Procedure Code (Act V of 1908), Sch. II, Para. 10—Court not properly disposing of objections to award **427**

——— ——— Civil cases—Second appeal treated as revision **282**

Revision—concld.

——— ——— Material irregularity **487**

——— ——— ——— Ruling, misapplication of, effect of—Material irregularity **919**

——— ——— Suit for money advanced in payment of goods to be delivered—No date fixed for delivery—Enquiry as to date of delivery **969**

Rival tenants. *See* OUDH RENT ACT, s. 108 (10).

Sale-deed of mortgagee rights—Consideration, whether mortgagor can question the passing of—Sale-deed, necessity not mentioned in, effect of **825**

Sale-proclamation *notifying charge on property, effect of—Sale subject to mortgage—Prior mortgagee, title of, to question validity of subsequent mortgagee—Vendee at Court-sale, right of, to contest validity of encumbrance on property sold—Evidence on both sides—Burden of proof—Court, duty of.*

The mere fact that notice of an alleged mortgage is given in the sale-proclamation, does not mean that the property is sold subject to that mortgage.

A prior mortgagee is entitled to contest the validity of a subsequent mortgage.

The vendee in a sale in execution has a right to contest the validity of the encumbrances with which the property sold is charged.

Where both parties adduce evidence upon a certain point, no question of burden of proof arises, and the Court has simply to decide that point on the whole evidence as lies before it. **O.** JAGDEI *v.* SOHAN LAL, 2 O. L. J. 140 **360**

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, s. 195.

Security. *See* CRIMINAL PROCEDURE CODE, s. 118.

Security for good behaviour. *See* CRIMINAL PROCEDURE CODE, s. 110.

——— ——— ——— offered not to be refused except after judicial inquiry **663**

——— **bond.** *See* CIVIL PROCEDURE CODE, O. 38, R. 1.

Secondary evidence. *See* EVIDENCE ACT, ss. 63, 91.

Secundum allegata et probata 921

Sedition. *See* PENAL CODE, s. 302.

Seditious intention—Truth of statement not sufficient justification **322**

Set-off—Suit by Official Liquidator for recovery of money due to Company—Defendant having money in fixed deposit **975**

Settlement decree, interpretation of **929**

——— ——— **papers,** *entries in, whether correct—Presumption.*

The entries in the present Settlement papers must be presumed to be correct until the contrary is proved **U. P. B. R.** PIAREY LAL *v.* BABBAN LAL, 2 O. L. J. 127 **239**

Share-holder. *See* COMPANIES ACT, 1882, s. 58; COMPANIES ACT, 1913, s. 184.

———, right of. *See* COMPANIES ACT (VI OF 1882), s. 160.

Sonthal Parganas Regulation (III of 1872), ss. 14, 25A—*Policy of Regulation—Record of Rights—Conclusive proof—Civil Court, jurisdiction of, to contest entries—Limitation—Limitation Act (IX of 1908), s. 29, scope of—Minor, position of, under the Regulation.*

The policy of Regulation III of 1872 is to have a complete Record of Rights and interests in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters.

Under section 25A of the Regulation a suit to contest the Record of Rights will lie only if it is brought within three years of the date of the publication of Record of Rights and if only the rights of *zemindars* and other proprietors as between themselves are concerned.

Therefore a suit for partition brought three years after the date of publication of the Record of Rights is barred.

The Limitation Act (IX of 1908) though applicable to the Sonthal Parganas does not affect the three years' rule under section 25A of Regulation III of 1872 as section 29 of the Limitation Act saves all provisions of local laws as to limitation.

The Regulation III of 1872 does not make any exception in favour of minors and the minority provisions of the general Limitation Act have reference to the periods of limitation prescribed in that Act.

A notice under section 14 of the Regulation is to the people of the village irrespective of age or intelligence and as the law makes the Record of Rights conclusive proof of the rights and interests therein recorded, a party whose name is recorded therein has no onus to prove the service of the required notices. **C.** SHANKER PROSAD JHA *v.* BABU LAL JHA, 19 C. W. N. 499 **241**

Specific Relief Act (I of 1877), s. 9—*Appeal against order passed in execution not competent—Execution of decree—Limitation—Time spent in revision applied for by judgment-debtor, whether to be allowed in extending period of limitation for execution—Revision—Civil cases — Second appeal treated as revision.*

The plaintiff obtained a decree under section 9 of the Specific Relief Act. He applied for execution of the decree but allowed his application to be consigned to the Record Room probably influenced by the pendency in the Chief Court of a petition for revision filed by the defendant against the decree. After the application was rejected, the plaintiff applied again for execution of the decree. The period of limitation for execution had expired but the application was granted allowing the period during which application for revision against the decree was pending in the Chief Court. The defendant's appeal against the order allowing execution was dismissed:

Held, (1) that having regard to provisions of section 9 of the Specific Relief Act the order passed in execution was not appealable;

(2) that the period spent in revision proceedings in the Chief Court could not be allowed in extending the period of limitation for execution.

Revision is competent when a ruling has been misapplied owing to imperfect understanding of its circumstances. **P.** MOHFUZ ALI *v.* BIRJI NAND KERAT, 45 P. L. R. 1915 **282**

——————— **s. 9,** claim for mesne profits, whether to be joined in suit under **1**

Specific Relief Act—contd.

——————— **s. 9,** *object of—Main question for determination under s. 9—Joint possession, whether can be physically restored.*

The object of section 9 of the Specific Relief Act is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed of it against his will and consent.

Under section 9 of the Specific Relief Act, the main question for determination is whether the plaintiff while in physical possession of property has been dispossessed of the same in the manner and within the time specified in the section.

A man in joint possession of immoveable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the whole, and such joint possession can as well be physically restored in respect of his share as the possession of the whole can be restored to the entire body of co-sharers. **C.** AJIMAN BIBI *v.* REASAT SHEIKH, 19 C. W. N. 1117 **570**

——————— **s. 9,** *scope of — Land, possession of—Court, jurisdiction of—House built, if can be removed.*

An order under section 9 of the Specific Relief Act which allows the plaintiff to remove the house built on land by the defendant, is beyond the jurisdiction of a Court under the section inasmuch as under that section a Court cannot do more than make an order with respect to possession of the land **C.** RAHMATULLA *v.* MOFIZULLA **472**

——————— **s. 39** **138**

——————— **s. 39**—*Coercion, contract through—Plea, whether supported by suspicion or mere probability*—Secundum allegata et probata—*Procedure—Substantial error—Findings of fact—Second appeal—High Court, power of, to interfere.*

A suspicion or mere probability is not sufficient to support a plea of coercion quite apart from the consideration that it is not *secundum allegata et probata*, but depends upon other circumstances coupled with doubts entertained as to the veracity of the defendant.

Where there is substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law, the High Court is entitled in second appeal to reverse such a finding.

Per *Beaman, J.*—Where the fraud or the coercion alleged must, by law, be supported by particulars, it is only after the due proof and establishment of those particulars that the Court can find as a fact that the alleged fraud or coercion is proved. It is not open to a Court to give the go-by to every material particular alleged and yet to reach the conclusion which ought only to be reached by those steps. **B.** PURUSHOTTAM DAJI MANDLIK *v.* PANDURANG CHINTAMAN, 17 BOM. L. R. 157; 39 B. 149 **921**

——————— **s. 42**—*Suit for declaration of title—Property in possession of Court of Wards for lawful claimant—Suit, whether maintainable.*

Where the Court of Wards is in possession of a certain property on behalf of the person who might establish his title to it, a suit for declaration of title by a claimant as against several other claimants to

S. N. DAR, B.A., LL.B.
Vakil High Court,
SRINAGAR (Kashmir)

Specific Relief Act—concld.

the property is not barred by section 42 of the Specific Relief Act. **A.** JAGARNATH GIR *v.* TIRGUNA NAND, 13 A. L. J. 252 **139**

——— ——— ——— **s. 55** **169**

Specific performance *of contract to grant a permanent lease—Civil Procedure Code (Act XIV of 1882), s. 375—Registration Act (III of 1877), ss. 3, 17, 47—Lease, meaning of—Compulsory registration—Unregistered deed, admissibility in evidence of—Petition of compromise, how far admissible in evidence—Conveyance, effect of—Lands not assessed by Government, effect of—Consideration—Court's duty.*

Per *Mookerjee, J.*—Under section 375 of the Code of Civil Procedure the Court has jurisdiction to pass a decree in accordance with a compromise only in so far as it relates to the subject-matter of the suit; and its decree is final only to that extent.

Under section 3 of the Registration Act, 1877, the term 'lease' includes an agreement to lease, and under section 17 clause (*d*), an agreement to grant a lease of immoveable property for any term exceeding one year is compulsorily registrable.

Neither clause (*h*) nor clause (*i*) affects cases under clause (*d*) as they apply only to cases under clauses (*b*) and (*c*) of section 17 of the Registration Act.

In a suit for specific performance of a contract to grant a lease, an unregistered deed containing the alleged agreement is admissible in evidence to prove the contract for the breach of which the suit is brought.

A petition of compromise which embodies the terms of the agreement to lease or the decree which recites the terms of the compromise can be received in evidence in proof of the agreement to lease.

The mere fact that the Government has not assessed any revenue on the lands (which were found to be re-formation and not accretion) does not entitle the defendant to claim rent at a higher rate than usual.

Per *Beachcroft, J.*—Where the petition of compromise embodying the terms of the agreement to lease, is not considered by the Court to be an agreement to lease:

Held, that section 49 of the Registration Act can have no application.

Where the promise to give a lease of the land which was the subject-matter of a previous suit was part of the consideration to the Company for consenting to a decree in a later suit:

Held, that the decree was equally admissible in evidence and the Court was bound to record the whole of the terms of the compromise.

The documents referred to in clauses (*e*) to (*u*) of section 17 of the Indian Registration Act are excepted only from the provisions of clauses (*b*) and (*c*), and not from the provisions of clauses (*a*) and (*d*). **C.** HEMANTA KUMARI DEBI *v.* MIDNAPUR ZEMINDARI CO., 19 C. W. N. 347; 22 C. L. J. 44 **879**

Stamp Act (II of 1899), s. 2 (22) **300**

——— ——— **s. 4**—*Settlement—Duty to be imposed.*

Where the two brothers *T* and *S*, to settle a dispute between them, executed two instruments, one a deed of gift whereby *T* conveyed all his property to *S* and another by which *S* undertook to maintain *T* during his life:

Stamp Act—concld.

Held, that the two instruments together were one transaction within the meaning of the word "settlement" in section 4 of the Stamp Act and were chargeable with the stamp duty in accordance with that section. **A.** MAHARAJ SOMESHAR DUT, *In the matter of*, 13 A. L. J. 335; 37 A. 264 **348**

——— ——— **s. 35** **300**

——— ——— **Sch. I, Arts. 13, 49** **300**

——— ——— ——— **art. 35**—*Lease reserving rent and Government assessment—Stamp to be paid only on amount of rent.*

In the case of a lease containing a stipulation regarding the payment by the lessee to the lessor of Government assessment, etc., for its eventual payment by the lessor to the Government, stamp duty should be calculated only on the amount of rent reserved and not also on Government assessment. **B.** GANGARAM NARAYANDAS TELI, *In re*, 17 BOM. L. R. 320 **584**

Step-in-aid of execution. *See* LIMITATION ACT, 1908, SCH. I, ART. 182 (5).

Submersion—Possession—Presumption **426**

Subrogation. *See* MORTGAGE.

Substitution, doctrine of **232**

Succession. *See* CUSTOM.

Succession Act (X of 1865), ss. 72, 80, 106 **481**

Succession Certificate, filing of, in appeal **383**

Succession Certificate Act (VII of 1889), s. 4—*Succession and survivorship—Joint Hindu family debt—Certificate, if required—Promissory note in favour of a member of the family makes no distinction—Opportunity to be given for production of certificate.*

In Hindu Law there is a clearly marked distinction between succession and devolution by survivorship, and as the succession certificate is designed to facilitate the collection of debts on succession, *prima facie* the cases of survivorship are not within the ambit of the Act.

The fact that a debt is due upon a promissory note in favour of a member of a joint Hindu family does not make any difference in the construction of section 4 of the Act. In all such cases the question is whether the moneys sought to be recovered were advanced from joint funds, or were the individual earnings of the person in whose favour the document was executed.

There is nothing in the Succession Certificate Act to countenance the view that upon the face of the document the debt should appear to belong to the family.

On taking evidence if it appears that the moneys were not advanced from the funds of the joint family, the Court should give the plaintiff an opportunity of producing a succession certificate within a reasonable time, and then pass a final judgment in the case. **M.** PICHAIKUTTIA PILLAI *v.* RENGANADAN, 20 M. L. J. 323; 17 M. L. T. 264 **490**

——— ——— ——— ——— **s. 9**—*Application for certificate by Hindu widow—Opposition by husband's divided brother—Security, if should be furnished.*

Succession Certificate Act—concld.

Under section 9 of the Succession Certificate Act, VII of 1889, it is not obligatory on Courts to demand security whenever a Hindu widow applies for the grant of a certificate to her. **M.** CHINNASAWMI CHETTIAR *v.* PONNA AMMAL, 2 L. W. 352 **638**

Succession (Property Protection) Act (XIX of 1841), ss. 3, 4, 5—*Appointment of Curator, necessary conditions for—Pocedure.*

The necessary conditions subject to which a Curator to be appointed are that:

(*i*) there must be an application and an examination as directed in section 3;

(*ii*) the Judge must be in a position to say upon such application and examination that danger is to be apprehended of misappropriation or waste of the property before the summary suit can be determined; and

(*iii*) the delay in obtaining security from the party in possession or its insufficiency must be likely to expose the party out of possession to considerable risk.

Where, therefore, there was no clear finding that the danger of misappropriation was really to be apprehended and the petitioner was never asked to give security:

Held, that the District Judge had acted with material irregularity in passing an order for the appointment of a Curator. **P.** MADAN GOPAL *v.* NARBADA, 11 P. R. 1915 **248**

——— ——— ——— **ss. 4, 5** **248**

Suit for declaration that decree passed against plaintiff is not binding on him—Consequential relief—Court bound to accept valuation put by plaintiff—*Ad valorem* Court-fee **79**

——— for declaration of title—Property in possession of Court of Wards for lawful claimant—Suit, whether maintainable **139**

——— by *lambardar* against *malikan-i-qabza* for value of tree—Civil and Revenue Court—Jurisdiction **919**

——— for money advanced in payment of goods to be delivered—No date fixed for delivery—Enquiry as to date of delivery—Revision **970**

——— to redeem mortgage—Amount due under mortgage determines jurisdiction—Lower Court erroneously putting higher value—High Court, power of, to revise **624**

——— by reversioner for declaration that certain alienation was not binding, withdrawal of, without permission—Fresh suit for possession, whether maintainable **91**

——— for right to collect Government Revenue—*Inam* land—Certificate—Pensions Act (XXIII of 1871), s. 6 **934**

Suits Valuation Act (VII of 1887), s. 8 **624**

Surety—*Bail, person giving—Contract with third person to be indemnified—Forfeiture—Contract, whether legal.*

It is essential that the person giving bail should be interested in looking after and, if necessary, exercising the legal powers he has, to prevent the accused from disappearing. This is essential for the protection of the public and anything that tends to prevent or hinder his so doing is illegal.

Surety—concld.

It is illegal for a surety to contract with a third person to be indemnified in case of forfeiture and he cannot, therefore, escape his liability. **C.** PROSONNO KUMAR *v.* PROKASH CHANDRA DUTTA, 19 C. W. N. 329 **560**

——— *of Receiver—Extent of liability—Principle—Test—Surety's remedy.*

The surety for a Receiver is liable to the payment of interest on balance improperly retained by him as also for the costs of proceedings in Court necessarily or properly incurred in consequence of the Receiver's default, such as the costs of a proceeding to take accounts, of an attachment for failure to account, of an application for his discharge and for the appointment of another person in his place, and of any proceedings taken to enforce the recognizance

The principle is that the liability of a surety upon the bond of a Receiver conditioned for the due discharge of his duties is limited to cases of a violation of those duties which may properly be said to be within the scope of his appointment as Receiver, in other words, the surety is responsible only in respect of liability incurred by the Receiver in his capacity as Receiver. To determine, whether a particular liability has been incurred by the Receiver in his capacity as Receiver, the test to be applied is, could the Receiver be made accountable in that respect in the account proceedings. If he could not, the surety is not liable; if he could be held liable in that proceeding as Receiver, the surety is liable.

A surety, after satisfying the claim against the Receiver, is entitled to stand in the place of the Receiver to the extent of the payment made by him and to re-imburse himself from the sums ordered to be paid to the Receiver. **C.** RASHMANI DASI *v.* BARODA KANT SARKAR, 20 C. L. J. 123 **31**

——— Security for good behaviour, object of—Surety, rejection of—Grounds—Enquiry, whether can be delegated—Reference to Sessions Court **721**

Tank, *village, let for cultivation of water-nuts—Tank, whether land—Cultivator, whether tenant.*

A village tank which is let for the cultivation of water-nuts is not "land let or occupied for agricultural purposes or for purposes subservient to agriculture" within the meaning of these terms in the Central Provinces Tenancy Act, and, therefore, no cultivator of such nuts is a tenant as defined in that enactment. **N.** BATTOO *v.* NARAIN PRASAD, 11 N. L. R. 49 **869**

Tazia *placed at a place by mutual consent—No absolute right acquired.*

Where a *tazia* was placed on a particular land for many years by mutual consent of both the Hindu and the Muhammadan population of the locality, no absolute right was thereby created to put the *tazia* on that land. **A.** BACHCHA *v.* SHIAM LAL, 13 A. L. J. 209 **622**

Temple. *See* HINDU LAW.

——— Election — Triplicane temple scheme — General bribery—General personation—Illiterate voters, signature by—Invalidity of election **612**

——— Mirasi *office—Worship, right of—Right to form* Vedic goshti *before and behind—Interference by other sects—Rights in Conjeevaram temple.*

Only one *mantram* can be recited in a temple on all

Temple—concld.

occasions in which the *puja* ceremony is performed and that by the *mirasdars*. Recital of a different *mantram* or *prabandham* during any ceremonial worship or by any *goshti* would be performance of the duties of the office of *mirasdars*. Any interference in the *puja* from its commencement with the ringing of the bells to its close with the distribution of the *theertham* and *prasadam*, is a violation of this *mirasi* right.

The different steps in the course of *puja* discussed.

There is nothing in law to prevent any sect worshipping the deity consistently with the equal rights of other worshippers, nor is there anything in law to prevent any worshipper from repeating any portion of the *prabandham* separately and as an act of personal devotion. The question whether any individual may repeat any particular *mantram* or portion of the *prabandham* is one not for the Civil Courts to decide. The right of any individual worshipper to worship the deity without interfering with others by the recital of any appropriate *mantrams* or *prabandhams* in a temple is very different from the right to form a *goshti* or congregation of his own sect and recite anything different from the *prabandhams* which are recited by the *mirasdars*.

All sects are entitled to use the public streets for processions.

During a procession other sects than the *mirasdars* are not entitled to interfere with it and carry on a different worship. Recital of *prabandhams* and *mantrams* in front of the idol can only be intended as a worship of the idol.

In the Conjeevaram temple the *Vedic goshti* behind is composed of Vadagalai *mirasdars* and the Thengalais can only join as ordinary worshippers. The Tengalais form the *prabandham goshti* reciting their *mantrams* before the idol and the Vadagalais are entitled to join only as ordinary worshippers. **M.** TIRUMALAI EACHAMBADI *v.* ROYADURGAM KRISHNASAMI, (1915) M. W. N. 281 **604**

Temple Committee. *See* RELIGIOUS ENDOWMENTS ACT, s. 3.

Tenancy-in-common — Joint tenancy—Distinction **561**

Tenant, permanent—Right to cut trees planted by himself **140**

Tenants at fixed rates, status of. *See* BENGAL TENANCY ACT, s. 105.

Thakorate of Gamph. *See* CUSTOM.

Thumb Impression—Appellate Court acting on report of Thumb Impression Bureau—Illegality—Evidence **132**

Tort—Law applicable to torts in India **394**

Tortious act, liability for—Damages, measure of **1**

Tout, admission of a person as, whether sufficient to declare him as such **918**

Transfer. *See* CRIMINAL PROCEDURE CODE, s. 528.

Transfer of Property Act (IV of 1882) **599**

——— ——— ———, applicability of, to tenancy under Bengal Tenancy Act **267**

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——— ——— ——— **s. 6 (a)**—Income, uncertain and indefinite, whether transferable **675**

——— ——— ——— **ss. 8, 36, 44, 52, 73,** application of, to execution sales—Substitution, doctrine of **232**

——— ——— ——— **s. 10**—*Lease—Condition that lessee shall have no right to transfer his interest, validity of—Assignee, right of.*

A condition in a lease that the lessee has no right to transfer his lease is one intended for the benefit of the lessor and is, therefore, not invalid under section 10 of the Transfer of Property Act.

An assignee from such a lessee obtains no rights. **M.** JACKI MINEZES *v.* VENKATRAMANA KAMTHI **904**

——— ——— ——— **s. 14**—*Perpetuities, rule against, when applicable—Interest in land—Agreement to sell, if within the rule.*

The rule against perpetuities is applicable only in reference to an attempt to create an interest in land.

No interest in land is created by an agreement to sell the land, still less by reason of there being a possible claim to have an agreement for sale specifically enforced as against a transferee with notice of the agreement and, therefore, such an agreement is not within the rule against perpetuities. **M.** AVULA CHARAMUDI *v.* MARRIBOYINA RAGHAVULU, 28 M. L. J. 471; 18 M L. T. 76; (1915) M. W. N. 596 **871**

——— ——— ——— **ss. 36, 44** **232**

——— ——— ——— **s. 51** **51**

——— ——— ——— **s. 51**—Improvements—Compensation, right of **840**

——— ——— ——— **s. 52** **232**

——— ——— ——— **s. 54**—*Contract of sale unregistered, whether creates interest — Possession delivered, effect of—Suit for possession—Contract, if can be pleaded—Interpretation of Statute—Express words of Statute, whether overriden by equitable principles.*

Under section 54 of the Transfer of Property Act, a contract of sale, followed by delivery of possession, does not, when there is no registered sale, create any interest in the property agreed to be sold, and therefore, cannot even if enforceable at the date of suit or decree, be pleaded in defence to an action for ejectment by a person having a legal title to recover.

The express words of an Indian Statute are not to be overriden by reference to equitable principles which may have been adopted in the English Courts. **B.** TIMANGOWDA VENKANGOWDA *v.* BENEPGOWDA CHHENAPGOWDA, 17 BOM. L. R. 335 **946**

——— ——— ——— **ss. 54, 60**—*Registration—Restriction on redemption—Revenue Surveyor's register—Custom of reporting mortgages as sales.*

Mortgages are frequently reported as sales in Revenue Surveyor's register in Burma.

Under section 54 of the Transfer of Property Act a mortgage or sale of a property of the value of one hundred rupees and upwards should be effected by registration. A stipulation restricting the period of redemption should be treated by the Courts as inoperative, according to the equitable principles embodied in section 60 of the Transfer of Property Act. **L. B.** MA NYEIN *v.* KADERSAN CHETTY **264**

Transfer of Property Act—contd.

——— ——— **s. 56,** scope of—Marshalling **49**

——— ——— **s. 59** **422**

——— ——— **s. 60** **264**

——— ——— **ss. 60, 70**—*Mortgagor and mortgagee—Usufructuary mortgage—Consideration, portion of, unpaid—Unregistered letter passed, undertaking to give credit for interest, admissibility of—Registration Act (XVI of* 1908), *s.* 49—*Mortgagee admitting non-payment but contending that separate suit ought to be brought—Plea, if valid—Decree, if to be given for full amount of mortgage—Litigation expenses, liability for—Burden of proof.*

Where a portion of the consideration for a usufructuary mortgage-deed for 10 years, execute d by the plaintiff to defendants Nos. 1 and 2 and their deceased undivided elder brother *G*, remained unpaid and where at the time of the registration of the said document, *G* passed an unregistered letter to the plaintiff whereby he undertook to pay the said balance in 10 days and in case of default to pay interest on the same at 1 per cent. per mensem and give credit to this interest till the mortgage-bond remained undischarged; and where on failure of *G* or defendants Nos. 1 and 2 to pay the said sum, the plaintiff instituted a suit after the expiry of the 10 years, for redemption of the mortgage and for accounts and the defendants contended that they were entitled to be paid the full amount of the mortgage without deducting the amount mentioned as unpaid in the letter, which was inadmissible in evidence for want of registration, leaving the plaintiff to bring a separate suit for the amount:

Held, that the letter was not admissible in evidence to modify the terms of the mortgage-deed; that though the transaction covered by the letter was independent of the mortgage and the plaintiff was entitled to institute a separate suit for the recovery of any amounts that may be due under it yet the defendants were not entitled on that ground to claim that they must be paid the full amount of their mortgage without that sum being deducted.

Held, further, that it was the duty of the mortgagees to prove the exact amount of expenses incurred by them in carrying on litigation connected with the property mortgaged if they insisted to recover them from the mortgagor and that in the absence of any evidence to show what those expenses were they were not entitled to be given credit for any amount, even though it might appear that they were put to some expense.
M. ALLAMSETTI APPALA SURYANARAYANA *v.* PEELEEKHANA VENKATASIVA RAO, 2 L. W. 224 **186**

——— ——— **s. 70** **186**

——— ——— **s. 72**—*Hypothecation of animals—Offspring of animals—Accessions*—Fructus.

The rights of a person in whose favour a hypothec is made of a chattel are limited strictly to the actual chattel hypothecated and do not extend beyond that.

Where, therefore, the plaintiffs purchased a number of goats, sheep and camels on behalf of themselves and the judgment-debtors and it was agreed that the parties were to be joint owners of the animals and their offspring, and the animals belonging to the judgment-debtors were to be deemed to be hypothecated to the plaintiffs as security for the re-payment of money advanced by plaintiffs for the purchase, but no provision was made for the hypothecation of such of the offspring as might fall to the share of the judgment-debtors:

Held, that the young of animals were not mere accessions to the latter but were *fructus* and could not, therefore, be made subject to the hypothecation.
P. JOT SINGH *v.* AMIR CHAND, 10 P. R. 1915 **230**

——— ——— **s. 73** **232, 571**

——— ——— **s. 89** **211**

——— ——— **s. 95**—*Mortgagor allowed to redeem in part—Contract—Integrity of mortgage, if broken—Co-heirs redeeming a mortgage—Charge—Dispossession by other co-heirs—Suit for possession, maintainability of.*

Where a mortgage-deed provides that the mortgagor might redeem any portion of the property upon payment of a proportionate part of the debt and some of the heirs of the mortgagor redeem their share in the property, the integrity of the mortgage is not broken up.

One of the co-heirs of a mortgagor who, being a person interested in the mortgaged property, pays off the mortgage-money and redeems the property, is entitled to possession of the property, and the other co-heirs cannot defeat the charge he thereby acquires on the property under section 95 of the Transfer of Property Act by keeping him out of possession.
A. SHAFAAT-ULLAH *v.* IZZAT-ULLAH, 13 A. L. J. 372 **677**

——— ——— **s. 106** **568**

——— ——— **s. 108 (h)**—*Permanent tenant—Right to cut trees planted by himself.*

A permanent tenant who has planted trees upon his lands is entitled to cut them down and use them.
B. SITABAI RAGHUNATH KARMAKAR *v.* SHAMBHU SONU GAJANA, 16 BOM. L. R. 595; 38 B. 716 **140**

——— ——— **s. 111**—Land let out on *purakudi* service—Tenancy, determination of **915**

——— ——— **s. 111 (d), (f)** **314**

——— ——— **s. 116** **252**

——— ——— **s. 130**—*Deposit receipt, transfer of—Transferee becomes owner of the money mentioned therein—Resulting trust, whether can be implied—Trusts Act (II of* 1882), *s.* 81.

A deposit receipt is not a negotiable instrument which passes either by delivery or by indorsement, but where the money mentioned in the receipt is immediately payable and the receipt is presented duly indorsed together with an order to pay a given individual, that individual becomes the owner of the money upon payment by the banker or his promise to hold it at the disposal of the payee.

Where, therefore, *W* who had a fixed deposit of Rs. 10,500 falling due on the 7th August 1912 sent on that date the receipt duly indorsed with a letter to the Bank asking them to hand over the amount to his nephew (the defendant) and the defendant drew the interest and Rs. 500 out of the principal and deposited the balance Rs. 10,000 in his own name,

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on a suit by the heirs of W on his death for a declaration that the amount of Rs. 10,000 formed part of W's estate:

Held, (1) that the plaint was defective as it did not show that the plaintiff had obtained Letters of Administration and should on that account have been rejected on presentation;

(2) that the defendant became the absolute owner of the money secured by the existing receipt;

(3) that there was no resulting trust in favour of the plaintiff. **B.** SETHNA *v.* GRACE EDITH HEMMINGWAY, 16 BOM. L. R. 534; 38 B. 618 **114**

Tree—*Branches overhanging neighbour's house, right to remove.*

A party has a right to the removal of the branches of a tree, which overhang his house. **A.** DEODUTT PANDEY *v.* KAULESHAR DUBE **843**

Trees, whether moveable or immoveable property **180**

——, right of tenant to transfer **352**

Trespass—Projections over another's land, when amount to trespass—Remedy in case of trespass—Specific Relief Act (I of 1877), s. 55—Injunction, grant of **169**

Trust—Estoppel—Conduct of trustees **840**

——*Management—Application for alteration of existing scheme—Grounds.*

An application to alter a scheme of management under which the affairs of a temple are administered even if based on grounds of malversation, should, unless accompanied by a fresh scheme to prevent such malversation, be dismissed. The mere fact that some mismanagement has resulted through the misconduct of the Committee members and the trustees, is not a ground to modify a scheme which contains provisions which if properly worked are sufficient to protect the interests of the trusts. **M.** NAMBURI VENKATARAMA CHETTY *v.* VEMUR THIRUVENGADATHAN CHETTY **479**

——, *religious—Permanent lease, whether valid—Custom, validity of—Transfer of Property Act (IV of 1882), s. 51—Improvements—Compensation, right of—Estoppel—Trust—Conduct of trustees.*

The permanent lease of a religious trust property which is neither necessary nor beneficial to the trust, is beyond the power of a trustee and a custom which would give him this right, is not a valid custom.

The right to claim compensation for improvements under section 51, Transfer of Property Act, exists only in favour of a person who makes improvements believing that he is absolutely entitled to the property and not in favour of one who merely believes he has got a permanent right of occupancy in it for building purposes.

A religious trust will not be estopped by any act or conduct of its trustee committed in breach of trust. **M.** PERUMAL GRAMANI *v.* MAHAMAD KASIM SAHIB **840**

——, verbal, whether valid **205**

Trustee. *See* RELIGIOUS ENDOWMENTS ACT, s. 3.

Trusts Act (II of 1882), s. 81 **114**

Undue influence. *See* CONTRACT ACT, s. 16.

U. P. Land Revenue Act (III of 1901), s. 118—*Partition—Site of house belonging to one co-sharer given to another—Step to get rent fixed not taken—Owner of site, right of.*

Where the site of a house belonging to one co-sharer is given to another co-sharer at the time of partition and no step is taken under section 118 of the U. P. Land Revenue Act to enable the occupier of the house to retain possession of the house on payment of rent, the co-sharer to whom it is allotted at the partition can recover possession of the site by removal of the materials of the house. **A.** RAMJAS MAL *v.* ZAHARYA SINGH **358**

—— **s. 233K**—*Partition—Subsequent suit claiming a share, allotted at partition, by inheritance*—Res judicata.

A suit in which the plaintiff claims to have become entitled, by inheritance as reversionary heir, to a share which had been dealt with in a particular way at a partition, is not barred by section 233K of the U. P. Land Revenue Act III of 1901. **A.** MANORATH CHOUBE *v.* SUMERA **454**

"Vilaku" money, nature of **8**

Village headman. *See* MADRAS HEREDITARY VILLAGE OFFICES ACT, s. 13.

Vrittis—*Alienation, when permissible.*

The general rule is against the alienability of *vrittis*. They may only be alienated in special cases and under special conditions, provided that such alienations can be supported by local usage and custom. **B.** MANJUNATH SUBRAYABHAT *v.* SHANKAR MANJAYA, 16 BOM. L. R. 593; 39 B. 26 **139**

Waiver—Declaration of intention to acquire a part—Owner's desire that the whole should be taken—Fresh notification necessary **489**

——Forfeiture—Acceptance of rent without protest **343**

Wajib-ul-arz. *See* PRE-EMPTION.

——, *entries in, interpretation of—Attestation of entries by landlord alone, effect of—*Muafidar, *whether bound by entries.*

The entries in a *Wajib-ul-arz* attested by the landlord alone and not by the *muafidar* are not binding on the latter. **U. P. B. R.** RAUSHAN ZAMAN KHAN *v.* RAMA NAND MISRA, 2 O. L. J. 121 **229**

——, evidentiary value of **34**

Waqf property. *See* MUHAMMADAN LAW.

——Will—Private family matter—Administrator and trustee—Scheme under section 92, Civil Procedure Code, when to be settled—Accounts, direction for **116**

Widow. *See* BUDDHIST LAW; HINDU LAW.

Will. *See* CONSTRUCTION OF WILL; PROBATE.

——, interpretation of **217**

—— disposing of joint Hindu family property in family of survivors—Probate—Duty payable—Party, whether can go behind Will **473**

——*Legatee not in existence at death of testator—Construction—Intention—Life-estate to daughter—Gift over to cousins failing male issue to daughter.*

Will—contd.

In construing Wills the Courts must look at and give effect to the intention of the testator.

Where a Will gave first a life-estate to the testator's widow and on her death a life-estate to his daughter and further provided that in the event of the daughter having a male child he was to take the whole estate of the testator on attaining the age of 18 and that the testator's cousins, who were appointed general executors of the Will and also trustees for the minor son of the testator's daughter, were to get the estate absolutely should the daughter die without male issue:

Held, that the dominant intention of the testator after providing a suitable life-estate for his widow was to give the whole of his property to his grandson and in the event of that being defeated, his intention was to retain the estate in his own family, and, therefore, the daughter could not get the estate absolutely. **B.** NARANDAS VRIJBHUKHANDAS *v.* BAI SARASWATI, 16 BOM. L. R. 577; 38 B. 697 **130**

—— Mofussil Will—Joint executors—One executor taking Probate—Another executor, if disentitled to act without Probate—Executor, if can renounce for consideration—Compromise between co-executors, if valid—Retainer, executor's right of, if exists even though claim is barred **221**

—— to be considered independent of Probate **972**

——, *Probate of, revocation of—Knowledge, acquiescence and lapse of time, whether bar to Probate proceeding—Application to be made* bona fide.

In a proceeding to set aside a Probate, where knowledge, acquiescence and lapse of time are shown, the petitioner must give some reasonable and true explanation of the delay, or in other words the application must be made *bona fide*, before it can succeed. **C.** MANORAMA CHOWDHURANI *v.* SOSHI MOHAN DAS, 19 C. W. N. 366; 42 C. 480 **886**

——*Probate, application for—Order refusing to allow caveator to oppose grant of probate, appeal from—Hindu Law—Maintenance—Widowed daughter-in-law of predeceased son, right of, to oppose probate of Will of her father-in-law in favour of his daughter—Maintenance, right of, if enforced against devisee—Civil Procedure Code (Act V of* 1908), *s.* 115.

An order refusing to allow a caveator to oppose the grant of probate of a Will on the ground that he has no interest sufficient to enable him to appear in proceedings on an application for probate, is an order refusing to make the caveator a party to the proceedings and is, therefore, not appealable.

A Will executed in favour of a widowed daughter of the testator, who was not a heiress, provided that all the properties should be sold a certain sum should be paid to the widowed daughter-in-law of the testator and certain other sums to two other persons, and the whole of the balance should be appropriated by the daughter. The daughter entered into an agreement to sell the property and applied for probate of the Will:

Held, that under the circumstances the Will seriously affected the interest of maintenance of the widowed daughter-in-law and that she had sufficient interest to oppose the grant.

Will—concld.

Upon the death of a son, the father has no legal obligation to maintain his daughter-in-law except under certain circumstances. His obligation is merely a moral or an imperfect obligation, which, however, ripens into a legal obligation on the part of the heir who gets his estate after his death.

A daughter-in-law can legally enforce her right to maintenance as against the heir in possession of the estate of her father-in-law. **C.** INDUBALA DASI *v.* PANCHUMANI DASI, 21 C. L. J. 292; 19 C. W. N. 1169 **578**

—— *Terms approved by testator—Document need not be read at the time of signing—Sound disposing mind.*

Where the testator approves of the terms embodied by his legal adviser in the final Will, it is not necessary that it should be read out to him when he affixes his signature to it.

It is necessary for the validity of a Will that the testator should have a sound disposing mind, that is, sufficient capacity to deal with and appreciate the various dispositions of property to which he is about to affix his signature. **M.** NAMBERUMAL CHETTY *v.* PASUMARTY KANNIA CHETTY **959**

—— *Waqf*—Private family matter—Administrator and trustee—Scheme under section 92, when to be settled—Accounts, direction for **116**

Withdrawal of suit. *See* CIVIL PROCEDURE CODE, O. XXIII, R. 1.

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Writ of possession, *execution of—Presidency Small Cause Courts Act (XV of 1882), ss. 41, 43—Forcible removal, bailiff's power of—Civil Procedure Code (Act V of 1908), O. XXI, r. 35—Hurt—Findings, nature of—Graver charges failing, smaller ones how far sustainable.*

Under the provisions of either the English Common Law or the Code of Civil Procedure a reasonable degree of force may be used in the execution of a writ of possession in order to the removal of persons bound by the decree and refusing to vacate.

In a writ of possession the order to "give possession" authorises and requires the removal by bailiff of all persons from off the premises by force if need be.

A Magistrate should come to a definite finding free from ambiguity and he should omit from his judgment what is mere conjecture following the principle that to say that a thing may possibly have happened is not to find that it did happen.

In a criminal case the witnesses having been disbelieved with regard to the graver charges brought against the accused, cannot be safely believed with regard to the small residuum of what the Magistrate conceives to be truth.

The procedure followed in the Small Cause Court and in the Courts of the Presidency Magistrates commented upon. **C.** H. MEREDITH *v.* SANJIBANI DASSI, 19 C. W. N. 273; 16 CR. L. J. 424 **1000**

INDIAN CASES.

1915.

VOLUME XXVIII.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2007 TO 2009 OF 1913.

December 2, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

THAVASI AND OTHERS—DEFENDANTS—APPELLANTS IN ALL

versus

IN S. A. NO. 2007 OF 1913

ARUMUGAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN S. A. NO. 2008 OF 1913

MUTHUKARUPPAYEE ATHAL—PLAINTIFF—RESPONDENT.

IN S. A. NO. 2009 OF 1913

VALATHAL—PLAINTIFF—RESPONDENT.

Mesne profits, suit for—Tortious act, liability for—Damages, measure of—Possessory suit, claim for mesne profits in, not allowed—Fresh suit for mesne profits, whether barred—Res judicata—*Cause of action—Civil Procedure Code (Act V of* 1908), *s.* 11 *Expl. V; O. II, r.* 2—*Specific Relief Act (I of* 1877), *s.* 9.

A plaintiff is entitled to recover the loss sustained by him through the defendant's tortious acts of having kept him out of possession of a certain land. The damage sustained in such a case is the profit which the plaintiff would have naturally got from the land if the land had not been wrongfully retained by the defendant in the beginning of the cultivation year. [p. 3, col. 2.]

A claim for mesne profits ought not to be made in a suit for possession under section 9 of the Specific Relief Act, as the question of title cannot be directly decided in such a suit and, therefore, a relief which depends upon title, considered apart from possession, cannot be given in such a suit. [p. 4, col. 1.]

The words "relief claimed in the plaint" in Explanation V to section 11 of the Civil Procedure Code, 1908, do not include a relief which, though claimed in the plaint, cannot be granted as of right, assuming the defence fails. [p. 4. col. 1.]

Therefore, a claim for mesne profits claimed in a former possessory suit but not allowed is not barred either by section 11 or Order II, rule 2, of the Civil Procedure Code. [p. 4, col. 2.]

Sheo Kumar v. *Narain Das*, 24 A. 501; A. W. N. (1902) 139; *Tilak Chandra Dass* v. *Fatik Chandra Dass*, 25 C. 803; *Kuppusawmy Aiyaa* v. *Venkataramier*, 15 M. L. J. 462, followed.

Second appeals against the decrees of the District Court of Ramnad at Madura, in Appeal Suits Nos. 15 to 17 of 1910, preferred respectively against those of the Additional District Munsif of Paramakudi in Original Suits Nos. 14 to 16 of 1909.

FACTS.—The defendants having forcibly dispossessed the plaintiffs of certain lands, the latter sued the former in January 1905 under section 9 of the Specific Relief Act for possession of the lands of which they were dispossessed with the crops then standing thereon, or the value of such crops in case they were removed by the defendants before delivery of possession to the plaintiffs. Possession of lands alone was decreed to them in that suit on 31st March 1906, as the right to mesne profits depended on their title to the land, which question need not be gone into in a possessory suit under the Specific Relief Act and could not be finally decided therein. The plaintiffs executed that decree and got possession in November 1906 after the cultivation season for *Fasli* 1316 had expired. The plaintiffs thereupon sued the defendants for mesne profits for *Faslis* 1314 to 1316. The District Munsif held that as the defendants did not, after the decree in the possessory suit, cultivate the lands, but left them waste, the plaintiffs were not entitled to the profits for *Fasli* 1316, and awarded them profits for *Faslis* 1314 and 1315. On appeal the District Judge, while allowing the plaintiffs mesne profits for *Fasli* 1316, disallowed the same for *Fasli* 1314 on the ground that it was

barred by *res judicata*, because the plaintiffs had claimed the profits in their possessory suit failed to get them. Against the decree the defendants preferred a second appeal to the High Court and the plaintiffs preferred a memorandum of cross-objections.

Mr. *C. S. Venkatachariar*, for the Appellants :—The appellants are not liable for the mesne profits for *Fasli* 1316, as they did not cultivate the lands in that *Fasli* but left them waste after the date of the decree in the possessory suit, *viz.*, 31st March 1906, and the cultivation season for that *Fasli* began only in August-September 1906. Further even if the defendants had cultivated the lands in that *Fasli*, the crops could not have been fully ripe on the date on which possession of the lands was delivered to the plaintiffs and so they could not, in any event, be deemed to have 'received the profits' within the meaning of Order XX, rule 12, Civil Procedure Code. The claim for mesne profits for *Fasli* 1314 is clearly barred by *res judicata*. It is also barred by the provisions of Order II, rule 2, Civil Procedure Code. *Rangayya Goundan* v. *Nanjappa Rao* (1).

Mr. *K. V. Krishnaswami Iyer*, for the Respondents :—The respondents are entitled to mesne profits for *Fasli* 1316, as the appellants never intimated to them that they might take possession and it is not alleged that the plaintiffs wilfully abstained from taking possession in spite of such notice. The defendants continued in wrongful possession till delivery and could have cultivated the lands if they had only used ordinary diligence. The defendants being trespassers, they were liable to compensate the plaintiffs for losses sustained by them by reason of their tortious act. It does not matter in what shape compensation is required, whether as damages or as mesne profits. The District Judge erred in holding that the mesne profits for *Fasli* 1314 were barred by *res judicata*. See *Sheo Kumar* v. *Narain Das* (2); *Tilak Chandra Dass* v. *Fatik Chandra Dass* (3). As to the scope of the rule, see also *Kuppusawmy Aiyar* v. *Venkataramier* (4). As the plaintiffs could not have got the reliefs they now seek for in the former suit, there is no *res judicata*. Again Order II, rule 2, is no bar as the plaintiffs did not, in the former suit, intentionally omit to sue or relinquish any portion of their claim and further, the causes of action for the two suits are not the same. *Ponnammal* v. *Ramamirda Aiyar* (5).

JUDGMENT.—The contesting defendants are the appellants in this second appeal. The suit was brought for the recovery of the mesne profits due to the plaintiffs for *Faslis* 1314, 1315 and 1316, during which *Faslis* the defendants were in unlawful possession of the plaintiffs' land. The plaintiffs had brought a former suit (Original Suit No. 131 of 1905) under section 9 of the Specific Relief Act in January 1905, very soon after they were forcibly dispossessed by the defendants. In that suit they prayed for possession of the lands with the crops then standing thereon. But if before the decree was passed for possession, the crops were removed by the defendants, the plaintiffs also prayed for recovery of the value of the crops from the defendants.

The District Munsif in that suit decreed only possession of the lands, evidently because the question of the plaintiffs' right to the value of the crops depended upon the plaintiffs' title to the land and in a suit under section 9 of the Specific Relief Act, the question of title could not be finally decided and need not be gone into (See the judgment, Exhibit IV). The judgment in Original Suit No. 131 of 1905 was passed on the 31st March 1906. The plaintiffs executed that decree and got possession in November 1906, that is, about the middle of the *Fasli* 1316, after the season for ploughing, sowing and cultivation had expired, such season being in August-September 1906. If the defendants had given up the land before August 1906 to the plaintiffs, the plaintiffs could have begun cultivation in the due season of August 1906 and there would have been crops almost ripe for harvest in the middle of November 1906, when alone the plaintiffs were able to get possession through Court.

Such being the facts, several questions of law have been raised and decided in this case. The District Munsif held that because the defendants, after the 31st March 1906 (the date of the decree in the Original Suit

(1) 24 M. 491; 3 Bom. L. R. 299; 6 C. W. N. 17; 28 I. A. 224 (P. C.).

(2) 24 A. 501; A. W. N. (1902) 139.

(3) 25 C. 803.

(4) 15 M. L. J. 462

(5) 27 Ind. Cas. 679; 28 M. L. J. 127; (1915) M. W. N. 130; 17 M.L.T. 124.

No. 131 of 1905 for possession), did not cultivate the lands and left them waste, the plaintiffs were not entitled to mesne profits for *Fasli* 1316. He, therefore, decreed mesne profits only for *Faslis* 1314 and 1315. The learned District Judge thought that the learned District Munsif was wrong in his opinion that the plaintiffs had negligently delayed the execution of their possessory decree beyond August 1906. The District Judge, therefore, allowed the claim for mesne profits for *Fasli* 1316 which had been disallowed by the District Munsif; but the learned Judge disallowed the claim for mesne profits for *Fasli* 1314 (*i.e.*, mesne profits which the defendants wrongfully carried away in January 1905), on the ground that the plaintiffs having claimed such mesne profits in the former summary suit and not having been granted those mesne profits by the decree in that suit, the plaintiffs' claim was barred by *res judicata* under section 11 of the Civil Procedure Code, read with its Explanation V. The decree passed by the learned District Judge contained an arithmetical error because, instead of allowing Rs. 160 (at Rs. 80 a year) for the two *Faslis* 1315 and 1316 as mesne profits, a sum of Rs. 390 was mentioned in the decree.

Out of the 11 grounds mentioned in the memorandum of second appeal, the only two arguable contentions are that the plantiffs are not entitled to the mesne profits for *Fasli* 1316 and that the decree of the lower Appellate Court was not in accordance with the judgment, as it made the defendants liable for the mesne profits of the value of Rs. 390 instead of Rs. 160. The second contention based upon the clerical or arithmetical error is accepted as valid by the respondents' Vakil and it appears further that that error has been corrected by the lower Appellate Court itself pending this second appeal. As, however, there is a memorandum of objections by the plaintiffs contending that the lower Appellate Court's disallowance of the plaintiffs'claim for mesne profits for *Fasli* 1314 is erroneous and as the whole of the disputed matter is now before us, this Court will draw up a proper decree in accordance with the rights settled by our judgment in supersession of the lower Appellate Court's decree. The only remaining contention so far as the second appeal is concerned is that relating to the mesne profits for *Fasli* 1316. Mr. C. S. Venkatachariar for the appellants argued that because the defendants did not cultivate the lands after the date of the decree in the former suit (31st March 1906) and left the lands waste, they were not bound to pay mesne profits for *Fasli* 1316, though the plaintiffs were unable to raise and obtain any profits in that *Fasli*. It is not alleged that the defendants gave notice to the plaintiffs to take possession of the lands as soon as the decree was passed against the defendants, or that the plaintiffs wilfully refused to take possession notwithstanding such notice. Order XX, rule 12, of the Civil Procedure Code, defines mesne profits as "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received." The defendants' wrongful possession continued till the plaintiffs were put in possession through Court, that is, till the middle of November 1906, and the defendants, if they had used ordinary diligence, could have cultivated the plaint lands in August 1906 and raised profits thereon. It was ingeniously argued that, as on the date of the taking of possession by the plaintiffs, the crops would not have been quite ripe for harvest even if they had been raised, the defendants could not have *received* any profits and hence they were not liable for mesne profits for *Fasli* 1316. Of course, on a literal interpretation of the words in the definition of mesne profits, the argument is plausible enough; but, in any event, the plaintiffs are entitled to recover the loss which they sustained by the defendants' tortious act in having kept the plaintiffs out of possession and whether compensation for such loss is called "profits" or "damages" they are entitled to be reimbursed that loss. Such damages are, naturally, the profits which the plaintiffs would have got from the lands, if the lands had not been wrongfully retained by the defendants in the beginning of the cultivation season in *Fasli* 1316. This second appeal, therefore, fails, except as regards the clerical error already referred to and is dismissed with the respondents' proportionate costs on the sum of Rs. 160.

Coming to the memorandum of objections, the question to be considered is whether

the lower Appellate Court was right in holding that the claim for mesne profits for *Fasli* 1314 was barred by *res judicata*. The true scope of a suit under section 9 of the Specific Relief Act has been considered in the case of *Sheo Kumar* v. *Narain Das* (2) and *Tilak Chandra Dass* v. *Fatik Chandra Das*(3). In *Sheo Kumar* v. *Narain Das* (2) the following observations occur: "Under the Specific Relief Act, the plaintiff would be entitled to recover possession in any event if he had been dispossessed otherwise than in due process of law, and, therefore, was entitled to a decree in the suit instituted under the Specific Relief Act, whether or not the defendants who had dispossessed him were the true owners. *In a suit, however, for mesne profits, other considerations would arise, because, as it appears to us, in a suit to recover mesne profits for the time during which a party has been dispossessed, if it be found that he was only a trespasser, and that the person who dispossessed him was the true owner of the property, in such a case, the Court could not award mesne profits as against the true owner.* Therefore we think that the defence under section 43 of the Code of Civil Procedure fails." Thus it follows that a claim for mesne profits ought not to be made in a suit for possession under the Specific Relief Act, because the plaintiff who was forcibly dispossessed could not obtain a decree for mesne profits if the defendant who dispossessed him forcibly was the true owner of the lands: the question of title could not be directly decided in that suit and a relief which depends upon title (considered apart from possession) cannot be given in such a suit. In *Kuppusawmy Aiyar* v. *Venkataramier* (4) it was held by a Full Bench of this Court that the words "relief claimed in the plaint" in Explanation III to section 13 of the old Civil Procedure Code (corresponding to Explanation V to section 11 of the new Civil Procedure Code) did not include a relief which, though claimed in the plaint, the plaintiff was not entitled to as of right, assuming that the defence fails. Now in the former original suit, the defence did fail, but the plaintiff was not entitled as of right to the relief of the award of mesne profits which he claimed, because, as we said just now, the relief of the award of mesne profits depended upon a decision as to the plaintiffs' title, which the Court trying a suit under section 9 of the Specific Relief Act was not bound to decide. We, therefore, hold that notwithstanding the wide words of Explanation V to section 11, the plaintiffs are not barred by *res judicata* from claiming in the present suit based on title the relief as to mesne profits for *Fasli* 1314.

Mr. C. S. Venkatachariar further contended that even if the suit is not barred by *res judicata*, it is barred by Order II, rule 2, of the new Civil Procedure Code (corresponding to old section 43) and he relied upon the Privy Council decision in *Rangayya Goundan* v. *Nanjappa Rao* (1). There are at least two answers to this contention. In the first place, the plaintiff did not omit to sue in respect of, or intentionally relinquish in the former suit his claim for mesne profits for *Fasli* 1314 and hence Order II, rule 2, does not in terms apply. In the second place, even if he had so omitted to sue, the case in *Sheo Kumar* v. *Narain Das* (2) clearly shows that the cause of action for mesne profits in an ordinary suit being different from the cause of action in the former summary suit, Order II, rule 2, corresponding to section 43 of the old Civil Procedure Code, has no application. We might further add that Order II, rule 2, directs only that the whole claim in respect of the same *cause of action* should be included in one and the same suit and it had been recently held by a Full Bench of this Court that the cause of action *even for past mesne profits* is a different cause of action from the cause of action in the suit in ejectment [see *Ponnamma* v. *Ramamirda Aiyar* (5)]. We, therefore, allow the memorandum of objections with costs throughout on the amount awarded. In the result, a decree will be drawn up in the suit awarding Rs. 240 as the mesne profits due to the plaintiffs for the three *Faslis* 1314 to 1316. For similar reasons, similar decrees will be drawn up in the connected suits out of which connected Second Appeals Nos. 2008 and 2009 of 1913 have arisen.

Appeal dismissed;
Memorandum of objections allowed.

GHULAM MAHOMED *v.* SAHEBSINGH.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 3 OF 1912.

August 27, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

GHULAM MAHOMED AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAHEBSINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease of agricultural land—Failure of source of irrigation—Remission of rent—Burden of proving warranty—Rebate by guardian—Guardians and Wards Act (VIII of 1890), s. 27—Discretion—Ratification.

A tenant cannot claim remission of rent on failure of rain or other source of irrigation in the absence of any stipulation in the lease or of any express or implied warranty. [p. 6, col. 2.]

Where the Deputy Commissioner acting as guardian of the minor co-sharer and agent of the major co-sharer granted a remission of rent of the defendant, a lessee of agricultural land, as he could not raise crops owing to scarcity of water in the canal by which the land was to be irrigated:

Held, that the defendant had no legal right to remission of rent but the Deputy Commissioner had a discretion in the matter under section 27 of the Guardians and Wards Act and as the plaintiffs did not repudiate his acts there was an implied ratification of his acts by them. [p. 7, col. 1.]

Per *Fawcett, J. C.*—The burden of proving such warranty is on the tenant who alleges it. [p. 7, col. 2.]

When the law creates a duty and a party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him, but when a party by his own contract creates a duty, he is bound to make it good notwithstanding any accident by inevitable necessity. [p. 8, col. 1.]

First appeal against the decree of the District Judge, Hyderabad.

Mr. *Mathradas Ramchand*, for the Appellants.

Mr. *Rupchand Bilaram*, for the Respondents.

JUDGMENT.

CROUCH, A. J. C.—Plaintiffs in this suit have sued defendants for a sum of Rs. 16,806-3-3, as being the amount due to them under a lease of certain agricultural lands with interest. The annual rent payable under the lease was Rs. 10,025 payable in three equal instalments. The rent for the first two years had been paid in full, as also the first instalment of the third year; but out of the remaining instalments, aggregating to Rs. 26,733-5-4, only Rs. 14,467-11-7 had been received, leaving Rs. 12,265-9-9 still due.

Defendant, in his written statement, contends that the rent was settled at Rs. 10,025 per annum in consideration of the land being watered by a perennial canal, *viz.*, the Jamrao, and so capable of yielding two crops a year; that during the last three years of the lease there was deficiency of water in the Jamrao, in consequence of which only small portion of the land could be cultivated; that accordingly he was entitled to a rebate or remission of rent; that the Deputy Commissioner, Thar and Parkar, who was the Manager of the estate, agent of the major plaintiffs and guardian of the minors, had remitted Rs. 1,253-2-0 for the third year and Rs. 5,012-8-0 for the fourth year that; nothing was due for the fifth year, for there had been no *rabi* cultivation and Rs. 4,025 had been advanced as *takavi*.

The lower Court has found that there is nothing in the document executed by defendant (Exhibit 57) which debars him from claiming a rebate; that in view of the provisions of section 108 of the Transfer of Property Act, and, in accordance with equity and natural justice, and in pursuance of the ruling in *Sheikh Enayatoolah* v. *Sheikh Elahee Baksh* (1) defendant No. 1 was entitled to the rebates of Rs. 1,253-2-0 for 1906-1907 and of Rs. 5,012-8-0 for 1907-08, and that he was also entitled to a rebate of Rs. 6,000 for 1908-09. It was further held that the Deputy Commissioner's action in granting the rebate for the years 1906-1907 and 1907-08 was authorised as guardian of the minors and was ratified by the major plaintiffs. The Court also held that a sum of Rs. 4,025 having been advanced as *takavi* had been, in effect, paid to plaintiffs, and gave a decree for Rs. 1,846 for interest only

Plaintiffs appeal on several grounds which may be formulated in the following issues:--

1. Could defendant claim remission of rent by reason of the insufficiency of the water supply?

2. Had the Deputy Commissioner, Thar and Parkar, authority as guardian of the minor plaintiffs to grant remission?

3. Was the Deputy Commissioner, Thar and Parkar's action in making the remission ratified by the major plaintiffs?

4. To what amount of remission, if any, is plaintiff entitled for the last year?

(1) W. R. Sp. 42.

The lands with which we are concerned formed part of the estate of Khan Bahadur Wali Mahomed Burgri deceased. On the 28th June 1901, the Deputy Commissioner, Thar and Parkar, was appointed administrator of the estate of the minor children of the said K. B. Wali Mahomed under Act VIII of 1890 and was invested with the same duties and powers as regards the management of the property in the same way as the minors could have exercised the same had they been majors (Exhibit 48). The names of the minors and the dates of their birth are given in the order of appointment as follows:—

1. Ghulam Mahomed ... 15th July 1887
2. Usman ... 29th May 1889
3. Jan Mahomed ... 17th November 1881
4. Ghulam Husein ... 30th July 1889
5. *Musammat* Fatma ... 9th January 1891

In 1904, the Deputy Commissioner, Thar and Parkar, granted the lease for five years to defendant No. 1. No formal lease was signed by the Deputy Commissioner, but on the 16th February 1905, Mr. Sahebsing, defendant No. 1, signed the so-called lease-deed (page 12) which contains the term, and conditions on which he had taken the land. There is, admittedly, nothing in this document which could be construed as giving defendant No. 1 a claim to any remission of rent. There is no mention of the land being watered by a perennial canal, or of its being capable of producing two crops a year.

In the whole of the record there is no evidence that at the time of granting the lease any warranty as to water was given, or that there was any direct or indirect promise to remit rent in case of deficiency of water.

There is no allegation that, in Sind, the lessee has a customary right to claim remission on failure of water.

Section 108 B (*e*) offers no assistance. The section has not been applied to Sind, and no attempt has been made to show that the sub-section represents the old customary law obtaining in Sind. It deals solely with the case of the land or buildings leased being destroyed or rendered substantially and permanently unfit for the purpose for which they were let by "fire, tempest, or flood, or violence of an army or of a mob, or other irresistible force"; it has reference only to cases of positive, actual destruction or injury by some violent force; it has no reference whatever to the case of land becomig unprofitable or unfit for cultivation through the failure of its ordinary water supply, that is through, something not happening which was expected to happen. Even if the sub-section had application, the defendant can make no appeal to it at this stage, for he never exercised his option under it; he never declared the lease void. The sub-section gives no right to claim remission of rent.

In the case of *Sheikh Enayatoolah* v. *Sheikh Elahee Baksh* (1) it was held that a tenant was entitled, under the Common Law, to abatement of rent for land washed away.

There is no known rule of equity under which a tenant can claim remission of rent on failure of rain, or other source of irrigation.

In the letter, Exhibit 46, in which Mr. Sahebsing first asked for remission, he based the claim on equity, urging that both parties had presumed that the Jamrao would continue to work as a perennial canal. No doubt, both parties hoped and expected that the canal would continue to flow satisfactorily, but this is quite a different thing from its being a condition of the contract that it would do so.

Mr. Mackenzie, in dealing with the case (page 41), writes: "Under the terms of his agreement no remissions are at all admissible. Even should the water-supply be stopped he has no claim—an obviously inequitable clause, considering that failure in supply is always admitted by Government for remission and as a rule I think that the procedure adopted by Government is usually followed. It is no uncommon practice, for instance, to allow remissions in the fish, *pan-paban* and grazing contracts, and the principle should also be applicable with regard to private estates; and they are admitted by the Manager also."

Now, though the Revenue Department frequently makes remission on failure of crops, it has never yet, so far as I am aware, been contended that the tenant or occupant has a legal right to remission which he can enforce in a Court of law; and defendant's case as recognised by Mr. Mackenzie amounts to this: Government is a lenient and generous landlord; so is the Manager

so are many big land-owners; as I am Manager of a big estate, I also ought to be lenient and generous. And this seems to be defendant's case; no higher plea can be made out from the record; defendant had no legal right to remission.

A guardian appointed under Act VIII of 1890 is bound to deal with the property as carefully as a man of ordinary prudence should deal with it, were it his own; and by the order of the Court above quoted, the powers of the Deputy Commissioner as guardian were, perhaps, slightly enlarged. Rent is remitted by Govenment and private landlords not merely from a spirit of generosity, but from a sense of expediency; it is inexpedient that tenants become too hard pressed for money, or that they become discontented and resentful, or that the particular estate have a name for treating tenants illiberally. Hence, the view taken by the lower Court that, in Sind, the guardian of a large estate has a discretion, within reasonable limits, to remit rent, is, I consider, correct.

I agree, also, that ratification of the Deputy Commissioner's act was implied in the conduct of the major plaintiffs. Knowing of the remission granted, they admittedly made no written protest to Mr. Mackenzie and so behaved that both Mr. Sahebsing and Mr. Mackenzie were led to believe that they sanctioned it, even though they grudged the loss of the money. If the plaintiffs desired to repudiate the acts of Mr. Mackenzie they should have acted promptly after the communication of his orders to them and their silence amounted in the circumstances to implied ratification.

Plaintiffs will be entitled, therefore, to recover the three instalments of the last year, less Rs. 4,025 held by the lower Court to have been paid as *takavi*, *viz.*, Rs. 6,000, with interest at Rs. 6 per cent per annum as to Rs. 3,000 from the 15th April 1909 and as to Rs. 3,000 from the 15th June 1909 upto date of payment. They will also be entitled to further costs as on the further sum awarded with interest to date of suit.

Let the lower Court's decree be amended accordingly. Appellants to have the costs of this appeal as on the amount awarded to them in appeal, Respondents to bear their own costs.

FAWCETT, J. C.—I concur.

The agreement executed by the defendant in favour of the Deputy Commissioner must clearly be taken to comprise all the terms on which he accepted the lease, in accordance with section 91 of the Evidence Act; and the contention that, in addition to those terms, the lease was subject to an implied warranty that there would be a sufficient supply of water from the canal to enable defendant to cultivate as much land as he wanted to cultivate or anticipated cultivating at the time he entered into the agreement, is in my opinion entirely unsubstantiated. The ordinary law on the subject is thus summarized in Addison's Law of Contracts, 10th Edition, page 625:—"Having executed the lease and put the lessee into possession of the demised premises, the lessor has done all that is necessary for him to do to entitle himself to the rent; he does not, in the case of demises of reality, warrant that the premises are, at the time of the demise or that they shall continue to be during the term, in any particular condition or fit for any particular purpose; and the lessee, therefore, is bound to pay his rent, although the subject-matter of the demise is not fit for the purpose for which he required it, and although he may have had no beneficial use of it." If, therefore, there was any express or implied warranty of the kind alleged, the burden of proving it rests on the defendant and he has clearly failed to do so. There is no evidence of any such warranty on the record, nor was any authority cited to us for the proposition that in Sind or elsewhere in India it is an implied condition of the lease that land let for cultivation is necessarily fit for cultivation or will continue to be so fit. Even in the case of occupancy land under the Bombay Land Revenue Code, the occupant has no legal right to a remission of the assessment, if he is unable to cultivate, or his crops wither, for want of water; and the original theory was that the assessment was fixed at such a moderate sum that the occupant should pay it in a bad, as well as in a good, year. Even now that a more liberal policy has been adopted, an occupant is not able to claim a remission or suspension of land revenue *as of right* and it is only by the recent amendment

Act of 1913 that under the new section 94-A an inferior holder in an alienated village can in certain circumstances, claim the benefit of a suspension or remission corresponding to any allowed in respect of unalienated land in the same neighbourhood. The analogy of Government lands affords, therefore, no assistance to the defendant. Nor does the analogy of the rule in cases affected by an "act of God" help him, for the general rule in such cases is that when the law creates a duty and the party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him, but where (as in this case) a party by his own contract creates a duty, he is bound to maks it good, notwithstanding any accident by inevitable necessity [per Melish, L. J., *Nichols* v. *Marsland* (2)]. Thus Addison in his Law of Contracts, page 326, says: "Although, therefore, houses become ruinous and fall down, and fences and crops be destroyed by floods, or burned by lightening or accidental fire, or be thrown down by enemies, yet is the tenant liable to pay the rent so long as the land remains to him, and his legal title to the occupation and use thereof continues." This rule is no doubt modified by section 108, clause (*e*), of the Transfer of Property Act, but this enactment is not in force in Sind and the learned District Judge has, in my opinion, put an entirely unjustifiable construction on the words "permanently" and "irresistible force" in that clause. Another circumstance which would entirely prevent the applicability of that clause is that the defendant did not in fact treat the lease as void, but continued in occupation thereunder and merely requested an abatement of rent. The Deputy Commissioner, as a reasonable landlord, took this request into consideration and allowed an abatement for certain years; but that does not entitle the defendant to any abatement other than that specifically allowed by the Deputy Commissioner and ratified by the plaintiffs. As a case in point I may refer to the recent Privy Council case, *Raja Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (3), where it was held that though the landlord had agreed to accept a reduced rent, and did in fact accept a reduced rent for several years, that did not make the abatement more than a purely voluntary and temporary one (see at page 506).

The case in fact falls under the general rule that a person cannot claim relief from a contract merely on the ground that it was a hard or unfortunate bargain *Cf. Dhanipal Das* v. *Raja Maneshar Bakhsh Singh* (4), and the rule against variance of written contracts contained in section 92 of the Evidence Act also applies to this case.

Appeal accepted.

(2) (1875) 10 Ex. Cas. 255.

(3) 21 Ind. Cas. 750; 41 C. 493; 19 C. L. J. 95; 18 C. W. N. 66; (1914) M. W. N. 1; 15 M. L. T. 68; 26 M. L. J. 25; 16 Bom. L. R. 42; 40 I. A. 223 (P. C.).

(4) 8 Bom. L. R. 491; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 10 C. W. N. 849; 16 M. L. J. 292; 28 A. 570; 33 I. A. 118 (P. C.).

MADRAS HIGH COURT.

CIVIL APPEAL No. 69 OF 1913.

September 3, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Hannay.

V. K. CHERIA PANGY ACHAN AVERGAL, MANAGER OF KELPETHY VISWANATHASWAMY DEVASWAM—COUNTER-PETITIONER No. 22—APPELLANT

versus

C. V. KRISHNA PATTAI AND OTHERS—COUNTER-PETITIONERS Nos. 1 TO 21, AND 23 TO 26—RESPONDENTS.

Land Acquisition Act (I of 1894)—Landlord's share—Apportionment—Malabar Law—"Vilakku money," *nature of.*

"*Vilakku* money," customarily paid by house-holders in Malabar to the temples on whose land they are living, is in the nature of quit rent and a grant of the said sites to the house-holders, by the Rajahs, though conferring a permanent tenure on the grantee, is subject to the payment of the quit rent. [p. 10, col. 1.]

Though, as a rule, the landlord would ordinarily be entitled to share with the tenant actually in occupation, in the compensation paid for land taken up by the Government under the Land Acquisition Act, 1894, he may be refused a share if, owing to the small extent and value of the land acquired, it is impracticable to apportion the compensation amount. [p. 10, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Palghat (in Land Acquisition case) Miscellaneous Petition No. 1314 of 1910.

CHERIA PANGY ACHAN AVERGAL *v.* KRISHNA PATTAI.

FACTS.—The appeal arose out of a reference under sections 18 and 30 of the Land Acquisition Act, I of 1894, in respect of the lands acquired for widening certain streets in Palghat. The claimants were the 22nd counter-petitioner, the Uralan of Kelpethy Viswanathaswamy Devaswam, and the counter-petitioners Nos. 1 to 21, who are owners of the houses the sites of which have been acquired by the Government. The case of the 22nd counter-petitioner was that the sites in question formed part of the *inan* lands belonging to the above said Devaswam, having been registered as such by the *jenm* registration officer, that he as Manager of the said Devaswam was entitled to the *jenm* value awarded, that the other counter-petitioners were only persons in possession and that their claims against the Devaswam were not sustainable. The other counter-petitioners asserted that the Devaswam was not the owner of the suit lands, that they had been granted to them as Brahmaswam by a prior Raja of Palghat, that they and their ancestors had been holding them as their own *jenm* and adversely to the Devaswam and that they were entitled to the compensation awarded. The Court below found that the suit sites were once the *inam* of the Devaswam, and that at the time of the Inam Settlement they were registered in the name of the Devaswam and *inam pattas* had been issued to it. Nevertheless it disallowed the claim on behalf of the Devaswam, on the ground that the other counter-petitioners acquired the sites by a Brahmaswam gift as alleged and that even if the gift was invalid they had acquired title by limitation and prescription. On behalf of the 22nd counter-petitioner evidence was adduced to prove a payment of rent at 4 annas per site to the Devaswam for *sivaratri vilakku* on the *sivaratri* day. This circumstance was relied upon as showing that the Devaswam was the landlord and the other counter-petitioners were only tenants. The Court below held, however, that the *vilakku* money was paid not as rent, but only as a voluntary donation. The 22nd counter-petitioner appealed.

Mr. *K. P. M. Menon*, for the Appellant :—The Court below has found that the suit sites formed the *inam* of the Devaswam and that the respondents came into possession under the Devaswam. Further, the account books show that the *vilakku* money has been paid by the respondents to the Devaswam. It ought, therefore, to have held that they were only tenants and not entitled to claim any portion of the amount awarded.

Messrs. *C. V. Ananthakrishna Aiyar* and *P. S. Narayanaswamy Iyer*, for the Respondents :—Under the circumstances of the case, the gift by the *inamdar* should be presumed. The presumption in Malabar is that the *inam* to the temple was only of the land revenue payable to the Government. The *inamdar* has no title to eject. *Venkatacharlu* v. *Kandappa* (1).

Long possession and erection of substantial buildings on the suit sites show that the house-holders had at any rate permanent heritable rights over the sites. *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (2) and *Nilratan Mandal* v. *Ismail Khan Mahomed* (3).

The fact that the *patta* stands in the name of the Devaswam does not help the appellant's case. *Muthu Veera Vandayan* v. *Secretary of State for India in Council* (4).

At the most the invariable payment of the *vilakku* money for a long time is proof only of a right to the payment of the said sum and not of title to the sites. *Doe d. Whittick* v. *Johnson* (5). In any event only a very insignificant portion of the compensation could be awarded to the appellant, because he is only entitled to the capitalised value of the share of the *vilakku* money payable in respect of the suit sites. *Dinendra Narain Roy* v. *Tituram Mukerjee* 6).

JUDGMENT.—Certain lands having been taken up for street widening under the Land Acquisition Act in four streets in Palghat occupied by Brahmins, a dispute has arisen between the house-holders, parts of whose premises have been acquired, and the temple, represented by the 22nd counter-petitioner, which claims to be the owner of the streets. The facts proved are few and the question is, what is the right inference to draw from

(1) 15 M. 95.
(2) 32 C. 41 at p. 49 (P. C.); 31 I. A. 144; 8 C.W.N. 889.
(3) 32 C. 51 (P. C.); 31 I. A. 149; 8 C. W. N. 895.
(4) 29 M. 46 ; 1 M. L. T. 278.
(5) 21 R. R 826; Gow 173
(6) 30 C. 801; 7 C. W. N. 810.

them? The secondary evidence as to the inscriptions in the temple shows that it is a very old one, connected with the Palghat Rajahs, in whose family the management is vested. The Brahmins who inhabit those streets came, according to tradition, from Tanjore. The date of their settlement in Malabar is not proved but is believed to have been some hundreds of years ago, though long subsequent to the settlement of the Nambudris, as appears from the fact that their usages conform to those of the Brahmins on the East Coast. It would appear that, at some time or other, those East Coast Brahmins were allowed to settle on lands belonging to temples. That these lands in the first instance at any rate belonged to the temple appears from the fact that they have all along been free from assessment, on the ground that they were temple *inam*. The earliest evidence dates from the time of the Inam Commission. Exhibit XLIII, an extract from the Inam Register of 1864, shows that the Mahratta *paimash* accounts of 1807 were then produced and showed the lands were entered therein as *inams* appertaining to the temple. The register also refers to an alleged grant by Tippu in 1772, to which too much importance must not be attached, as it probably refers only to a confirmation, at some time or other, of a pre-existing state of things. At the recent Settlement in Malabar, the houses in these streets were at first assessed and some of the house holders paid and others objected. Finally, the temple authorities put in a petition stating that the streets were temple *inam* and the assessment was taken off. The fact that the streets, from time immemorial, have been immune from assessment as temple *inam* certainly goes to show that the houses are held under the temple, and this is further borne out by the customary payment to the temple of four annas for each house on *sivaratri* day. There has been some contention before us as to whether this was in the nature of rent or a mere charitable payment for lights as suggested by the name *vilakku*. This payment has been made by people who were not house-holders and has been refused by some house-holders without any attempt being made to enforce it. Nonetheless, it appears to be the more reasonable view that it is in the nature of a quit rent, and it has not been shown that in the case of the lands in question, the claim for such a quit rent is barred. The Subordinate Judge has found that an out and out gift to the Brahmins must be presumed, but we think the grant of a permanent tenure subject to a quit rent of 4 annas in the case of each house is the more reasonable inference. That the Brahmins occupiers cannot have less than a permanent tenure of this nature is clear not only from the evidence already referred to, but from the numerous copies of registered documents showing that they have been freely transferring their holdings. These documents go back to 1864 when compulsory registration was introduced, and there is no reason to suppose that such transfers were then introduced for the first time. Some of them, it is worthy of note, were in favour of members of the Rajah's family in which the management of the temple is vested. Such transfers are very strong evidence indeed that the Brahmins had a permanent tenure. On the view that there had been an out and out gift to the Brahmins, the Judge refused the claim of the temple to a share in the compensation. If, as already held, the relation is that of landlord and tenant, the temple, as landlord, would ordinarily be entitled to share in the compensation. In the present case, however, the rent for each house is only four annas, and the value of the small items of land taken in each site is very small, about 2 or 3 rupees in most cases, and in no case more than 4 rupees. As in each case the capitalised value of the quit rent of 4 annas is only a small fraction of the valuation of the house and site, and as further small items of land are only very small fractions of the whole extent, it seems impracticable to attempt an apportionment, more especially as the extent of the land taken is so small as in no way to affect the security for the rent of four annas. We are not, therefore, prepared to interfere with the Subordinate Judge's award and dismiss the appeal but without costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 5 OF 1913.

September 4, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Oldfield.

ARIYAMUTHU PILLAI—PLAINTIFF—APPELLANT

versus

SINNAYA PILLAI *alias* MUTHU-KARUPPA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appeal—New evidence, admission of, illegal—Decree based on such new evidence, if sustainable.

Where an Appellate Court, during the hearing of an appeal, having before it a petition only for the admission in evidence of one single exhibit and evidence connected therewith, admitted other exhibits and evidence without any petition therefor and without recording its reasons, and disposed of the appeal after considering the evidence so admitted:

Held, that the order of the Appellate Court admitting the evidence was opposed to the provisions of Order XLI, rule 27, Civil Procedure Code, and that the decree based on such evidence could not be supported.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga, in Appeal Suit No. 913 of 1911, preferred against that of the Court of the District Munsif of Manamadura in Original Suit No. 502 of 1910.

FACTS.—The suit was for recovery of possession of land. The Court of first instance gave a decree for the plaintiff. The defendant appealed to the Subordinate Judge's Court of Sivaganga and sought for admission in appeal of certain evidence (Exhibit VII), on the ground that the Court of first instance had wrongfully refused to admit the same. That Court without recording its reasons not only admitted Exhibit VII, but also other evidence though there was no petition therefor, and after a consideration of the same dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Mr. *T. Rangaramanuja Chariar*, for the Appellant :—The lower Appellate Court was completely in error in admitting fresh evidence without recording any reasons therefor. There was not even a petition for the admission of such evidence. The Subordinate Judge's decree is vitiated by its being based upon the evidence so improperly admitted and cannot be upheld. Vide *Sreemanchunder Dey* v. *Gopaul Chunderchuckerbutty*(1), *Hurpurshad* v. *Sheo Dyal* (2) and *Gunga Gobind Mundal* v. *Collector of 24-Parganahs* 3).

Mr. *K. Bhashyam Iyengar*, for the Respondents :—The decree of the lower Appellate Court is not bad, merely because no reasons are given for the admission of new evidence. That at the most is a mere irregularity. At any rate, so far as Exhibit VII is concerned, there was a petition for admission and the ground on which it was sought to be admitted was that it was improperly excluded by the Court of the first instance. The order admitting fresh evidence is, therefore, not wholly bad. The record of reasons is not a condition precedent to the reception of such evidence. Vide *Hafiz Abdul Kurrim* v. *Sri Kissen Rai* (4), *Gopal Singh* v. *Jhakri Rai* (5).

JUDGMENT. It is argued on behalf of the appellant that the judgment of the lower Appellate Court proceeds very largely on a consideration of evidence admitted during the hearing of the appeal in contravention of Order XLI, rule 27, of the Code of Civil Procedure. This evidence consists of Exhibits 7, 8 and 9 and certain oral evidence for the defendants (respondents) and Exhibits O and O1 for the plaintiff (appellant). The only petition for the admission of fresh evidence is one by the respondents, which asks for the admission of Exhibit 7 and evidence in respect of the same. The lower Appellate Court has recorded no reasons for allowing the production of any portion of this additional evidence and as regards Exhibit 9, we may remark that there is no petition for admission, no evidence adduced which would have justified its admission even before the original Court, and no reasons for allowing its admission are alleged even here.

Under the circumstances of the case we think it best to set aside the decree of the lower Appellate Court and to direct it to restore the appeal to its file and dispose of it according to law. It will exclude from consideration the additional evidence above referred to, unless it sees ground to allow its admission by a legal order under Order XLI, rule 27.

The costs will abide the result.

Appeal allowed.

(1) 11 M.I.A. 28 at p. 48; 7 W. R. (P.C.) 10; 1 Suth. 51; 2 Sar. P. C. J. 215; 20 Eng.Rep. 11.

(2) 3 I A. 259; 26 W. R. 55.

(3) 11 M. I. A. 345 at p. 368; 7 W. R. (P. C.) 21; 1 Suth. P. C. J. 676; 2 Sar. P. C. J. 284; 20 Eng. Rep. 131.

(4) 11 C. 139.

(5) 12 C. 37.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 548 OF 1914.

January 15, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge.

BUA DITTA—PLAINTIFF—PETITIONER

versus

Musammat RATTAN DEVI—DEFENDANT—RESPONDENT.

Contract—Agreement to purchase—Option to withdraw—Earnest money, refund of, on withdrawal.

Where an agreement for the purchase of a house gives an option to the purchaser to withdraw on his being not satisfied with the defendant's title, he is entitled on his withdrawing to a refund of the earnest money given.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Amritsar, dated the 25th of February 1914, dismissing the suit.

Mr. *Nand Lal*, for the Petitioner.

Mr. *N. C. Mehra*, for the Respondent.

JUDGMENT.—This is a petition for revision of the Small Cause Court's decree dismissing plaintiff's suit for recovery of Rs. 100 earnest money and Rs. 100 damages in respect of an unfulfilled contract for sale of a house. Defendant admits receipt of the earnest money, but pleads that she was entitled to retain this sum of Rs. 100 as the plaintiff eventually refused to complete the purchase transaction, without giving sufficient reason.

I cannot read the preliminary agreement between the parties in the same way as the Small Cause Court Judge. I take it as meaning that plaintiff was proposing to buy the house but wished to make certain about defendant's title before concluding the bargain, and that the agreement gave him an option of withdrawing if not satisfied. Rightly or wrongly he was not satisfied by his inquiries and accordingly withdrew.

I cannot construe the agreement as if it amounted to a contract binding on the plaintiff, and though he has no claim to damages I think that he was entitled to recover his Rs. 100 earnest money when he availed himself of his option of withdrawal.

The revision is allowed in part. The lower Court's decree is set aside and plaintiff is given a decree of Rs. 100. The parties will pay their own costs in the lower Court and in this Court.

Petition partly accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 678 OF 1913

July 28, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

YELLAVA SAKREPPA BARKI—DEFENDANT—APPELLANT

versus

BHIMAPPA GIREPPA DESAI—PLAINTIFF—RESPONDENT.

Deshgat watan - *Grant for personal service—Grantor, when can resume land.*

Where there is a grant of *deshgat watan* land for personal service, it is not at the option of the grantor to determine the services and resume the land. Where the grantor claims his right to resume, he must show that the terms of the grant give him that right or, if the terms are unknown, that the proved circumstances justify an inference that he has that right. [p. 13 col. 1.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 58 of 1911, reversing that of the Subordinate Judge, Gokak, in Civil Suit No. 243 of 1909.

Mr. *V. H. Kelkar*, for the Appellant.

Mr. *Campbell* (with him Mr. *A. G. Desai*), for the Respondent.

JUDGMENT.

HEATON, J.—In this case the plaintiff sued to recover possession of certain lands. It has now been established as a fact in the case that the lands belonged to the Deshgat Watan of the plaintiff's family and were granted to the defendant's family for service, and it has further been found by the Court of first Appeal that, if I understand the judgment aright, this grant must, in all probability, have been made sometime subsequent to the year 1853. The first Court came to the conclusion that the plaintiff, the *inamdar*, had no right to resume the lands in the circumstances appearing in this case and it rejected the claim with costs. On appeal, the District Judge came to the conclusion that the plaintiff had the right to dispense with the services and to resume the lands.

The case has been fully argued. The facts, such as they are, have been found by the Court of first Appeal and we have to deal with these facts as the basis of an inference. But, first of all, I will deal with a question which has been a good deal argued in the case, and it is this. It is said that where, as here, there is a grant of land for services and where those services are, as

here, personal services, then the grantor has, under what may be called the Common Law of the country, the right to dispense with the services and resume the lands. We have no authority to this effect in any Bombay case to which we have been referred, but as to the law in Bengal, we have the case of *Radha Pershad Singh* v. *Budhu Dashad* (1), and possibly the law is the same also in Madras. But while it appears that in Bengal the distinction between a grant for service of a public nature and one for services, private or personal, to the grantor, is well understood; and though in the case of these private or personal services there is in Bengal presumably a right to dispense with the services and resume the land, it does not follow that it is so in Bombay. In our Presidency the trend of decisions, and what I may describe as the tone of thought in this Court, has always been in the direction of, within reason, protecting the right of the occupants of lands and not increasing and exaggerating the rights of the *inamdar* or *zemindar* or whatever he may be termed. I think that the Bombay cases do undoubtedly disclose a reluctance to presume a right to resume lands where resumption involves ejectment. The tendency is to require that it should be an inference from facts proved in the case, and not a mere presumption arising out of the circumstance that there is a grant and that the grant is for personal services. Moreover, the judgment in the Calcutta case itself shows that even there the Judges considered very carefully the circumstances of that particular case and that the presumption which they mentioned was used not as a conclusive way of deciding the case, but rather as an aid to them in dealing with the circumstances which were proved. For the reasons that I have given, I find myself entirely unable to presume that in this Presidency where there is a grant of land even for personal services, it is at the option of the grantor to determine the services and thereupon to resume the land. t seems to me that if a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant, as here, are unknown, that the proved circumstances justify an inference that he has that right. That is the principle which, I think, ought to be applied here. This is the view which the District Judge took, as I understand his judgment, and very properly took. But where he went wrong, and I think he did go wrong, was in coming to the conclusion that the proved circumstances do justify the inference that there is a right to resume.

In dealing with the proved circumstances—and they are very clearly set out in the District Judge's judgment—we have to remember that there are two alternative theories. The first is the theory of the plaintiff which, put in common, everyday language, is this that the grantor in giving the lands to the grantee said: "You may hold these lands so long as I require service from you." The other theory—that which is set up by the defendant-grantee—is this that what the grantor said was, "these lands are yours, but so long as I require them of you, you must render me these services." We have to decide, or rather the District Judge had to decide, whether the proved circumstances did definitely favour one theory rather than the other. The circumstances are that there was a grant for service, but in all probability the grant was made subsequent to 1853. There is no written record of the grant; there is apparently no entry anywhere in the village books which evidences it; the lands have been held continuously since the grant by the grantee or his successors; services of a purely personal, indeed of a domestic, nature have been rendered. Those, I think, are all the circumstances which have been proved, What the Judge asked himself was this: "Do they indicate a grant burdened with services or a mere grant in lieu of wages," Even taking that as the question rather than the one which I myself have stated, I should say that the proved circumstances do not in any way whatever suggest that it was a grant in lieu of wages rather than a grant burdened with services. And where that is the state of things, where the circumstances do not, in any way in any perceptible degree, incline to one theory rather than the other, then I say that there is no evidence of either theory. This is a case, therefore, which in my judgment the District Judge has decided on no evidence. That being so, as a matter of law, we are bound to set aside his decision. It comes to this therefore. We know that there was a grant for service

(1) 22 C. 938.

and we know now in the view of the law which I have stated that the plaintiff has not a right to resume these lands merely because he chooses to dispense with the service.

There then remains the question: Has the defendant in fact refused to render service? On this point there is no finding by the District Judge, for he deemed it unnecessary to find on it. Therefore, under the law as it now stands, because we think it was incumbent on the District Judge to find on this issue, it is for us to look into the evidence and to come to a finding on it for ourselves. We have looked into the evidence and we are satisfied that it cannot be said that it is proved that the defendant in fact refused to render service.

Therefore, the plaintiff has failed to make out any just or legal ground for ejecting the defendant from these lands. Consequently, the decree of the Court of first Appeal must be reversed and that of the Court of first instance restored.

The appellant here should have her costs in the Court of first Appeal and in this Court.

SHAH, J.—I concur.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 681 OF 1913.

January 12, 1915.

Present:—Mr. Justice Shah Din.

MUHAMMAD—PLAINTIFF—APPELLANT

versus

RAM DIAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 61—Execution of decree—Attachment, objection against—Suit by unsuccessful objector, when allowed—Pro forma defendant in original suit—Second appeal, grounds of—Finding of fact based on inadmissible evidence—Appeal—Additional evidence, irregularly admitted.

The plaintiff's suit for a declaration that property attached by the decree-holder was his and did not belong to the judgment-debtor was dismissed as barred under section 47 of the Civil Procedure Code on the ground that the plaintiff being a defendant in the suit in which the decree was passed was not entitled to file the declaratory suit, but his remedy was to appeal against the order disallowing his objection to the attachment of the property. It appeared that in the original suit the present plaintiff had been impleaded as a defendant in the capacity of an heir to the person against whose estate relief was claimed, but the Court found that he was not heir and the suit against him was dismissed:

Held, that the suit was not barred. [p. 15, col. 1.]

Gour Kishore Chowdhry v. *Mahomed Hassim Chowdhry*, 10 W. R. 191, followed.

Where a Divisional Judge on appeal reversed the finding of a lower Court as to ownership of an attached property, basing his finding chiefly on certain entries relating to cattle enumeration in the village of the parties in the year 1909 after admitting copies of the entries in evidence:

Held, (1) that the entries were not admissible in evidence and that (2) the Divisional Judge was in error in admitting this additional evidence in contravention of the provisions of the Civil Procedure Code and without giving the plaintiff an opportunity of producing rebutting evidence and that, therefore, his findings were of no value. [p. 15, c l 2.]

Second appeal from the decree of the Divisional Judge of the Attock Division, dated the 22nd January 1913, reversing that of the Munsif, first Class, Mianwali, dated the 20th August 1912, decreeing the claim.

Mr. *Nand Lal*, for the Appellant.

Mr. *Bhagat Ram Puri*, for the Respondent.

JUDGMENT.—The facts are fully given in the judgments of the Courts below. The Munsif decreed the plaintiff's claim holding that sheep and lambs in question belonged to the plaintiff and were not liable to be attached in execution of the decree passed in favour of defendant No. 1 against defendant No. 2. On appeal the Divisional Judge has dismissed the suit on the grounds—

(1) That the plaintiff being a party to the suit in which the decree was passed in favour of defendant No. 1 was precluded from bringing the declaratory suit which has been instituted by him; and (2) that on the merits he has failed to prove that the sheep and lambs were his property.

After hearing Counsel on both sides, I think that the Divisional Judge's decision is erroneous, and his judgment and decree must be reversed. As regards the first ground on which the Divisional Judge bases his decision, I note that although the

present plaintiff was made a party to the suit brought by defendant No. 1 against defendant No. 2 upon the allegation that the plaintiff was an heir of Wazira deceased, the Court held that he was not Wazira's heir, his sole heir being his son Nazira, present defendant No. 2. A decree was accordingly passed in favour of present defendant No. 1 against present defendant No. 2, only the suit being dismissed against the present plaintiff.

In these circumstances the present plaintiff was not debarred by section 47 of the Civil Procedure Code from bringing the declaratory suit out of which this appesl has arisen. The case reported in *Gour Kishore Chowdhry* v. *Mahomed Hassim Chowdhry* (1) is in point.

As regards the merits of the case, the Divisional Judge admitted in evidence certain copies of entries relating to cattle enumeration in the village of the parties in the year 1909, showing that in that year Wazira, deceased, had 21 sheep, while the present plaintiff, Muhammad, had none. In the *first* place, the Divisional Judge was in error in admitting this additional evidence in contravention of the provisions of the Civil Procedure Code and without giving the plaintiff an opportunity of producing rebutting evidence. In the *second* place, the entries relied upon by the Divisional Judge are not admissible in evidence at all and this has been conceded by the learned Counsel for defendant No. 1. This additional evidence must, therefore, be excluded from consideration. Next, the Divisional Judge, referring to the evidence of plaintiff's witness Hayat Ali who is a *zaildar*, says that his statement that the sheep were taken from plaintiff himself is absolutely untrue, they being in possession of Naza at the time. I have read the evidence of Hayat Ali, and the Divisional Judge has clearly misunderstood his statement. Hayat Ali says that the sheep were attached from the possession of Muhammad, plaintiff, but he adds that at the time of attachment they were being grazed by Muhammed's younger brother Naza. Surely if at the time of attachment the sheep were being grazed by Naza it does not mean that they were not attached from the possession of Muhammad, plaintiff. Naza was the grazier and his possession was clearly that of Muhammed on whose behalf he was in temporary charge of the sheep; and the Divisional Judge is not only hypercritical, but is wrong when he remarks that Hayat Ali's statement that the sheep were taken from Muhammad is "absolutely untrue." The fact seems to be that the entries in the cattle enumeration papers of 1909, which were admitted by the Divisional Judge in evidence, influenced his judgment in favour of the decree-holder, and he bestowed only a cursory attention on the oral evidence of the plaintiff. His findings, therefore, are of no value at all.

I have read the evidence of the parties, and upon that evidence I have no hesitation in agreeing with the Munsif that the plaintiff has proved that the sheep and lambs in question were his property at the time when they were attached, and not the property of Wazira deceased.

I accept this appeal and reversing the decree of the Divisional Judge, restore that of the Munsif with costs throughout, Counsel's fee Rs. 10.

Appeal accepted.

(1) 10 W. R. 191.

MADRAS HIGH COURT.

CIVIL SUIT No. 145 OF 1914.

December 14, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

T. RAMAKRISHNA CHETTY AND ANOTHER—PLAINTIFFS

versus

G. VENKATASUBBIAH CHETTY AND OTHERS—DEFENDANTS.

Limitation Act (IX of 1908), ss. 19, 20—Endorsement of payment on note—No payment made, if valid as an acknowledgment.

Where on a promissory note, dated 24th January 1911, there was an endorsement as follows:—"On the 22nd January 1914, the amount paid towards this promissory-note in ready money is Rs. 10, in words rupees ten." And the defendants pleaded that no payment of Rs. 10 was made by them

and that the endorsement was not sufficient to save limitation:

Held, that the endorsement would be sufficient as an acknowledgment of liability and would save limitation even if no payment was made. [p. 17, col. 2.]

An endorsement which is not good as a payment under section 20 of the Limitation Act might still be sufficient as an acknowledgment under section 19 of the Act. [p. 17, col. 2.]

Visvanatha Santhasingaro v. *Ramchandra Mardraja Deo*, 27 Ind. Cas. 744; 17 M. L. T. 78, *Jaganadha Sahu* v. *Rama Sahu*, 27 Ind. Cas. 747; 17 M. L. T. 80, followed.

FACTS of the case appear from the judgment.

Mr. *M. Venkatasubba Rao*, for Defendants Nos. 1 to 3 :—Evidence shows that no part payment was actually made. If any was made, it was not for interest as such. If the payment is taken as one made towards principal, requirements of section 20 have not been satisfied. The body of the endorsement is not in the handwriting of the defendants who made the payment: *Lodd Govindass Krishna Dass* v. *Rukmani Bhai* (1). The defendants know to how write, but the endorsement is not in their handwriting.

[KUMARASWAMI SASTRI, J.—Why should the endorsement not be regarded as amounting to an acknowldgement under section 19 ? Some recent cases have taken that view.]

I submit that an endorsement which is held insufficient for section 20 cannot be regarded as amounting to an acknowledgment under section 19. The Act of 1859 contained a section relating to acknowledgment but none relating to part payment. In *Khwaja Muhammad Jannla* v. *Venkatarayar* (2) it was held that a part payment could not be treated as an acknowledgment. The same view was again taken in *Raja Ieyara Das* v. *Richardson* (3); *Gora Chand Dutt* v. *Lokenath Dutt* (4) adopted the same view. Very cogent reasons were given in these cases in support of the view. As a matter of fact the law was different before the 1859 Act came into force. The Act effected a change. No doubt in *Kristna Row* v. *H. Hachapa Sugapa* (5) a part payment was held to contain an acknowledgment, but the decision clearly states at page 310 that it proceeded upon the ground that the writing contained an unqualified admission of the debt.

(1) 21 Ind. Cas. 308; 14 M. L. T. 310; 1 L. W. 529.
(2) 2 M. H. C. R. 79.
(3) 2 M. H. C. R. 84.
(4) 8 W. R. 334.
(5) 2 M. H. C. R. 307.

In the 1871 Act provision was made both for acknowledgment and part payment There was less reason, after this Act was enacted, for holding part payments which were insufficient for section 20 to constitute acknowledgments under section 19.

The subsequent Act practically reproduces the two sections of the 1871 Act. Section 19 requires an acknowledgment. How can then plaintiff rely upon section 19 when there are no words of acknowledgment ? To hold that a part payment which does not satisfy section 20 will be good as an acknowledgment under section 19 will be to render sec. 20 a dead letter.

Again, the cases which have held that the suit was barred because endorsement of principal was not in the handwriting of the defendant should be taken to have impliedly negatived this view ; for if this view was correct, the suits could not have been dismissed. *Lodd Govindass Krishna Dass* v. *Rukmani Bhai* (1) and the cases cited therein. No doubt in two recent cases, *Visvanatha Santhasingrao* v. *Ramchandra Murdraja Deo*(6) and *Jaganadha Sahu* v. *Rama Sahu* (7), it was held that endorsement of part payment amounted to acknowledgment. Of course, the words of the endorsement must be looked at in each case.

Further I submit that these cases cannot be regarded as having overruled carefully considered decisions cited already. They do not discuss principles nor refer to cases on the point.

Mr. *M. N. Duraiswami Iyengar*, for the Plaintiff:—I refer to *Visvanatha Santhasingrao* v. *Ramchandra Sahu* (6) and *Jaganadha Sahu* *Rama Sahu* (7).

JUDGMENT.—The plaintiffs sue to recover Rs. 4,294 with costs and further interest due on a promissory note, dated 24th January 1911, executed by defendants Nos. 1 to 3 in respect of dealings between the parties.

Defendants Nos. 4, 5 and 7 are the sons of the 1st defendant. Defendants Nos. 6 and 8 are sons of the 2nd defendant.

It is alleged that the defendants are members of an undivided family and that the trade carried on by defendants Nos. 1 to 3 is family trade. It is also alleged

(6) 27 Ind. Cas. 744; 17 M. L. T. 78.
(7) 27 Ind. Cas. 747; 17 M. L. T. 80.

that the suit is not barred by limitation, by reason of the payment of Rs. 10 towards interest by defendants Nos. 1 to 3 on the 22nd January 1914, which payment was endorsed on the promissory note and signed by them.

Defendants Nos. 1 to 3 filed a written statement admitting the execution of the promissory note, but pleading that they did not pay the sum of Rs. 10 towards interest on the 22nd January 1914 and that the endorsement is not sufficient to save limitation as it does not satisfy the requirements of section 20 of the Limitation Act. Defendants Nos. 4 and 5 are *ex parte;* 6th defendant did not file a written statement; 7th and 8th defendants, through their guardian *ad litem*, filed a written statement putting the plaintiffs to the proof of the various allegations in the plaint and to the validity of the endorsement saving limitation.

The following issues were settled:—

(1) Was the payment on 22nd January 1914, as alleged in the plaint, and if so, is it sufficient to save limitation?

(2) If not, is the endorsement on the promissory note good as an acknowledgment?

The note was executed on the 14th January 1911. On the 17th January 1914 the plaintiffs applied for leave to file the suit in the High Court and notice was ordered returnable on the 24th. The 2nd plaintiff then went to the defendants' village and according to him, he demanded the payment of the amount due on the promissory note and defendants Nos. 1 to 3 paid Rs. 10 for interest and made the endorsement (Exhibit A), which was written by the 5th defendant, who is the son of the 1st defendant, and signed by defendants Nos. 1 to 3. The endorsement (Exhibit A) runs as follows:— "On the 22nd January 1914 the amount paid towards this promissory note in ready money is Rs. 10, in words rupees ten." It is attested by three witnesses *viz.*, P. Parthasarathy Aiyangar, Venkatasubbayya and the 5th defendant. Second plaintiff states that after making the endorsement he came to Madras, and that he made the entries (Exhibit B1 and B2) in his cash book (Exhibit B) and ledger (Exhibit b) which are to the effect that Rs. 10 was paid on account of interest. The defendants admit making the endorsement, but their case is that the 2nd plaintiff came to their village and said that the note was about to become barred and asked them to make an endorsement on the promissory note and that the endorsement was made without any money being paid at the time.

* * * *

I am of opinion that Rs. 10 was paid on the date of the endorsement [Exhibit A (1)]. The next question is whether it was paid for interest or principal.

* * * *

The entries [Exhibits B (1) and b (1)] made almost immediately after the endorsement show that the payment was for interest and the probabilities support this view. I find the first issue in plaintiffs' favour.

Second Issue. Even assuming that there was no payment of Rs. 10 as alleged by the defendants, the endorsement would be sufficient as an acknowledgment of liability and would save limitation. The endorsement has already been set out by me in full and whatever my own opinion might be, I am bound to follow the decision in *Visvanatha Santhasingroa* v. *Ramachandra Mardraja Deo* (6) and *Janganadha Sahu* v. *Rama Sahu* (7), where it was held that an endorsement which was not good as payment under section 20 might still be sufficient as acknowledgment under section 19 of the Limitation Act. In the present case it is admitted by the defendants that the parties signed the endorsement with the intention of its being an acknowledgment of liability and saving limitation. The wording of the endorsement is similar to the acknowledgments which in *Visvanatha Santhasingaro* v. *Ramchandra Mardraja Deo* (6) and *Jaganadha Sahu* v. *Ramu Sahu* (7) were held to be sufficient under section 19 of the Limitation Act. I hold that the endorsement is good as an acknowledgment. It follows from my findings that the suit is not barred by limitation.

There will be a decree for the amount claimed with costs and further interest against defendants Nos. 1, 2 and 3 personally and against defendants Nos. 4, 5, 6, 7 and 8 to the extent of any joint family properties in their hands.

S. N. DAR, B.A. LL.B.
Vakil High Court,
SRINAGAR (Kashmir)

UMABAI SHANKAR GODBOLE v. AMRITRAO ANANT.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 209 OF 1912.

August 13, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

UMABAI SHANKAR GODBOLE—PLAINTIFF—APPELLANT

versus

AMRITRAO ANANT—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 52—Garnishee order—Attachment of revenue payable in future—Execution proceedings kept alive.

Property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders under Order XXI, rule 52, of the Civil Procedure Code, and revenue *in futuro* is for the purposes of attachment on the same footing as interest or dividend and thus attachable under the rule. [p. 19, col. 1.]

The plaintiff and the defendant submitted their differences to arbitration and obtained a consent-decree, which provided that the defendant should pay the sum of Rs. 41,000 in 14 years by instalments of Rs. 3,100 a year and in the 14th year an instalment covering the balance. On an application in 1894 for execution of the decree a further agreement was entered into, whereby the defendant was constituted a tenant of the plaintiff and the defendant's share of the revenue of the villages was made payable to the plaintiff through the Court. The Court then issued a prohibitory order giving effect to the above arrangement and the revenue continued to be paid to the plaintiff till 1912, when the Court of its own motion took up the matter again and came to the conclusion that it was *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands under the agreement of 1895:

Held, that the order on the *darkhast* of 1894 continued alive and effective up to 1912 and would remain so until the plaintiff's debt was satisfied. [p. 19, col. 2.]

First appeal from the decision of the first Class Subordinate Judge at Belgaum, in Darkhast No. 335 of 1894.

Mr. *D. A. Khare*, for the Appellant.

Mr. *S. R. Bakhale*, for the Respondent.

JUDGMENT.—The plaintiff and the defendant submitted their original differences to arbitration in the year 1887. Upon the award a consent-decree was taken creating what appears to have been a usufructuary mortgage in the plaintiff's favour. The scheme of that award was clearly to pay off the sum of Rs. 41,000, said to be due by the defendant to the plaintiff, in fourteen years by instalments of Rs. 3,100 a year, and in the fourteenth year an instalment covering the balance. The plaintiff was to be put in possession of the defendant's lands and also to receive the defendant's share of he revenues of three *inam* villages. It is in respect of this latter part of the decree that the point arose with which alone we are now concerned.

In 1894 the plaintiff put in a *darkhast* for the execution of this decree, and it appears that in the proceedings taken upon that *darkhast* the plaintiff and defendant entered into a further agreement, the main purpose of which was to constitute the defendant the plaintiff's tenant of the lands. There were many other minor details and provisions in case of default on the defendant's part and loss occasioned thereby to the plaintiff. But those are immaterial. This agreement appears to re-affirm and be intended to carry out the scheme of the consent-decree of 1887. Again, the share of the revenues of the villages belonging to the defendant is to be paid through the Court to the plaintiff, and this agreement would appear to have been recorded as a modification or amplification of the original consent-decree, for the enforcement of which the Court would undertake responsibility. We may well doubt whether the Court was well advised in accepting any modification of this kind upon those or any other terms. What appears to us to have been a more proper course would have been to record this, if at all, as a new agreement, and to record it, not as a decree of the Court, but as such agreement, in substitution of the first consent-decree. Even as to that, I mean the first consent-decree, we may again doubt whether the Court was well advised in taking upon itself virtually the execution of a mortgage contract between these parties in the form of a consent-decree, without any of the preliminaries of a mortgage suit having been gone through. But notwithstanding the doubts we feel upon both these points, the fact remains that the Court appears to have accepted this *darkhast* of 1894 at the close of the year 1895, and thereon to have issued a prohibitory order providing that the share of the revenues of the three *inam* villages belonging to the defendant should be paid by the village officials to the Court's order to hold in satisfaction of the decree, and was to be paid by the Court to the plaintiff. Such an order at that time, assuming that the defendant's share of the revenues of these *inam* villages was an estate, would certainly have been within the express terms of Civil Circular No. 87 of the Order Book of the year 1889; nor do we think that it would in any

way conflict with the principle of the decision in *Tulaji* v. *Balabhai* (1), for regarding the estate as that which produces the revenue, and as something attachable in itself, it would fulfil the requirements which we understand to underlie the principle of Farran, Chief Justice's judgment, namely that what is attached must be something in existence, and not merely in the future. It is prefectly clear that property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders under Order XXI, rule 52, and that such interest or dividend becoming due, and, therefore, in the future, is expressly provided for in that rule, and it would follow upon the same principle that if an estate yielding a revenue were properly attachable under the same rule, then revenue *in futuro* would be for all the purposes of such attachment on the same footing as interest or dividend. The only doubt we feel in thus applying the rule to the principle of *Tulaji* v. *Balabhai* (1) is whether Order XXI, rule 52, was really intended to contemplate the attachment of immoveable property. We think it unnecessary to dwell further upon this point, because it is clear in the events that have happened that the order of 1895 making the defendant's share of the *inam* revenues of these three villages payable into Court for the benefit of the plaintiff, was never appealed against and continued in force up to the date of the present proceedings.

In the year 1904 it would appear that the *darkhast* of 1894, upon which the order of 1895 was passed, came under criticism, probably on account of its apparent staleness. The learned Subordinate Judge, at that time Mr. Wagh, held that the order of 1895 was still in force, the *darkhast* of 1894 was alive and must be continued. On that footing it would appear that the defendant's share of the revenue of these *inam* villages has been paid into Court, and that the Court has paid it to the plaintiff under this *darkhast* of 1894.

In 1912 the learned Subordinate Judge appears to have called upon the parties and to have taken up the matter of this *darkhast* again. The Pleaders, who represent the parties here, cannot inform us whether th defendant really took any part in these proceedings. The plaintiff certainly did, and the learned Judge appears to have come to the conclusion that the Court was already *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands under the agreement of 1895 and issued one garnishee order of the same year. The learned Judge, therefore, came to the conclusion that the *darkhast* of 1894 was no longer in existence and must be struck out. We think that in taking that view the learned Judge was wrong. From what has been already stated it is clear that however doubtful the steps may have been through which the order of 1895 was reached, that was an order upon the *darkhast* of 1894, and continued alive and effective up to 1912. We think that unless it could be shown that the plaintiff's debt was satisfied, for this appears to be the only condition imposed upon the continuity of the order in 1895, that order would still have to be in force. We certainly feel great sympathy with the learned Judge, who evidently conceived himself to have been acting within the scope and principle of section 151, but we think that his proper course here would have been to issue notice to the parties concerned, if he thought it essential in the interests of justice to do so, to show cause why the order of 1895 should not now be discharged on the ground of full and complete satisfaction of the plaintiff's debts. As matters stand, no such satisfaction appears to have been pleaded before the learned Judge, and ordinarily it would be for the defendant, whose money was thus being appropriated, to take the first step and raise the first objection, if he really believed that his debt to the plaintiff was satisfied.

With these observations, we think, that the order complained of must be reversed, and that the *darkhast* of 1894 must still be considered to be alive and operative until it shall be brought to an end in the manner we have suggested, should the investigation thus set on foot prove that there is no need to continue further this garnishee order. In the circumstances, we think that each party should bear his own costs of this appeal.

Order reversed.

(1) 22 B. 39.

HAKIM v. GHASITA.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1404 OF 1912.

November 14, 1914

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

HAKIM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GHASITA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Chundawand—Pagwand—Chawinda and Dogranwali villages, Zaffarwal Tahsil, Sialkot District.

A person died leaving land in Chawinda and Dogranwali villages of the Sialkot District. The plaintiff claimed land in the Chawinda village and contended that the *chundawand* rule of succession governed the parties. It was admitted that *chundawand* was the rule in Dogranwali:

Held, that though ordinarily *pagwand* is the rule of succession, the *chundawand* rule must be held applicable to the case having regard to the fact that in Dogranwali the mutation was effected without contest and the plaintiff made no claim to a share in the land left by the deceased in that village.

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated the 1st June 1912, affirming that of the Munsif, first Class, Sialkot, dated the 31st January 1911, dismissing the claim.

Messrs. *Badur-ud-Din Kureshi* and *Asquith*, for the Appellants.

Mr. *Sham Lal*, for the Respondents.

JUDGMENT.—The genealogical tree is given on pages 8 and 9 of the paper-book. The dispute in this case relates to the succession to certain land left by Surjan whose widow, *Musammat* Narain Devi, died shortly before the institution of this suit. As will be seen from the genealogical tree the plaintiffs, who are descendants of Sikandar by his wife *Musammat* Raj Kour, are related to Surjan only in the half blood while the defendants, who are descended from one of the two sons of Sikandar by his wife *Musammat* Rattan Kour, are relations of Surjan in the full blood. Sikandar left land in two villages, Chawinda and Dogranwali.

According to the *chundawand* rule the two sons of *Musammat* Rattan Kour would have taken one-half of the land and the son of *Musammat* Raj Kour would have taken the other half. While if the *pagwand* rule had been observed the land would have been divided equally between the three brothers. As a matter of fact neither rule seems to have been observed and *Musammat* Raj Kour's son obtained even more than one-half of his father's estate. The question for decision in this case is whether Surjan's land should go to the defendants, or should be divided between them and the plaintiffs, and this depends on whether the rule of succession is *chundawand* or *pagwand*. Surjan, like his ancestor Sikandar, left land in both villages, Chawinda and Dogranwali, but the plaintiffs in this suit claim only a share in the land in Chawinda village, and for some reason, which their Counsel cannot explain, they claim only one-quarter of the land and not one-half. The first Court dismissed the suit, holding that the rule of succession was *chundawand*. The learned Divisional Judge held that the plaintiffs had failed to prove any custom and that the case must be decided according to Hindu Law. He dismissed the plaintiffs' appeal, finding that Hindu Law was in favour of defendants. Counsel for the respondents admits that the parties are governed by custom and that Hindu Law has nothing to do with the case.

Ordinarily the presumption is in favour of the *pagwand* rule being observed, but in the present case we have the fact that in Dogranwali the defendants have obtained mutation without contest and the plaintiffs make no claim to share in the land left by Surjan in that village. Counsel for the appellants admits that *chundawand* is the rule in Dogranwali, but he contends on the strength of *Sant Singh* v. *Ganga Singh* (1) that in Chawinda succession goes by *pagwand*. The ruling relied on relates to *Khatris*, and there is no sufficient ground for holding that *Khatris* and *Jats* observe the same customs. Counsel is unable to quote any authority for the proposition that any family can be bound by one rule of succession in one village and by another rule of succession in another village. Moreover no instances are cited to prove that *Jats* of Chawinda village follow the *pagwand* rule.

In these circumstances we hold that the same rule must be held to apply in both villages and that the custom in Chawinda

(1) 47 P. R. 1901; 63 P. L. R. 1901.

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is the same as in Dogranwali, that is to say, *chundawand*. We, therefore, uphold the decision of the lower Court dismissing the claim, and dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 151 OF 1913.

January 13, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P.C. Banerji, KT.

GAYA PRASAD TEWARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM PHAL MISIR—PLAINTIFF—RESPONDENT.

Hindu Law—Alienation by manager of joint family - Family necessity - Onus—Money borrowed for Government revenue, whether for legal necessity.

Where certain members of a joint Hindu family executed a mortgage of the joint family property and a suit was brought to enforce the mortgage as against the entire family of the executants:

Held, that it was for the plaintiff to prove that the debt was borrowed for family necessity and that there was necessity to borrow it at a high rate of interest stipulated in the deed. [p. 21, col. 2.]

Money borrowed and utilized in payment of Government revenue amounts to a debt borrowed for family necessity. [p. 21, col. 1.]

The family property can in a mortgage suit be brought to sale for such amount of the debt as the Court finds to have been borrowed for legal necessity. [p. 22, col. 1.]

First appeal from a decree of the Subordinate Judge of Gorakhpur.

Mr. *Motilal Nehru* (with him Mr. *Braj Nath Vyas*), for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Messrs. *Iswar Saran* and *Rama Kanta Malaviya*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage, dated the 19th of May 1899. The principal amount was Rs. 722. The interest was 1-8, per cent. per month, compound interest, with annual rests. The claim has now swelled to the large sum of Rs. 6,207-6-0. The Court below has held that the full amount was borrowed and that there was family necessity and has granted a decree. The mortgage was executed by Lachmi Prasad Tewari and Gaya Prasad Tewari. The defendants are the entire joint family of Lachmi Tewari and Gaya Prasad Tewari, who are brothers. One of the defendants, Badri Prasad Tewari, is the brother of Lachmi Prasad and Gaya Prasad, who was a minor at the time the bond was executed. Lachmi Prasad, in his written statement, admitted that he executed the bond, but said as to Rs. 300-5-0, part of the consideration, that he had never received it. Gaya Prasad Tewari pleaded that he was a minor at the time that the bond was executed and that he knew nothing about it. The other defendants pleaded that there was want of consideration and that there was no family necessity. On these pleas it lay upon the plaintiff to prove not only that the bond was executed, but that there was family necessity and that the full amount of the consideration was duly paid. We find that part of the consideration was a sum of Rs. 421-11 0, alleged to be due for a previous debt, namely, a bond dated the 14th of October 1898. Looking at this bond we find that it was executed by Lachmi Prasad alone and in consideration of two sums, one of Rs. 353 paid in cash and Rs. 22-10-9 due upon foot of another bond, dated *Magh Badi* 1st, 1302 *Fasli*. This bond is also on the record. It was a bond for Rs. 17, found to be due for a debt of the grandfather of Lachmi Prasad. There is no evidence to show that the Rs. 53, was for any family necessity. We think, however, that it is proved that the Rs. 22-10-9 was for family necessity. The balance of the consideration was Rs. 300-5-0. This is said to have been wanted for the payment of Government revenue. The evidence as to the payment of the money is not altogether satisfactory. Gaya Prasad and Lachmi Prasad deny having received the amount, though they admit that it was required. However after considering the evidence and what has been put forward on each side, we do not feel justified in holding that this sum of Rs. 300-5-0 was not received. If it was received and utilized for the payment of Government revenue it would amount to family necessity. It appears that shortly after the date of the bond the Government revenue was in fact paid. We, therefore, find that Rs. 300-5-0 and Rs. 22-10-9 was for family necessity, but no necessity has been proved for raising the remaining part of the loan. It must be remembered that we are not dealing with the case of a father's debts. The sum

of Rs. 421-11-0 was alleged to have been given to Lachmi Prasad, the brother of Gaya Prasad and Badri Prasad. It remains to be considered whether there was any necessity to borrow at the high rate of 18 per cent. per annum compound interest. In our opinion no necessity for borrowing at this rate has been proved.

It is contended, on behalf of the respondents, that as Lachmi Prasad has not appealed the decree of the Court below should stand against him. In our opinion this contention is not sound. The family property can in a mortgage suit only be brought to sale for such amount as the Court finds there was family necessity for.

We accordingly must vary the decree of the Court below by giving a decree for Rs. 322-15-9 together with simple interest at the rate of 12 per cent. per annum from the date of the mortgage up to the time hereby fixed for payment. This sum together with costs in all Courts proportionate to this amount will be realised by sale of the mortgaged property. We fix six months from this date for payment. After the date so fixed for payment interest will run at the rate of 6 per cent. per annum. The decree will be drawn up in the usual form.

Decree modified.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3080 OF 1911.

April 23, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Ray.

FAIZUDDIN KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

REJU AKAB AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Prescription—Co-tenant, possession of, when adverse—Ouster—Intention, whether sufficient—Limitation Act (IX of 1908), s. 28, scope of.

Nothing short of an ouster or something equivalent to ouster can make a co-tenant's possession to be an adverse one; and mere mental determination is not sufficient in law to make the possession of a co-owner adverse. [p. 23, col. 1.]

Corea v. *Appuhamy*, (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836, followed.

For the purposes of the application of section 28 of the Indian Limitation Act, it should be established that the period limited for instituting a suit for possession of the property has determined. In case of no ouster, or its equivalent, of a co-tenant, no case of adverse possession arises and consequently there is no determination of the period limited for instituting a suit and no extinguishment under section 28. [p. 23, col. 2.]

Appeal against the decree of the Subordinate Judge of Dacca, dated the 7th August 1911, reversing that of the Fifth Additional Munsif of Dacca, dated the 15th August 1910.

Babu *Upendra Lal Roy*, for the Appellants.

Babus *Birendra Chandra Das* and *Joges Chandra Guha*, for the Respondents.

JUDGMENT.—This is a second appeal arising out of a suit brought by the plaintiffs for recovery of possession of certain lands after establishment of their *khamar* right to the same. The title to the land, according to the plaintiffs, is made out as follows. It unquestionably at one time belonged to a lady named Monsa Bibi. She died leaving a son Rajabdi and two daughters, Mogul Bibi and Jolusi. Mogul was married to one Ali Manjhi. In this state of things, the property devolved as to eight annas on the son and as to the remaining eight annas, in equal shares, on the two daughters. Mogul's husband obtained a money-decree against Rajabdi and in execution of that decree, the right, title and interest of the judgment-debtor in the eight annas was sold to the plaintiffs Nos. 1 to 3. This was in 1908. Subsequently, the eight annas of the two daughters was acquired by private sale, four annas of Mogul being purchased by plaintiffs Nos. 1 to 3, and that of Jolusi by plaintiffs Nos. 1 to 5. Thus the plaintiffs claim to have become entitled to the sixteen annas of the property. Having become so entitled and, as they say being in possession, they were dispossessed by the defendants. The defendants, by way of answer to the suit, based on this dispossession, say that the sixteen annas of the property was vested in Rajabdi, whether as sold to him or how has not been made apparent to us: and it is further claimed that there was a settlement of the *jote* by Rajabdi and that defendants Nos. 1 and 2 succeeded to eight annas of each share, being the portion not sold, as his heirs. The Munsif decided the case in favour of the plaintiffs, holding that title had been established and the suit was within time. The lower Appellate Court has modified this decree

and has determined that the plaintiffs' claim in respect of eight annas is barred by limitation. The eight annas to which this remark applies seems to be the eight annas belonging to the two daughters. It seems to me that we cannot accept this judgment as conclusive, for it is obvious that the matter has not been discussed with a complete apprehension of what are the principles that apply to such a case as this. The first point that has to be decided is whether by their purchase from the two daughters, Mogul and Jolusi, the plaintiffs took anything. It is clear they did, unless the interests of those two daughters had become extinguished under section 28 of the Indian Limitation Act. But this requires that it should be established that the period limited to them for instituting a suit for possession of the property had determined. The only person, against whom they could have brought this suit prior to 1908, was their brother who was a co-tenant with them in the property. Now the law relating to co-tenants in matters of this kind has been authoritatively stated by the Privy Council in *Corea* v. *Appuhamy* (1). The circumstances of that case bear a strong resemblance to those of the present, and Lord Macnaghten, by whom their Lordships' judgment was delivered, said as follows :—"The two learned Judges in the Court of Appeal did not adopt in its entirety the suggestion of the Trial Judge. They both held that Iseris entered as 'sole heir', and that his title has been adverse ever since he entered. They held that he entered as 'sole heir', apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result." Therefore, in this case, *prima facie*, the possession of Rajabdi was the possession of his sisters, and it could not become an adverse possession, until there was an ouster or the equivalent of an ouster. No mere mental determination would be sufficient. There is no finding of the lower Appellate Court which would in any way meet the conditions which are laid down here as requisite, and I do not for one moment suppose that the learned Judge had these considerations in his mind, for otherwise he could not have disposed of the matter in the summary way which he has adopted. If there was not that ouster or its equivalent, there was no adverse possession, there was no determination of the period limited for instituting a suit, and there was no extinguishment under section 28. If so, the plaintiffs acquired title not only to the brother's share by the sale in execution but also to the sisters' shares. Then has it been made out that in any other respect there was no possession within twelve years? According to the principles to which I have referred, the possession of the sisters continued through the possession of the brother, at any rate, till 1908. How then is it possible to say that possession within twelve years is not established? To my mind, these matters call for further consideration, and a decision disregarding these matters cannot possibly stand. Before this case can be determined upon this ground of limitation, it will be for the Court to consider, in the light of the remarks in the judgment of Lord Macnaghten to which I have referred, whether it can reasonably be said that possession of Rajabdi was not the possession of his two sisters; and in determining that, it will be necessary to consider whether there has been any ouster or the equivalent of any ouster.

The decree of the lower Appellate Court passed in disregard of this cannot stand, and we must reverse the decree of that Court and send back the case for the determination of this issue, which seems to be the only issue remaining between the parties, in accordance with the law as is laid down.

The costs of this appeal and of the suit hitherto will follow the result.

Appeal allowed; Case remanded.

(1) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836.

SUBAPPA SHENKAREPPA v. VENKAPPA GOLAPPA.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 543 OF 1913.

August 31, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

SUBAPPA SHENKAREPPA—PLAINTIFF—APPELLANT

versus

VENKAPPA GOLAPPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144 —*Suit to recover possession—Defendant in possession.*

Every suit for possession of immovable property in which the plaintiff alleges that he has had possession falls under Art. 142 of the Limitation Act, and not under Art. 144.

Second appeal from the decision of the first Class Subordinate Judge at Bijapur, in Appeal No. 20 of 1912, modifying the decree passed by the Subordinate Judge at Mudebihal in Civil Suit No. 147 of 1910.

Mr. *Baptista*, (with him Mr. *S. R. Bakhale*), for the Appellant.

Mr. *P. D. Bhide*, for Respondents Nos. 2 and 3.

JUDGMENT.—The plaintiff brought this suit to recover certain land from the possession of defendant No. 1, who, he alleged, was his tenant. He appears to have joined defendants Nos. 2 and 3 because, in collusion, as he says, with defendant No. 1, the name of defendant No. 2 had been entered as owner of this land, or part of it, in the Record of Rights.

The learned Judge of first appeal has broken up the land into two parts, in respect of one of which he has decreed the plaintiff's claim in full, holding that that land was in the possession of defendant No. 1 as tenant of the plaintiff. In respect of the other portion of the land in suit, the learned Judge of first appeal appears to have come to the conclusion that that land was *de facto* in possession of the defendants, and, therefore, that the plaintiff's suit fell under Article 142 of the second Schedule to the Limitation Act. Accordingly, he held that the plaintiff had been unable to prove possession of this portion of the plaint land within 12 years of the suit as required by that Article, and so in effect dismissed his suit as against these defendants in respect of the land so found in their possession.

It has been contended here that the plaintiff's suit against defendants Nos. 2 and 3 really fell under Article 144, and not under Article 142. The written statement of these defendants certainly appears to set up a claim by adverse possession, as well as on a title which the Courts below found was not proved. Having regard, however, to the fact that in respect of all the land the plaintiff has certainly alleged possession, and still alleges possession, we think that as soon as any part of that land is found to be *de facto* in the possession of other persons against whom a suit is brought, the case must necessarily fall under Article 142, and not under Article 144. It is quite clear from the wording of those Articles that every suit for possession of immoveable property in which the plaintiff alleges that he has had possession, must fall under Article 142. It is only where the plaintiff does not allege that he has ever been in possession that the case will fall under Article 144. In the former class of cases the plaintiff is bound to show that the dispossession or discontinuance of possession which gives rise to the starting point of limitation was within 12 years of the date of the suit. The learned Judge below has found, and the finding is a finding of fact, that the plaintiff has not proved his possession within 12 years of suit of the land in the present actual possession of the defendants Nos. 2 and 3. Indeed the learned Judge has gone much further, and upon the evidence appears to have found that these defendants have satisfactorily proved adverse possession for more than 12 years before suit. It would not, therefore, be a matter of much importance now under which Article of the Limitation Act this suit falls to be classed. Under either Article we are bound by the findings of fact of the learned Judge of first appeal, and those findings sufficiently dispose of the plaintiff's case. We must, therefore, dismiss this appeal with all costs.

Appeal dismissed.

BARODA KANTA SARKAR *v.* RASHMANI DASI.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1127 OF 1911.
July 23, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BARODA KANTA SARKAR—RECEIVER—OBJECTOR

versus

RASHMANI DASI AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Receiver—Adjustment of accounts—Receipts by minor for sums in excess of the sanction of Court, whether valid discharges—Money paid as bribe to Police for release of minor—Receipt taken from minor, vilidity of—Liability of person through whom bribe alleged to have been paid—Litigation expenses—Details necessary—Allowance for unavoidable waste of money in conducting litigation—Appointment of persons in excess of sanction of Court, whether permissible—Improper claim of Receiver—Money deposited accordingly—Interest allowed in excess deposit—Payment of high rate of interest on account of Receiver's improper conduct—Separate suit.

In proceedings for the adjustment of the accounts of a Receiver appointed for the estate of an infant, receipts granted by the infant for payments of money made to him in excess of the amount sanctioned by the Court and not shown to have been applied for the benefit of the infant, are not valid discharges, and the infant or his representative is not liable to be charged with the money thus paid. [p. 26, col. 1].

Any money paid by a Receiver as bribe to the Police in order to obtain release of the infant from custody must be deemed wholly unauthorised and disallowed. The Receiver is not entitled to credit the amount even as against the person to whom it is alleged to have been made over for the purpose, after the Receiver has credited the money in the minor's accounts and as a matter of fact has taken receipt for it from the minor. [p. 27, col. 1.]

It is not sufficient for a Receiver merely to show that he had paid certain sums to a Vakil for the purposes of a certain litigation, and unless details are furnished, the items will be disallowed. In adjusting small sums spent for the purposes of litigation, however, it must be borne in mind that a certain amount of money is unavoidably wasted when a suit is instituted and conducted, and the Receiver cannot be expected to do better in this respect than an ordinary prudent man. The Receiver is not entitled to credit the salaries of persons appointed by him in excess of the sanction allowed by the Court. [p. 27, cols. 1 & 2.]

Where a Receiver improperly puts forward a claim for an amount which accordingly is deposited in Court, the Receiver must be held liable, when his accounts are adjusted, for interest upon the excess deposit. But whether or not the minor or his representatives were obliged to raise money for the deposit at a higher rate of interest than usual, by reason of the improper conduct of the Receiver, is foreign to the proceedings for adjustment of accounts, and the rights and liabilities of the parties in this connection must be determined in a separate suit. [p. 30, col. 1.]

Mr. *H. D. Bose* and Babu *Troylokya Nath Ghose*, for the Receiver-Objector.

Babus *Procash Chunder Mittra* and *Surendra Madhub Mullick*, for the Plaintiffs-Opposite Party.

JUDGMENT. - The circumstances of the litigation which has culminated in the present proceedings for the adjustment of the accounts of a Receiver, are fully narrated in the previous judgment of this Court, *Mohini Mohan Patra* v. *Baroda Kanta Sarkar* (1), and need not be recited here. This Court held on that occasion that the Receiver had not fully rendered his accounts and appointed Babu Haradhan Nar, a Vakil of this Court, to take the accounts. The Commissioner commenced the work, but resigned on the ground of ill-health, whereupon the Court appointed Babu Ashutosh Mukerji, another Vakil of this Court, to take the accounts, with directions to submit his report to the Subordinate Judge of the 24-Perganahs, who had seizin of the partition suit in the course of which the Receiver had been appointed. Before the Commissioner, the proceedings were much protracted, as every single item was fought out by the parties with unusual pertinacity, irrespective of the amount in controversy. The result was that the Commissioner submitted a full report in which he dealt with each disputed point with great care and elaboration. The Receiver thereupon filed a memorandum of exceptions in which he not only questioned the the correctness of the conclusions of the Commissioner, but imputed to him grave misconduct. The Subordinate Judge did not investigate the matter on the merits, but reported to this Court that he felt embarrassed as the report of the Commissioner raised a question as to the propriety of the conduct of a gentleman, who need not be named here and who had been intimately known to the Subordinate Judge for many years. It transpired on inquiry at the same time that there was no other senior officer available in the District who could conveniently take up the case for early disposal. The Court was consequently called upon to determine what course should be adopted, in the best interests of the parties

(1) 12 Ind. Cas. 780; 14 C. L. J. 445.

BARODA KANTA SARKAR v. RASHMANI DASI.

for the speedy determination of the questions in issue, and this Bench was specially constituted by the Chief Justice to deal with the matter. After anxious consideration of all the circumstances of the case, we decided to transfer the proceedings for the adjustment of the accounts of the Receiver from the Court of the Subordinate Judge to this Court, to be tried in the exercise of our extraordinary original civil jurisdiction. The order was accordingly made, and the proceedings are now before us for final disposal. In this Court, the learned Counsel for the Receiver, who has put the case before us with great fairness and clearness, has unreservedly withdrawn the imputations made against the Commissioner and has confined himself to such items in the accounts as really call for consideration. We now proceed to examine the exceptions to the report in the order in which they have been placed before us.

The first group of items to which exception is taken by the Receiver comes under the head of maintenance. The Commissioner has disallowed several items which in the aggregate amount to Rs. 388-8-0 and may be arranged in two classes: *first*, the sums paid to one of the plaintiffs, Mohini Mohan Patra, who was at the time an infant: and, *secondly*, a sum of Rs. 200 which was raised by way of loan by the Receiver on his personal undertaking under somewhat exceptional circumstances.

As regards the items included in the *first* class, it has been argued on behalf of the Receiver that the receipts granted by Mohini Mohan Patra constitute a valid discharge, but this contention cannot possibly succeed. Mohini Mohan Patra was an infant at the time these sums are alleged to have been paid into his hands. His natural guardian was his mother who was acting as his next friend for the purposes of the suit. The Court had sanctioned specific sums for the maintenance of the mother and her two sons, namely, Rs. 75 for the mother and Rs. 50 for each of her sons. The sums now in controversy are not included in the sanctioned amounts of monthly allowances. It is not necessary for us to determine whether, under any circumstances, receipts granted by an infant for payments made to him by the Receiver in excess of the amount sanctioned by the Court, are valid discharges. In the present case, it has not been shown that these sums were applied for the benefit of the infant; consequently, it is impossible for us to accede to the contention that Mohini Mohan Patra or his representative is liable to be charged with the sums named.

The sum of Rs 200 included in the *second* class was spent by the Receiver under very exceptional circumstances. On the 22nd December 1909, Mohini Mohan Patra, who was a young man of dissolute habits, was arrested by the Police as he was found drunken and disorderly in the public streets. Thereupon his relation (the defendant in the suit) and one of the officers of the Receiver applied to the latter for money to secure the release of the young man from Police custody. The Receiver, it is alleged, raised this sum of Rs. 200 by a loan on his personal guarantee. The sum carried interest at the very high rate of 48 per cent. per annum. The story is that this sum was placed in the hands of Ram Narayan Patra (the defendant) and Jogendra, the officer of the Receiver, and that they applied it in the payment of what must be regarded as a bribe to the Police to obtain the release of the young man from custody. No doubt, there is no direct evidence that the money was so applied, but we cannot very well expect that evidence will be available to establish that the bribe was as a matter of fact paid. It is further worthy of note that when the Receiver reported the incident to the Court, he did not state that he had raised the sum by way of loan at an exorbitant rate of interest. In fact, if he had reported to the Court the details of the incident and the manner in which the money raised was intended to be applied, he would have found himself in a position of great embarrassment. It is plain that so far as Mohini Mohan Patra is concerned, the expenditure must be deemed wholly unauthorised and disallowed on that ground. But it has been argued for the Receiver that as the money was put into the hands of the defendant, Ram Narayan, the

Receiver is entitled to credit as against him. This argument is obviously unsustainable. The books of the Receiver show that this money was credited in the accounts of Mohini Mohan Patra, and as a matter of fact a receipt was obtained from Mohini Mohan Patra for this amount. The Receiver plainly acted as though he had placed the money into the hands of Mohini Mohan Patra, to be applied by the young man in the payment of a bribe to the Police. Under these circumstances, it is not open to him now to turn round and set up a claim as against Ram Narayan. On the other hand, it is more than probable that if Ram Narayan had been informed by the Receiver that the money could be paid to him only on his personal responsibility, Ram Narayan would never have assumed that liability. We may add that in assuming that the money was, as a matter of fact, applied in the payment of a bribe to the Police, we take the view most favourable to the Receiver, because the plaintiffs have suggested that the money was, as a matter of fact, never so applied but was misappropriated by the Receiver or his officer.

The result is that all the objections under this head fail, and the report of the Commissioner must be affirmed so far as maintenance allowances are concerned.

The *next* group of items comprises litigation expenses other than the fees paid to Pleaders, which amount in the aggregate to Rs. 661-9-6. Of these, the principal items are Rs. 110 and Rs. 100, alleged to have been paid to a Vakil of this Court on the 17th September 1909 and the 11th June 1910 in connection with an appeal from original decree pending in this Court. The Commissioner has disallowed these items on the ground that details have not been furnished, though receipts are produced signed by the Vakil.

In our opinion, the Commissioner acted properly, and it was not sufficient for the Receiver merely to show that he had paid these sums to a Vakil for the purposes of a certain litigation, specially as one of the receipts shows on the face of it that Rs. 100 was advanced as the probable expenses for preparation of the paper-book in that appeal.

We have been invited by the learned Counsel for the Receiver to examine the records of this Court and to ascertain what sum was actually spent. We have done so, and we find that the Vakil in question did file in this Court a memorandum of cross-objections. We, therefore, allow one item, namely, Rs. 110 in full.

In so far as the item of Rs. 100 is concerned we find that the costs of preparation of the paper-book of the respondent amounted only to Rs. 4-2. The sum of Rs. 4-2 only will be allowed out of the item of Rs. 100. The fees paid to the Vakil are included in the item of Rs. 100. The total amount allowed under these two items is thus Rs. 114-2-0.

The remaining items in the *second* group consist of small sums spent for the purposes of litigation. Several of these have been examined in detail by us, and it transpires that possibly in a good many instances, although litigation expenses were incurred, there has been an obvious overcharge. But it must be borne in mind that a certain amount of money is unavoidably wasted when a suit is instituted and conducted, and the Receiver cannot be expected to do better in this respect than an ordinary prudent man.

Under these circumstances, out of the remaining items which constitute an aggregate sum of Rs. 451-9-6, we allow in favour of the Receiver Rs. 300 and the balance of Rs. 151-9-6 is disallowed. The report of the Commissioner on this point is confirmed, subject to this variation. The sum now allowed will be charged as against the estate as a whole.

The *third* head of objections deals with the establishment charges. The Commissioner has disallowed a sum of Rs. 1,241-2. It has been argued before us on behalf of the Receiver that this is not justifiable. We are of opinion that this contention is partly well-founded. Immediately after the Receiver had been appointed, he obtained the sanction of the Court to the creation of a post of superintendent on a salary of Rs. 30 a month, which was filled by him by the appointment of Jogendra Nath Sinha Roy, who, in view of his antecedents, was clearly not a desirable person for the post. The Receiver, subsequently, without the leave of

the Court, appointed a cashier on a salary of Rs. 25 a month and a *mohurer* on an initial salary of Rs. 10, subsequently reduced to Rs. 5. We are of opinion that in view of the fact that a superintendent had been sanctioned, it was not necessary to appoint either a cashier or a *mohurer*, and the salary paid to these two persons, namely, Rs. 350 paid to Harendra and Rs. 81 paid to Debendra, amounting in the aggregate to Rs. 431, must be disallowed.

The result will be that the exception will be allowed in favour of the Receiver against the estate to the extent of Rs. 810.

The *fourth* head comprises two items, which relate to the Doorga *pooja* and *rash* festivals. The Commissioner has disallowed Rs. 547 in respect of Doorga *pooja* expenses, but out of this sum he has made the defendant liable to the extent of Rs. 440. The amount really in dispute is thus reduced to Rs. 107. For this sum, the defendant is liable because it is included in the receipts granted by him.

As regards *rash* expenses, the amount disallowed is Rs. 642-1-0, but out of this sum the defendant has been made liable to the extent of Rs. 227-1-0. The amount really in dispute under this head is thus reduced to Rs. 415. This also is covered by the receipt granted by the defendant who must be held liable. We, therefore, direct that Rs. 107, on account of Doorga *pooja* and Rs. 415, on account of *rash*, be credited against the defendant.

The next head deals with the construction and repair of buildings. The total amount disallowed by the Commissioner is Rs. 263-10-0, composed of several small items. Our attention has been drawn to the evidence and we are of opinion that the exception should be allowed to the extent of Rs. 170. In so far as the Commissioner disallowed the difference, Rs. 93-10-0, his report is confirmed.

The following head deals with brokerage. The Commissioner has disallowed the sum of Rs. 322-9-6. We hold that the Receiver is entitled to Rs. 300 only out of this sum as against the defendant.

The next following head deals with interest on debts. Here one item of Rs. 1,217-9-6 is in dispute. The Commissioner has disallowed this sum on the ground that it is claimed as interest on sums raised ostensibly for the purposes of the estate but applied really for the benefit of the defendant. We have, however, already held that sums applied for the benefit of the defendant should be recovered by the Receiver from him, and this necessarily leads to the conclusion that interest on such sums also should be paid by the defendant to the Receiver. We allow the exception to the extent of Rs. 1,217-9 6 against the defendant.

The next head deals with the question of Pleaders' fees. The Receiver claimed on this account Rs. 2,985-10-0. As the Commissioner allowed Rs. 1,128-10-0, the exception of the Receiver relates to the difference, Rs. 1,857. It has now been stated to us that out of this amount, Rs. 1,620 had been paid to Baboo Dwarka Nauth Chuckrabertty, who has now refunded the sum to the Receiver. The position consequently is as if this money had never been spent. The dispute is thus reduced to Rs. 237, and on examination of the evidence, we are of opinion that Rs. 181 should be allowed in favour of the Receiver against the defendant, the balance, Rs. 56, is disallowed. The Receiver undertakes to deposit in Court within two days the sum of Rs. 1,620 refunded by Baboo Dwarka Nauth Chuckrabertty.

The next following item relates to expenses in connection with the worship of an idol. A sum of Rs. 17-8-0 has been disallowed by the Commissioner. We allow this sum in favour of the Receiver against the estate.

The next head deals with the expenses in connection with the construction and repair of embankments. The Commissioner has disallowed Rs. 376 1-0. We are of opinion that Rs. 250 should be allowed in favour of the Receiver against the estate and the balance disallowed.

The Commissioner has disallowed Rs. 429-6-0 under the next head, travelling and halting charges. We allow Rs. 214 in favour of the Receiver against the estate. The balance is disallowed.

The next head relates to *gharry* hire. The sum of Rs. 60-4-0 was disallowed by the Commissioner. We allow Rs. 30 in favour of the Receiver against the estate. The balance is disallowed.

The next head deals with the house rent. The amount disallowed by the Commissioner is Rs. 138-8-0. We allow Rs. 70 in favour of the Receiver against the estate. The balance is disallowed.

The next head deals with contingencies. The Commissioner has disallowed Rs. 54-15 0. We allow in favour of the Receiver, Rs. 29 against the estate. The balance is disallowed.

The next head relates to expenses on account of kerosene oil and tobacco. The sum of Rs 30-8-0 has been disallowed by the Commissioner. We allow in favour of the Receiver the whole of the above sum against the estate.

The next head deals with the cost of constructing a sluice gate. The sum of Rs. 11-8 0 has been disallowed by the Commissioner. We allow Rs. 10 in favour of the Receiver against the estate. The balance is disallowed.

The next head deals with the expenses in connection with the *punya* ceremony. The sum of Rs. 165 has been disallowed by the Commissioner. We allow Rs. 83 in favour of the Receiver against the estate. The balance is disallowed.

The next head deals with expenses on miscellaneous accounts. The Commissioner has disallowed the sum of Rs. 37-10-3. We allow Rs. 25-8-0 in favour of the Receiver against the estate. The balance is disallowed.

The last head deals with Rs. 320 which was in the hands of a *gomastah* and was not realised. The Commissioner has disallowed this sum. We are of opinion that his decision must be upheld.

The accounts when re-adjusted, according to the directions just given, show that the plaintiffs are entitled to get from the Receiver Rs. 2,486, while the Receiver is entitled to get from the defendant Rs. 15,036 as well as interest at the rate of 12 per cent. per annum from the 1st February 1911 upon the sum of Rs. 14,600, which represents the sums borrowed from time to time by the Receiver for the benefit of the defendant. Interest at this rate will be allowed up to the 31st May 1913, consequently a sum of Rs. 4,088 is due to the Receiver from the defendant on account of interest in addition to the sum of Rs. 15,036 already mentioned. Two questions now require consideration, namely, *first*, the responsibility of the Receiver and of the defendant for interest on the sum of Rs. 20,950 which the plaintiffs were directed, at the instance of the Receiver, to bring into Court on the 1st February 1911, to have their estate released from his custody, and, *secondly*, the liability for costs of the Commissioner as also of the hearing before this Court.

With regard to the first of these questions, it is to be observed that on the 13th June 1910, the Subordinate Judge directed that the Receiver be discharged. The Receiver then applied to the Court to recall this order on the ground that till the liabilities he had incurred for the benefit of the estate had been satisfied, his possession should not be terminated. The Court, thereupon, on the 23rd June 1910, recalled the previous order and restored the possession of the Receiver. The Court further directed that the estate be released from the custody of the Receiver as soon as his dues are brought into Court. The Receiver subsequently filed a statement of accounts in which he alleged that he was entitled to get a sum of Rs. 2,950 from the estate. Meanwhile the plaintiffs were endeavouring to raise money with a view to make a deposit. While negotiations were in progress, the Receiver, on the 27th May 1910, wrote a letter to the person who was about to advance the money with a view to dissuade him from the transaction. This letter is on the record, and is of a highly improper character, as it shows clearly that the Receiver intervened to make it difficult, if not impossible, for the plaintiffs to borrow money for the release of their estate. The plaintiffs ultimately raised money on interest at the rate of 18 per cent. per annum and the deposit was made on the 1st February 1911. Upon the account, as now adjusted, it is manifest that the plaintiffs were not bound to make any deposit at all. The plaintiffs are, on the other hand, entitled to receive a large sum from the Receiver. The person really liable to deposit the money in Court was the defendant, but the amount he was liable to bring into Court was not Rs. 20,950 but Rs. 12,550,

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namely, the difference between the sum payable by the defendant to the Receiver and the sum payable by the Receiver to the plaintiffs. The only question is, at what rate interest should be calculated on this sum. On behalf of the plaintiffs, it has been argued that, but for the improper intervention of the Receiver, they would have been able to raise money on interest at 12 per cent. per annum, and that, consequently, the Receiver should be made liable in damages, in these proceedings, for the extra interest at 6 per cent. on Rs. 12,550 and also for interest at 18 per cent. on the difference between Rs. 20,950 and Rs. 12,550. We were at one stage impressed by this argument, but upon fuller consideration, we hold that this question should not be decided summarily upon affidavits, in these proceedings. The Receiver improperly put forward a claim for Rs. 20,950, while only Rs. 12,550 was due to him; he may be legitimately held liable, when his accounts are adjusted, for interst at 12 per cent. upon the excess deposit. But whether or not the plaintiffs were obliged to raise money at a higher rate of interest than usual, by reason of his intervention, is really foreign to this inquiry, and if the plaintiffs have been damnified by reason of his improper conduct, the rights and liabilities of the parties must be determined in a separate suit framed in such manner as the parties may be advised. We hold, accordingly, that the deposit was properly made to the extent of Rs. 12,550; and interest may legitimately be calculated on the excess deposit at the rate of 12 per cent. per annum. The result is that the plaintiffs are entitled to be indemnified in so far as interest upon the sum of Rs. 20,950 at the rate of 12 per cent. per annum is concerned. This up to the 31st May 1913 amounts to Rs. 5,866. Out of this sum, the defendant may rightly be charged with interest at the rate of 12 per cent. per annum upon Rs. 12,550, that is, Rs. 3,514. The Receiver must be held responsible for the balance, namely, Rs. 2,352. Consequently, in addition to the sum already found due from the Receiver to the plaintiffs, he must be held liable for the further sum of Rs. 2,352.

The second question we have to consider relates to the costs of the proceedings before the Commissioner as also the costs of the hearing before this Court. As regards the costs before the Commissioner, it is manifest that there was a protracted inquiry for which the parties as well as the Receiver must be held responsible. But it cannot be overlooked that the Receiver throughout has resisted an examination of the accounts, and if he had done his obvious duty, the appointment of a Commissioner would have been unnecessary. We, therefore, direct that the Receiver be held responsible for half the costs of the commission, namely, Rs. 1,710. As the plaintiffs have paid the costs of the Commissioner, this sum will be paidby the eceiver to the plaintiffs. In so far as the other half is concerned, the plaintiffs will bear a two-thirds share thereof, namely Rs. 1,140, and the defendant will bear an one-third share, namely Rs 570. Consequently, the defendant will pay Rs. 570 on this account to the plaintiffs. As regards the costs of the hearing before this Court, the defendant has not entered appearance and has incurred no costs. The plaintiffs are entitled to get their costs which we assess at ten gold *mohurs*.

The final result may be summed up as follows. The Receiver must pay to the plaintiffs the sum of Rs. 2,486 on the accounts taken. He must also pay Rs. 2,352 on account of interest on the sum which the plaintiffs were obliged to deposit in Court at his instance. He must further pay Rs. 1,710 on account of costs of the commission and Rs. 160 on account of costs of this Court. The aggregate sum payable by the Receiver to the plaintiffs is Rs. 6,708. The defendant will pay to the Receiver Rs. 15,036 on the accounts taken and Rs. 4,088 as interest on the loan incurred by the Receiver for his benefit. The aggregate sum payable by the defendant to the Receiver consequently amounts to Rs. 19,124. The defendant will further pay to the plaintiffs Rs. 3,514 on account of interest on the sum deposited by the plaintiffs in Court. He will also pay to the plaintiffs Rs. 570 on account of costs of the Commission. The aggregate sum payable by the defendant to the plaintiffs, therefore, amounts to Rs. 4,084. The plaintiffs will have a first charge to the extent of Rs. 6,708 upon the sum of Rs. 19,124 payable by the defendant to the Receiver. The plaintiffs will also

have a personal remedy against the Receiver. The Receiver will be personally responsible for the loans that he has incurred, and the estate will not, as between the parties to the present proceeding, be liable on account of those loans.

We are informed that a sum of Rs. 1,950-4-9 is in deposit, namely, Rs. 1,620 refunded by Babu Dwarka Nauth Chuckraberty and Rs. 330-4-9 brought into Court by the Receiver as the cash balance in his hands. The plaintiffs will be entitled to a two-thirds share of this sum, namely, Rs. 1,300-3-2, and the defendant will be entitled to Rs. 650-1-7. The plaintiffs will be at liberty to withdraw whatever now remains in deposit out of the sum of Rs. 20,950. The plaintiffs will also be entitled to apply Rs. 650-1-7, now standing to the credit of the defendant, in part satisfaction of the Rs. 4,084 payable by the defendant. The Receiver will make over to the parties all the title deeds and all the papers of the estate in his custody. The order of this Court as to the payment of the various sums will, if necessary, be executed as a decree of this Court.

On the sums now decreed in favour of the plaintiffs, they will be entitled to interest at the rate of 6 per cent. per annum from the 31st May 1913 against the Receiver as also against the defendant. But the Receiver will be entitled to interest at the rate of 12 per cent. per annum upon the aggregate sum allowed in his favour against the defendant. We make this order in favour of the Receiver, on the ground that the major portion of the sum decreed in his favour consists of borrowed money which we understand carries interest at 12 per cent. per annum.

CALCUTTA HIGH COURT.

ORDER No. 3343 OF 1913 IN APPLICATION IN THE MATTER OF CIVIL RULE No. 1127 OF 1911.

June 5, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

RASHMANI DASI AND ANOTHER—PETITIONERS

versus

BARODA KANT SARKAR AND ANOTHER—RECEIVER AND SURETY—OPPOSITE PARTY.

Surety of Receiver—Extent of liability—Principle—Test—Surety's remedy.

The surety for a Receiver is liable to the payment of interest on balance improperly retained by him as also for the costs of proceedings in Court necessarily or properly incurred in consequence of the Receiver's default, such as the costs of a proceeding to take accounts, of an attachment for failure to account, of an application for his discharge and for the appointment of another person in his place, and of any proceedings taken to enforce the recognizance. [p. 32, col. 2.]

The principle is that the liability of a surety upon the bond of a Receiver conditioned for the due discharge of his duties is limited to cases of a violation of those duties which may properly be said to be within the scope of his appointment as Receiver, in other words, the surety is responsible only in respect of liability incurred by the Receiver in his capacity as Receiver. To determine, whether a particular liability has been incurred by the Receiver in his capacity as Receiver, the test to be applied is, could the Receiver be made accountable in that respect in the account proceedings. If he could not, the surety is not liable; if he could be held liable in that proceeding as Receiver, the surety is liable. [p. 33, col. 2.]

A surety, after satisfying the claim against the Receiver, is entitled to stand in the place of the Receiver to the extent of the payment made by him and to re-imburse himself from the sums ordered to be paid to the Receiver. [p. 34, col. 1.]

Babus *Provas Chunder Mitter* and *Surendra Madhub Mullick*, for the Petitioners.

Babu *Troylokya Nath Ghose*, for the Receiver-Opposite Party.

Dr. *Sarat Chandra Basak* and Babu *Surendra Nath Das Gupta*, for the Surety-Opposite Party.

JUDGMENT.—This is an application, under section 145 of the Code of Civil Procedure of 1908, to enforce the liability of a surety. The circumstances under which the surety-bond was executed may be shortly stated. On the 14th August 1909, one Baroda Kant Sarkar was appointed Receiver to the estate of Mahendra Narayan Patra, at that time the subject-matter of an administration suit in the Court of the third Subordinate

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Judge of the 24-Perganahs. The Receiver was appointed on condition of his furnishing personal security for Rs. 5,000. The Receiver took possession of the estate and received the rents and profits, but never furnished the security. Proceedings were subsequently instituted in the Court of the Subordinate Judge to take the accounts of the Receiver. The Subordinate Judge directed that the estate be released, if the plaintiffs brought into Court, for payment to the Receiver, a specified sum of money to enable the latter to discharge the liabilities which, he alleged, he had incurred for the benefit of the plaintiffs in the course of the management of the estate. The deposit was made under protest. The plaintiffs next applied to this Court for proper directions as to the mode in which the accounts of the Receiver were to be taken and obtained an *ad interim* order that the sum deposited might be retained in Court till the accounts had been fully investigated. The decision of this Court, upon the questions raised at that stage, will be found in our judgment, dated the 29th May 1911, *Mohini Mohan Patra* v. *Baroda Kant Sarkar* (1). The proceedings to take the accounts of the Receiver were subsequently transferred to this Court, and while a report on his accounts by a Commissioner and the objections thereto were under examination here, it was discovered that he had not furnished security as directed by the Court which had appointed him Receiver. This Court, thereupon, on the 8th April 1913, directed him forthwith to furnish the security. This order was carried out on the next day, and one Shama Kant Chatterjee executed a surety-bond along with the Receiver. By this bond, the executants jointly and severally bound themselves to pay to the Registrar of this Court a sum of Rs. 5,000. The material portion of the bond is in these terms: "The condition of this obligation is such that if the above bounden Baroda Kanta Sarcar shall duly account for all and every the sum and sums of money which he has already received on account of the rents and profits of the immoveable property of the said estate and shall duly pay the balance which shall be certified to be due from him as this Court shall direct, then this obligation shall be void otherwise, it shall remain in full force." The accounts have now been taken and it has transpired that not only is the Receiver not entitled to receive any money from the plaintiffs, but he is liable to pay Rs. 6,708 to the plaintiffs, as determined by our order, dated the 23rd July 1913 [*Baroda Kanta Sarkar* v. *Rashmani Dasi* (2)]. The plaintiffs have now applied to this Court for an order upon the surety under section 145 of the Code for the payment to them of Rs. 5,000 or of such smaller sum as remains unpaid by the Receiver to them under the orders of this Court. On behalf of the surety, objection has been taken to three of the items for which the Receiver has been made liable to the plaintiffs, namely, *first*, costs of the proceedings to take accounts, *secondly*, interest on the sums for which the Receiver has not duly accounted, and, *thirdly*, interest on the sum deposited by the plaintiffs in Court at the instance of the Receiver for the release of the estate. It has been argued that though the Receiver may have been made justly liable to the plaintiffs for all these sums, the surety is under no obligation to pay them, though, he concedes, he is responsible for the principal money for which the Receiver has not duly accounted. We are of opinion that the objections taken by the surety are not well-founded.

It is well-settled that the surety for a Receiver is liable to the payment of interest on balances improperly retainted by him as also for the costs of proceedings in Court necessarily or properly incurred in consequence of the Receiver's default, such as the costs of a proceeding to take accounts, of an attachment for failure to account, of an application for his discharge and for the appointment of another person in his place, and of any proceedings taken to enforce the recognizance. The leading decision on the point is that of Sugden, L. C., in *Maunsell* v *Egan* (3) where he affirmed the decision of Blackburn, M. R. in *Maunsell* v. *Egan* (4). As the Lord Chancellor pointed out, the condition was

(1) 12 Ind. Cas. 780; 14 C. L. J. 445.

(2) 28 Ind. Cas. 25; 20 C. L. J. 113.

(3) (1846) 9 Ir. Eq. Rep. 283; 3 Jo. & Lat. 251; 72 R. R. 60.

(4) (1845) 8 Ir. Eq. Rep. 372.

that the recognizance shall be void if the Receiver shall duly account for sums received and shall duly pay the balance found due; the costs of the proceeding to take the accounts have been incurred as the necessary consequence of the neglect of the Receiver duly to render an account, and the liability for interest is also attributable to the same cause. The recognizance has, therefore, become absolute, and to the extent of the sum for which it was acknowledged, the surety must be responsible for the loss occasioned by the default which rendered the recognizance absolute. This exposition has been repeatedly followed: *MacDonaghs, In re* (5), *Smart* v. *Flood*(6), *Walters* v. *Walters*(7), *In re Nugent's Estate* (8). In the case of *In re Graham*; *Graham* v. *Noakes* (9), Chitty, J., referred to the judgment of Eldon, L. C., in *Dawson* v. *Raynes*(10), and stated the law in these terms: "The surety is answerable to the extent of the amount of the recoginzance for whatever sum of money, whether principal, interest or costs, the Receiver has been liable, including the costs for his removal and of the appointment of a new Receiver in his place." We may take it, then, as the general rule that the surety of a Receiver is answerable, to the amount secured by his recognizance, for such interest as well as for such principal as the Receiver is liable to pay, and also for such costs as may be thrown on the Receiver. The objection of the surety as regards the costs of the account proceedings and the interest allowed on sums for which the Receiver did not duly account, must consequently be overruled.

As regards the interest allowed to the plaintiffs against the Receiver on the sum which they were compelled to bring into Court at the instance of the latter, the surety has argued that he is not liable. There is apparent force in this contention, but upon closer examination, the objection turns out to be groundless. The deposit was intimately associated with the discharge of the duties of the Receiver and of his liability to render an account of the rents and profits received by him. The Receiver was called upon to account. He submittted a statement of accounts, which was accepted by the Subordinate Judge without due scrutiny and which showed that he as Receiver was entitled to obtain a large sum from the plaintiffs. The plaintiffs protested that the accounts were unreliable, that nothing was due from them, and that if the accounts were properly taken, they would be found entitled to receive a large sum from the Receiver. The Court, at the instance of the Receiver, summarily overruled this objection, and compelled the plaintiffs to bring into Court the sum claimed by the Receiver as due to him on his accounts, so as to enable him to apply the money to discharge the liabilities which, he alleged, he had incurred for the benefit of the plaintiffs. The plaintiffs were compelled, in these circumstances, to bring the money into Court. The accounts were then examined in detail by order of this Court, and it transpired ultimately that the claim of the Receiver against the plaintiffs was wholly unfounded. The Court accordingly held the Receiver liable for interest on the sum which the plaintiffs had been obliged to deposit at his instance. We are of opinion that for this sum also, the surety is liable on his bond, as it is not fairly distinguishable from the interest the Receiver was held liable to pay on sums for which he had not duly accounted. The principle is that the liability of a surety upon the bond of a Receiver conditioned for the due discharge of his duties is limited to cases of a violation of those duties which may properly be said to be within the scope of his appointment as Receiver, in other words, the surety is responsible only in respect of liability incurred by the Receiver in his capacity as Receiver: *In re, Walker*(11), *Board of Trade* v. *Employers' Liability Assurance Corporation* (12). To determine whether a particular liability has been incurred by the Receiver in his capacity as Receiver, the test to be applied is, could the Receiver be made accountable in that respect in the account proceedings; if he could not, the surety is not liable; if he could be held liable in that proceeding as Receiver, the surety is liable. Here, the Receiver contended, in the proceed-

(5) (1876) 10 Ir. Eq. Rep. 269.
(6) (1883) 49 L. T. 467.
(7) (1877) 11 Ir Eq. Rep. 335.
(8) (1897) 1 Ir. R. 464: 3 Irish Law Reports 218.
(9) (1895) 1 Ch. 66; 64 L. J. Ch. 98; 13 R. 8; 71 L. T. 623: 43 W. R. 103.
(10) (1826) 2 Russell 466 at p. 471; 38 E. R. 411; 26 R. R. 149.
(11) (1907) 2 Ch. 120: 76 L J. Ch. 580; 96 L. T 864; 51 S. J. 482.
(12) (1910) 2 K. B. 649; 79 L. J. K. B. 1001; 102 L. T. 850; 54 S. J. 581; 26 T. L. R. 511.

ngs to take his accounts, that the plaintiffs were bound to proceed against him by way of a separate suit to recover the interest on the deposit. This was overruled, on the ground that the liability he had incurred arose out of an act done by him in the discharge of his duties as Receiver, and not in relation to a matter beyond the scope of his appointment. This shows conclusively that the objection in the present case is not sustainable.

We direct accordingly that an account be prepared of the sum still due to the plaintiffs from the Receiver under the order of this Court after deduction of the various sums which have been paid from time to time and that the surety be called upon to deposit the balance in this Court within one month of the date on which notice of the ascertained amount is served on him. We may add that when the surety thus satisfies the claim of the plaintiffs, he will be entitled to stand in the place of the Receiver to the extent of this payment made by him, and, to reimburse himself from the sums ordered to be paid by the defendant, Ram Narain Patra, to the Receiver [*Glossop* v. *Harrison* (13), *In re, British Power Traction Co., Halifax Bank* v. *British Power Traction Co.* (14)], without derogation of his right to sue the Receiver: *Henderson* v. *Skerrett* (15). There will be no order as to the costs of these proceedings.

(13) (1814 Cooper 61; 3 Ves. & B. 134; 35 E.R. 429.
(14) (1910) 2 Ch. 470; 79 L. J. Ch. 666; 103 L.T. 451; 54 S. J. 749.
(15) (1842) 5 Ir. Eq. Rep. 404.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

November 25, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Kunwar DIGAMBAR SINGH—PLAINTIFF—APPELLANT

versus

Kunwar AHMED SAYEED KHAN—DEFENDANT—RESPONDENT.

Pre-emption—Origin and growth of right of pre-emption—Wajib-ul-arz, *evidentiary value of—Suit for pre-emption—Custom—Perfect partition of* mahal—*Effect of perfect partition—No new* wajib-ul-araiz *for new* mahals *framed—Custom or contract—Proof—Claim by a sharer in one of the new* mahals *to pre-empt property in another of those* mahals *in which he was not a sharer, maintainability of.*

Pre-emption in village communities in British India had its origin in the Muhammadan Law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan Law of pre-emption; and in such cases the custom of the village follows the rules of the Muhammadan Law of pre-emption. In other cases where a custom of pre-emption exists, each village community has a custom of pre-emption, which varies from the Muhammadan Law of pre-emption and is peculiar to the village in its provisions and incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the share-holders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Legislature and rights of pre-emption have also been created by contract between the sharers in the village. But in all cases the object is as far as possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved. [p. 38 col. 2, p. 39, col. 1.]

A *wajib-ul-arz* containing statements as to rights of pre-emption which are not in contravention of Muhammadan, Hindu or other law, is by itself good *prima facie* evidence of a custom of pre-emption which is stated in it and though such evidence may be rebutted by other evidence, the *wajib-ul-arz* does not require to be corroborated by evidence of instances in which the custom has been enforced. [p. 40, col. 1.]

In a pre-emption suit the question of the existence of the right must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence in the case. [p. 39, col. 2].

Where a *mouza* constituting one *mahal* has been perfectly partitioned into separate *mahals* and no new *wajib-ul-araiz* are framed at partition it does not follow, as a matter of law or principle, that the custom or contract as to pre-emption in force before partition is no longer to have effect or operation, but the question whether there is such a custom or contract in each case is that of the construction of the nature of the particular custom on which the claim for pre-emption is based and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected. [p. 39, col. 1.]

Dalgajan Singh v. *Kalka Singh*, 22 A. 1; A. W. N. (1899) 111, approved of.

Where after the perfect partition of a *mouza*, constituting one *mahal*, into separate *mahals* for which no *wajib-ul-araiz* were framed on partition, a sharer in one of the new *mahals* claimed the right to pre-empt property in another of those *mahals* wherein he was not sharer:

Held, that it was not sufficient to entitle the claimant to a decree to prove that prior to the

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partition of the *mouza* the custom of pre-emption existed amongst the sharers thereof, but that it was necessary for him to show, either on the construction of the *wajib-ul-araiz* for the *mouza* framed prior to the partition thereof or by other evidence, that the custom of pre-emption which obtained in the unpartitioned *mouza* survived a partition of the *mouza* into separate *mahals* so as to give the claimant the right claimed in the altered state of things which came into existence when the partition was effected. [p. 39, col. 1.]

Appeal from a decree of the High Court at Allahabad, dated the 15th July 1912, reported in 16 Ind. Cas. 361, reversing that of the Subordinate Judge of Aligarh, dated the 28th March 1911.

FACTS.—The suit in which the said decree was passed was filed by the appellant against the respondent and one Bhawani Das to enforce the right of pre-emption over certain property detailed in the plaint which had been sold by the said Bhawani Das, to the respondent, who denied the appellant's right to pre-empt. The said Bhawani Das did not appear.

The property in suit was situate in the Aligarh District and formed part of *Mauza* Pala Kher (otherwise known as Pala Kaser or Bilaksir) in which both the appellant and the said Bhawani Das were sharers and in which it was alleged that the usage of pre-emption existed, the right thereto having been recorded in the *wajib-ul-arz* of the village in 1863 and 1870.

In the year 1905 the said *mauza*, which up to that time had been jointly assessed as one *mahal*, was partitioned and five separate *mahals* appeared to have been constituted and the shares allotted to the appellant and the said Bhawani Das fell under two separate *mahals*, but no new *wajib-ul-arz* was recorded at the time of such partition.

By a sale-deed dated the 12th July 1909 and registered on the 6th August 1909, the said Bhawani Das sold the property in suit to the respondent to whom it had already been mortgaged with possession, the respondent being apart from his rights under such mortgage a stranger to the said *mauza*.

The Subordinate Judge decreed the suit, being of opinion that the right of pre-emption existed in respect of the property comprised in the said *mauza*, and that the appellant as one of the proprietors of the village was entitled to purchase the property in suit in preference to the respondent, who was a stranger, and that this right was not affected by the partition of the said *mauza*.

On appeal the High Court held that after the perfect partition of the said *mauza* in 1905 the said *wajib-ul-araiz*, which were prepared long before the partition, were not sufficient to establish a custom of pre-emption in favour of the appellant, and there being no other evidence the appeal was allowed and the suit dismissed with costs. The appellant thereupon appealed to His Majesty in Council.

Mr. *Lowndes*, for the Appellant :—The *wajib-ul-araiz* of 1863 and 1870 clearly prove that the custom of pre-emption existed amongst the co-sharers of the *mauza*. In 1863 all the sharers were Muhammadans and it is undoubted that under the Muhammadan Law there must have been the custom of pre-emption amongst them : See Syed Ameer Ali's Muhammadan Law, 4th Edition, Volume 1, page 718. If that right is by contract, the contract could not be rescinded except by the consent of all the co-sharers, and the right could not be put an end to by one of them obtaining a partition. But it is contended that there was a perfect partition, which put an end to the right which admittedly existed prior thereto. It is, however, submitted that there was no perfect partition of the *mauza* into separate *mahals* within the meaning of section 107 and section 3, sub-section 1, of the North-Western Provinces Land Revenue Act (XIX of 1873).

It is an essential thing for a *mahal* to have a separate Record of Rights framed for it. But no such separate records have been framed after the alleged perfect partition in this case. It is, therefore, submitted that the right in question still exists and that the appellant is entitled to have his suit decreed. The cases on the question take three different views. *Firstly*, that the custom or contract of pre-emption remains in force for partition : *Gokal Singh* v. *Mannu Lal* (1), *Janki* v. *Ram Partab Singh* (2) and *Sardar Singh* v. *Ijaz Husain Khan* (3); *secondly*, a perfect partition puts an end to the right : *Ghure* v. *Man Singh* (4); and *thirdly*,

(1) 7 A. 772; A. W. N. (1885) 263.
(2) 28 A. 286; 2 A. L. J. 833; A. W. N. (1906) 2.
(3) 28 A. 614; A. W. N. (1906) 134.
(4) 17 A. 226; A. W. N. (1895) 70.

that whether the right survives perfect partition depends upon the circumstances in each case: *Dalganjan Singh* v. *Kalka Singh* (5). In *Shiam Sundar* v. *Amanat Begam* (6) it was decided that the existing *wajib-ul-arz* at the time of partition must be presumed to subsist and govern the separate *mahals*, until it has been shown that new ones were made for them. Reference was also made to *Jagdam Sahai* v. *Mahabir Prasad* (7), *Gobind Ram* v. *Masih Ullah-Khan* (8), *Dori* v. *Jiwan Ram* (9), *Retuaji Dubain* v. *Pahalwan Bhagat* (10), *Chiphur* v. *Abdul Hakim* (11), Bengal Regulation VII of 1822, section 9, and Wilson's Glossary for the meaning of *patidari* and *chaiya-chari-tenures*.

Messrs. *DeGruyther*, *K. C.*, and *Dube*, for the Respondent:—The custom of pre-emption is adopted from the Muhammadan Law, under which it depends upon the pre-emptor being a sharer in the *mahal* wherein the land in question is situate. In Hamilton's Hedaya, Book 38, Chapter 1, the word used is "partner," other commentators use the word "co-sharer." Where any variation from the Muhammadan Law of pre-emption is set up, as in this case, the custom alleged must be strictly proved like any ordinary custom. The appellant is not a co-sharer in the *mahal* in which the land sold was situate, and he has not proved any custom applicable to the facts of his case. Directly a person ceases to be a co-sharer, the right of pre-emption, which is only a personal right, ceases too. They relied upon *Ganga Singh* v. *Chedi Lal* (12), *Digambar Misser* v. *Ram Lal Roy* (13), *Gopal Sahu* v. *Ojoodheapershad* (14) and referred to *Shiam Sundar* v. *Amanant Begam* (6), *Jagdam Sahai* v. *Mahibir Prasad* (7), *Jadu Lal Sahu* v. *Janki Koer* (15), *Rai Jainti Parshad* v. *Sheikh Mir Muhammad* (16), *Badri Prasad* v. *Hashmat Ali* (17), *Mathra Prasad* v. *Nemchand* (18), *Dalganjan Singh* v. *Kalka Singh* (5), Act XVIII of 1876, sections 6 to 10, and Thomasson's Directions for Revenue Officers in the North-Western Provinces (Edition 1858) pages 1, 50 and 53.

Mr. *Lowndes* in reply:—The right of pre-emption after partition has been allowed in a dozen cases after the Full Bench decision in *Dalganjan Singh* v. *Kalka Singh* (5). The point that the right was dependent upon the pre-emptor being a co-sharer, involves investigation of facts, and as it was not raised in the Courts below it should not be entertained at this stage. Reference was made to Thomasson's Directions for Revenue Officers in North-Western Provinces (1858 Edition), page 240.

JUDGMENT.

SIR JOHN EDGE.—The suit in which this appeal has arisen was brought on the 6th August 1910 in the Court of the Subordinate Judge of Aligarh by Kunwar Digambar Singh, who is the appellant here, against Kunwar Ahmad Sayeed Khan who is the respondent to this appeal, and one Bhawani Das to enforce a right of pre emption to which Kunwar Digambar Singh claimed to be entitled, under a custom which he alleged to be prevailing in *Mauza* Pala Kher in the the Distinct of Bulandshahr.

The respondent here, Kunwar Ahmad Sayeed Khan, who was the vendee of the property in dispute, by his written statement denied that there was any custom of pre-emption in *Mauza* Pala Kher and alleged that—

"*Mauza* Pala Kher was divided by prefect partition and entirely separate *mahals* were formed. After the said partition no connection of any kind was left among the co-sharers of the different *mahals*, nor did any joint right, based on the terms of any *wajib-ul-arz*, subsist among them."

The date of the sale in respect of which pre-emption is claimed was the 12th July 1909. In 1905, *Mauza* Pala Kher, otherwise known as *Mauza* Pala Khaser and as *Mauza* Bilaksir, was, on the applications of certain

(5) 22 A. 1 A. W. N. (1899) 111.
(6) 9 A. 234 A. W. N. (1887) 24.
(7) 28 A. 60; 2 A. L. J. 482; A. W. N. (1905) 190.
(8) 29 A. 295, 4 A. L. J. 137; A. W. N. (1907) 39.
(9) 6 Ind Cas. 17; 32 A. 265; 7 A. L. J. 133.
(10) 7 Ind Cas. 680; 33 A. 196; 7 A. L. J. 1040.
(11) 9 Ind. Cas. 23; 33 A. 296; 8 A. L. J. 23.
(12) 12 Ind. Cas. 98; 33 A. 605 at p. 615; 8 A L. J. 996.
(13) 14 C. 761.
(14) 2 W. R 47
(15) 15 Ind. Cas. 659; 39 I. A. 101; 16 C. W. N. 553; 11 M .L. T. 361; (1912) M. W. N. 486; 15 C. L. J. 483; 9 A. L. J. 525; 14 Bom. L. R. 436; 23 M. L. J. 28; 39 C. 915 (P. C.).
(16) J. P.'s App. No. 17.
(17) 1 A. L. J. 33.
(18) 2 A. L. J. 261.

of the then sharers in the *mauza*, partitioned into five *mahals*, of which two were named respectively Salig Ram and Bhawani Das. On the partition each of the five newly formed *mahals* became separately responsible for the revenue assessed upon it, but did not become responsible for the revenue assessed upon any other of the five *mahals*. No separate Record of Rights was before this suit framed for any of the five new *mahals*.

The property sought to be pre-empted is in *Mahal* Bhawani Das, in which *mahal* the appellant had not a share at the date of the sale; he was, however, at that date a sharer in *Mahal* Salig Ram, in which *mahal* neither the respondent nor his vendor, Bhawani Das, was a sharer. The respondent was not at the date of the sale a sharer in any of the five new *mahals*; he was, however, the mortgagee in possession of part of the share of Bhawani Das, the vendor, in *Mahal* Bhawani Das. The appellant and Bhawani Das are not related to each other. The respondent, who is a Muhammadan, is not related to the appellant or to Bhawani Das. Prior to the partition of 1905 *Mauza* Pala Kher was an unpartitioned *mauza* in which the appellant and Bhawani Das were sharers. Of the history of *Mauza* Pala Kher prior to 1863 their Lordships are unaware, but in 1863 all the sharers in the *mauza* were apparently Muhammadans.

The evidence to prove the custom of pre-emption upon which the appellant's claim is based, consisted of extracts from a *wajib-ul-arz* of *Mauza* Pala Kher of 1863, upon extracts from a *wajib-ul-arz* of the same *mauza* of 1870, and of a judgment of the Subordinate Judge of Meerut in 1875 in a suit for pre-emption which was confirmed by the High Court at Allahabad in 1876. The cause of action in that case arose, of course, long anterior to the partition of *Mauza* Pala Kher, but the judgments do afford evidence that there existed in *Mauza* Pala Kher a custom of pre-emption under which a relation of a vendor—sharer in the *mauza*—was entitled to pre-empt on a sale to a stranger to the *mauza*, but that is not the custom upon which the appellant must rely in this suit.

The extract from the *wajib-ul-arz* of *Mauza* Pala Kher which was prepared on the 16th June 1863, as translated and so far as it is material, is as follows:—

"In future every co-sharer mortgagor or mortgagee shall as such be at liberty to make transfer. But he shall make transfers first in favour of his own and *ekjaddi* brothers and after them in favour of co-sharers in the *khata* and *patti* as well as in favour of the proprietors of the village. If none of them take he shall be competent to make transfers in favour of strangers. If there is a dispute regarding difference in consideration it shall be decided by arbitration."

The *wajib-ul-arz* of 1863 was signed by all the sharers and by some, if not all, of the mortgagees.

The corresponding clause in the *wajib-ul-arz* of 1870, as translated in the record, is as follows:—

"In future co-sharer mortgagor or mortgagee has as such power. He shall have power to make transfers first to his own and *ekjaddi* brothers and next to co-sharers in the *khata* and *patti* as well as to proprietors. If none of the aforesaid persons takes he shall have power to transfer it to a stranger. If there arises any dispute as regards the price being more or less it shall be decided by arbitration."

In paragraph 14 of the *wajib-ul-arz* of 1870 it is expressly stated: "Custom as to pre-emption—pre-emption is allowed." There can be no possible doubt that the clauses to which their Lordships have referred set out what the sharers in *Mauza* Pala Kher had in 1863 and in 1870 agreed to be the custom of pre-emption in the *mauza*. It is to be presumed, as the contrary has not been shown, that the *wajib-ul-arz* of 1863 and the *wajib-ul-arz* of 1870 had been properly prepared in accordance with the law then in force, and with the "Directions for Revenue Officers in the North-Western Provinces of the Bengal Presidency," which had been promulgated under the authority of the Lieutenant-Governor of those Provinces.

The references in the clauses above mentioned to mortgagors and mortgagees are obscure. The sharers in *Mauza* Pala Kher may have intended that if a mortgagor should assign his interest as a mortgagor he should offer it in the first instance to his own or his *ekjaddi* brother and then to a sharer in the *khata* and *patti*, or to a pro-

prietor in the *mauza*, and if they should refuse to purchase it he might assign it to a stranger, and in the same way if a mortgagee should wish to assign his mortgagee's interest his right to assign it should be similarly limited. In their Lordships' opinion it was not meant by the clauses, to which they have referred, to treat mortgagees as such as sharers in the *mauza* and to confer on them a right to pre-empt.

Having regard to some of the decisions of the High Court of Allahabad, which have been referred to in the arguments in this appeal, it is unfortunate that the record which is before this Board does not show what was the vernacular word in the *wajib-ul-araiz* of 1863 and 1870 which has been translated as "co-sharer," or what was the vernacular word in the *wajib-ul-arz* of 1863 which has been translated as "village."

The *wajib-ul-arz* of 1863 contained a clause as to partition which, as translated in the record, was as follows:

7. Partition, separate and compact.

"Every one can get his property partitioned to the extent of his share. And, if the area be compact, he can also get a separate *mahal* formed. If at the time of partition the grove of one person comes to be included in the lot of another, the planter of the grove shall remain in possession as before, but the planter shall (have to) give land of the same quality in exchange. As to a well the costs of construction shall be given to the person who constructed it. If the *khudkasht* land of one person comes into the possession of another, then he (the person in possession) shall relinquish it of his own accord or shall pay rent as a tenant."

It appears to their Lordships that it may reasonably be inferred from this clause that the sharers of 1863 in *Mauza* Pala Kher not only contemplated that the *mauza* might subsequently be partitioned into separate *mahals*, but also intended that on a partition off from the *mauza* of a separate *mahal* the sharers in the other *mahals* or in the unpartitioned portion of *Mauza* Pala Kher should, as such, have no share or other proprietary interest in the separated *mahal*. It does not appear from the extracts from the *wajib-ul-arz* of 1870, which are printed in the record, whether the *wajib-ul-arz* of 1870 contained a similar clause, but it probably did.

It appears from the *rubkar* of the 5th December 1902, which was drawn up for the carrying out by the *amin* of the partition of *Mauza* Pala Kher, that the partition should be a perfect partition; that a grove should be allotted to the *mahal* of the person who had planted it, and that a Muhammadan tomb, which stood in the *abadi*, should be allotted to the share of the Muhammadans.

The Subordinate Judge of Aligarh found that a custom of pre-emption prevails in *Mauza* Pala Kher; that the partition of the *mauza* and the separation of the plaintiff's *mahal* Salig Ram from that of the vendor did not affect the custom of pre-emption; and that the plaintiff, the appellant here, had a right to pre-empt as against the vendee, the respondent here; and on the 28th March 1911 he gave the appellant a decree for pre-emption. From that decree Kunwar Ahmad Sayeed Khan, the respondent here, appealed to the High Court of Judicature at Allahabad.

The Chief Justice and Mr. Justice Tudball, before whom the appeal came for hearing, allowed the appeal and dismissed the suit. From the decree of the High Court this appeal has been brought.

Pre-emption in village communities in British India had its origin in the Muhammadan Law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan Law of pre-emption and in such cases the custom of the village follows the rules of the Muhammadan Law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Muhammadan Law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the share-holders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of

pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is as far as possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.

The only evidence in this case to prove that the custom, which is relied upon by the appellant, existed in *Mauza* Pala Kher, is afforded by the clauses relating to pre-emption which are contained in the *wajib-ul-araiz* of 1863 and 1870. These clauses do, in the opinion of their Lordships, prove that prior to the partition of *Mauza* Pala Kher the custom of pre-emption, which is set out in the second paragraph of clause 2 of the plaint, existed and was in force in *Mauza* Pala Kher, but that would not be sufficient to entitle the appellant to a decree. It would be necessary for him to show, either on the construction of the *wajib-ul-araiz* or by other evidence, that the custom of pre-emption which obtained in the unpartitioned *Mauza* Pala Kher would survive a partiton of that *mauza* into separate *mahals*, so as to give a sharer in one of the new *mahals* a right to pre-empt property in another of those *mahals* in which he was not a sharer at the date of the sale.

This question was very carefully considered by a Full Bench of the Allahabad High Court in *Dalganjan Singh* v. *Kalka Singh* (5), in which Sir Arthur Strachey, C. J., and Mr. Justice Banerji considered that the question in each case is that of the construction of the nature of the particular custom on which the claim for pre-emption is based and whether the custom can apply to the altered state of things which comes into existence when a perfect partition has been effected. In that case, as in this, no new *wajib-ul-arz* was framed on the partition. Their Lordships are not prepared to dissent from the view of Mr. Justice Banerji in the case which has been referred to, that "where a fresh *wajib-ul-arz* has not been prepared at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect or operation." The question must depend upon the circumstances of each case and the inferences which may legitimately be drawn from the evidence. In the present case their Lordships cannot overlook the fact that in 1863 all the sharers in *Mauza* Pala Kher were Muhammadans; that Hindus were obtaining interests in the *mauza* as mortgagees; and that the sharers in 1863 were contemplating that the *mauza* might be partitioned. The right to obtain perfect partition, of course, existed. Nor can their Lordships overlook the fact that in 1905, when perfect partition was applied for, Hindus had become sharers in *Mauza* Pala Kher, and that nothing was done on partition to provide that sharers in one *mahal* should have a right of pre-emption in respect of a sale in another *mahal* in which they were not sharers. Their Lordships are unable to draw the inference from the *wajib-ul-araiz* and the circumstances in this case that it was intended that, in case of a perfect partition of *Mauza* Pala Kher, a sharer in one *mahal* should have a right of pre-emption in another *mahal* in which he was not a sharer.

The learned Judges who decided the appeal in this case in the High Court apparently considered that the evidence afforded by the *wajib-ul-araiz* of 1863 and 1870 did not prove any custom of pre-emption, and each of them also relied upon the fact that no evidence that the right of pre-emption has been exercised was given. The learned Chief Justice also apparently suggested doubts as to the value of a *wajib-ul-arz* as evidence of a custom of pre-emption when unsupported by evidence that the custom had been enforced. As their Lordships have already intimated, they have no doubt that the clauses relating to transfers of shares in the *wajib-ul-araiz* of 1863 and 1870 stated what the sharers in 1863 and the sharers in 1870 had agreed was the custom of pre-emption in *Mauza* Pala Kher. These clauses were inartistically drafted. The *kanungo* or other official who collected information from the sharers in the *mauza* may have been a person who was as ignorant as they were of legal forms and legal phraseology, but before the *wajib-ul-araiz* were signed by the sharers or

sanctioned by the Settlement Officer, the sharers had an opportunity of objecting to any statements contained in them which they did not understand or did not consider to be correct. Pre-emption was a matter in which all the sharers were interested; it was a matter as to which they could agree as to what the custom in their *mauza* was. Pre-emption, with various incidents, limitations, and restrictions, prevails by custom or by special agreement amongst share-holders in very many, if not in most or all, of the village communities in the Province in which *Mauza* Pala Kher is situate.

In agreeing as to the custom of pre-emption which should be inserted in the *wajib-ul-araiz*, the sharers were not trying to establish any rule of inheritance in the *mauza* inconsistent with the Muhammadan or the Hindu Law of Inheritance and their Lordships fail to see on what principle statements in a *wajib-ul-arz* as to rights of pre-emption which are not in contravention of Muhammadan, Hindu, or other law, should not be considered as reliable evidence of a custom of pre-emption. To hold that a *wajib-ul-arz* is not by itself good *prima facie* evidence of a custom of pre-emption which is stated in it and that the *wajib-ul-arz* requires to be corroborated by evidence of instances in which the custom has been enforced, would be to increase the costs of litigation in pre-emption cases, and in many cases might practically deprive a sharer of his right. Of course the evidence as to a custom of pre-emption afforded by a *wajib-ul-arz* may be rebutted by other evidence.

The appellant has failed to prove that he is entitled to a decree. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dimissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent: Mr. *Douglas Grant.*

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 20 OF 1912.

September 10, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crump, A. J. C.

CHATTAMAL JETHMAL AND OTHERS—APPELLANTS

versus

REWACHAND AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), ss. 17, 23, ill. (c)—Agreement among intending purchasers not to bid against each other, whether legal—Public policy.

The plaintiffs entered into an agreement with the defendant and some others that in case of any one of them becoming the purchaser at an auction to be held by the Executive Engineer of the right to collect *lac*, that right was to be disposed of among all the "partners" by sale to the highe t bidder, and that they would not only not bid against each other but that there was to be a show of bidding up to a certain limit in order to make the Executive Engineer believe that there was no combination between them and that there was keen competition among the bidders. The right having been sold by the Executive Engineer to two of the "partners" the plaintiffs bought it from them paying a certain sum over and above the auction price and divided this surplus among all the "partners", the defendant receiving his share. The plaintiffs then applied to the Executive Engineer for a transfer of the right in their name, and on the application being refused they sued the defendant for recovery of the amount paid to him:

Held, that the agreement being fraudulent and opposed to public policy was void and the plaintiffs could not recover the amount paid under it. [p. 45, col. 1].

Second appeal against the decree of the Assistant Judge, Hyderabad.

Mr. *Wadhumal Oodharam*, for the Appellants.

JUDGMENT.—The main allegations set out in the plaint in this suit may be summarised as follows:—

(1) The three plaintiffs, the defendant and forty seven other persons entered into an agreement that if any one of them became the purchaser at an auction to be held by the Executive Engineer, Eastern Nara, of the right to collect *lac* for the year 1908-1909, then that right was to be disposed of among the said fifty-one persons by sale to the highest bidder.

(2) The said right to collect *lac* was sold by auction by the Executive Engineer to Akhund Hassanali and Chellaram, being two of the said fifty-one persons, on April 30th, 1908, for Rs. 13,000.

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(3) On June 10th, 1908, these fifty-one persons, who may for brevity be termed "the partners", put up the right for sale among themselves and plaintiffs purchased it for Rs. 21,200, being an advance of Rs. 8,200 over the auction price.

(4) This surplus of Rs. 8,200 was distributed by plaintiffs among the partners in accordance with the agreement between them and defendant received Rs. 713-9-0.

(5) On June 21st, 1908, Akhund Hassanali and Chellaram applied to the Executive Engineer to transfer to plaintiffs the said right but the Executive Engineer refused, having power to do so by the conditions of the sale.

The written statement of the defendant raised various pleas which it is unnecessary to consider here. The facts alleged by plaintiffs were not disputed, but certain additional particulars were given going to show that it was agreed among the partners that only Akhund Hassanali and Chellaram should bid, in order that the auction price might be kept down as low as possible. On these facts they pleaded that the agreement between the partners was opposed to public policy and void, as it was made with the object of defrauding Government.

To the facts disclosed by the above pleadings it is necessary to add certain facts which have been found by both the lower Courts. *First*, it is found that before the partners went inside the building, where the Executive Engineer held the auction, they agreed, not merely not to bid against each other, but that there should be a show of bidding upto a certain limit, in order to cause the Executive Engineer to believe that there was no combination between them and that there was keen competition among the bidders. *Secondly*, it is found as a matter of fact that the right to collect *lac* was worth fully Rs. 21,200. It follows that there was a loss to the public purse of Rs. 8,200, which loss was due to this arrangement among the partners.

The points of law which have to be determined here are three in number. It is urged by Mr. Wadhumal for the appellants:

(1) That the written statement is defective in that it does not plead fraud specifically.

(2) That the facts proved do not disclose either fraud, or anything which can be held contrary to public policy.

(3) That, even if fraud be made out, plaintiff is nevertheless entitled to recover his money.

The first point does not call for any detailed discussion. The first and simplest answer is that what the written statement does say is "the facts which you set out in your plaint show that what was done by us was contrary to public policy and was done with the object of defrauding Government." The object of the rule that fraud must be specifically pleaded is to avoid the obvious unfairness of calling upon a party to meet general allegations and it applies to those cases where one party alleges that he has been defrauded by the other. Within its appropriate limits that rule should be most strictly enforced, but it has no application here. Mr. Wadhumal has cited the cases of *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (1), *Jyotiprokash* v. *Jhowmull Johury* (2), *Ramchandra* v. *Krishna Rao*(3), in support of this part of his case. It will be observed that all these are cases in which a plaintiff comes into Court alleging that he has been defrauded by the defendant. In the first of these cases the Privy Council remark: "There can be no objection to the use of such general words as 'fraud' or 'collusion,' but they are quite ineffectual to give a fraudulent colour to the particular statements of fact in the plaint, *unless these statements taken by themselves, are such as to imply that a fraud has actually been committed.*" If this test be applied to the pleadings here, it is not possible to say that there is any material omission. It is hardly necessary to pursue this matter further, but it is pertinent to observe that in the third of these cases the Bombay High Court, sitting in second appeal, held that, as both parties had gone to trial on the question of fraud, it was too late to urge that plaintiff should not have been permitted to rely upon that case. There there was clearly no sufficient averment of fraud in the plaint. Here it is apparent from both the judgments below that

(1) 15 C. 533; 15 I. A. 119; 12 Ind. Jur. 254; 5 Sar. P. C. J. 168.
(2) 1 Ind. Cas. 784; 36 C. 134; 13 C. W. N. 87.
(3) 10 Bom. L. R. 279; 32 B. 259.

the parties were fully aware of the nature of the allegation of fraud and went to trial on that point. "If the illegality of a transaction is brought to the notice of the Court and the person invoking the aid of the Court is himself implicated in the illegality, the Court will not assist him, even if the defendant has not pleaded the illegality and does not wish to raise that objection." See Halsbury's Laws of England, Volume 7, page 390.

The second question is whether the facts disclose any fraud or anything that it is contrary to public policy. With regard to the question of fraud a number of cases have been cited in which the facts more or less resemble the facts now before us. But in dealing with those cases it must be remembered that no decision is an authority except upon the facts of the case in which it is given. It will be found that in this special matter of auction sales the language used by the Courts is for the most part studiously guarded. In *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (1) it would appear that the allegation made was that certain persons on behalf of the purchaser went about inducing other persons not to bid at the sale. The exact point settled by the decision of the Privy Council is that the words used in the plaint did not constitute sufficient particulars of fraud. In *Jyotiprakash Nandi* v. *Jhoormull Johurry* (2) the facts alleged were very similar to those now before us. A combination between all the intending bidders was alleged and the consequent loss to the sellers. On those allegations Fletcher, J., held that the plaint disclosed no cause of action and based his decision mainly upon the case last cited. It may, however, be remarked with all respect that the facts alleged in the former case were entirely different, and it is thus not easy to see how the decision of the Privy Council on those allegations can be an authority for holding that a different set of allegations do not disclose a cause of action. The learned Judge remarks: "It is sufficient for me to rest my judgment on the decision of the Judicial Committee in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (1), the facts in which case are practically on all fours with the present." There is, however, surely a difference between a combination by all the bidders at an auction not to bid against one another, and the fact that "certain people went about inducing people not to bid." This was the only allegation in the case before the Privy Council. The judgment of Fletcher, J., has been strongly relied upon here, but if the grounds on which it rests are examined it is not possible to treat it as being conclusive. It is, moreover, in direct conflict with a judgment of a Division Bench of the same Court [*Ambika Prasad Singh* v. *R. H. Whitwell* (4)]. Further there is something more in the facts here. All the bidders have combined not only not to bid, but to cause the seller to believe that there was no combination between them and that the bidding was fair and open. The case last cited is not a reported case, but in the absence of any authority to the contrary other than the judgment already discussed, it appears necessary to examine the line of reasoning there to enable us to decide whether we will follow that decision. In the first place it will be noted that the decision deals with a judicial sale, and in so far as it depends upon anything peculiar to judicial sales it must be distinguished—a remark which applies to many of the decisions to be cited later in this judgment. In the next place the decision, no doubt, proceeds in part on certain American authorities by which we are not bound and which we have had no opportunity of examining. But that portion of the judgment which lays down that a combination of all the bidders, coupled with a fictitious bidding to give an air of reality, is dishonest, appears to be based on sound reasoning, and, therefore, to be followed unless it is opposed to decisions by which this Court is bound.

How far is there anything in the cases which goes against the doctrine laid down here? In *Fuller* v. *Abrahams* (5) the plaintiff dissuaded other intending purchasers by openly enlisting their sympathies on his behalf. He was left alone to bid and when the auctioneer for that reason refused to knock down the property to him, a friend raised the last bid by a nominal sum and plaintiff made a final bid thus securing for £52 property worth £150.

(4) 6 C. L. J. 1 1.

(5) 23 R. R. 626; 6 Moore, 316; 3 Brod. & Bing. 116; 129 E. R. 1226.

The Court held that this was a fraud invalidating the sale. In *Levi* v. *Levi* (6) it was ruled that a combination among certain brokers at an auction not to bid against one another was an indictable offence. The other cases which have been cited before us or examined by us are less directly in point. These cases are *Galton* v. *Emuss* (7), *In re Carew's Estates* (8) and *Heffer* v. *Martyn* (9). They are all on this point that an agreement between two intending purchasers not to bid against each other is not fraudulent. None of them touches directly the matter of a combination between all the bidders at an auction. But in *Heffer* v. *Martyn* (9) there is a remark that the plaintiff endeavoured to enter into arrangements to prevent competition but did not succeed in making any such arrangement. It is said that the decision of the Privy Council in *Doolubdass* v. *Ramloll* (10) dissents from *Levi* v. *Levi* (6). That is no doubt so. In that case their Lordships had before them a wager, the result of which turned directly upon the market price of opium as sold by public auction on a given date. It was to the interest of plaintiffs to run up the price and they did so by bidding. It was pleaded that this was a fraud on defendants as it was in contravention of the understanding between the parties. This point of fact was found against the defendants. It was further urged that the acts done by plaintiffs and their agents were a fraud on third persons and therefore illegal. "But it is said that the fact of employing several agents who were all cognizant of the purpose as well as the plaintiffs constituted an illegal conspiracy, and is an indictable offence" (page 133). It was with reference to this suggestion that their Lordships criticized the dictum in *Levi* v. *Levi* (6), and the effect of their remarks is to dissent from that dictum, *videlicet*, that an agreement of several *not* to bid is an indictable offence. But for the purposes of the case before us nothing turns upon this *dictum*.

(6) (1833) 6 Car. & P. 239.
(7) 1 Coll. C. C. 243; 13 L. J. Ch. 388; 8 Jur. 507; 63 Eng. Rep. 402.
(8) 28 L. J. Ch. 218; 26 Beav. 187; 4 Jur. (N. S) 1290; 7 W. R. 81; 122 R. R. 76; 53 Eng. Rep. 869.
(9) 36 L. J. Ch. 372; 15 W. R. 390.
(10) 5 M. I. A. 109; 7 M. P. C. 239; Perry, O. C. 233; 1 Sar P C. J. 403; 4 Ind. Dec. (o. s.) 212; 18 E. R. 836; 13 E.R. 873; 83 R. R. 42.

It is unnecessary to establish that the combination with which we are concerned amounts to an indictable offence. It is enough that misrepresentations made were intended to deceive the seller and to damp competition. The case is in fact analogous to one of puffing as to which their Lordships say: (page 134) "A puffer is not a real bidder. By arrangement between him and the vendor his bid is to go for nothing; but as to the competing bidders it appears to be what it is not, a real bidding, and the vendor, by authorising it, is guilty of a fraud on them, and cannot profit by it."

There is at least nothing in these cases to support the proposition that all the bidders at a sale may enter into a combination such as we have to deal with here, nor it is possible to say on those decisions that *Ambica Prasad Singh* v. *R. H. Whitwell* (4) was wrongly decided. If that be so, it must follow *a fortiori* that the artifice employed by the partners here was fraudulent, for this is no case of a mere combination. We have here acts deliberately done to soothe any possible suspicion in the mind of the seller as to the fairness of the auction. It may be added that the Indian authorities certainly do not go any further than the English cases. There is none which goes so far as to say that all the bidders at an auction may combine without the knowledge of the seller so as to stifle all competition. In *Doorga Singh* v. *Sheo Pershad Singh* (11) the decision is based on *In re Carew's Estate* (8), which deals with a combination of two intending purchasers. It is said no doubt that "a combination among certain purchasers" would not be illegal, but there is more than that here. *Hari Balkrishna* v. *Naro Moreshwar* (12) is to the same effect. A case somewhat closer to that before us is *Jayinilabdin Rowthan* v. *Vijaya Ragunadha* (13). There was there an agreement by the purchaser with an influential *zemindar* that the former would reconvey the property to the latter if the latter would dissuade other persons from bidding. The Madras High Court followed the case of *In re Carew's Estate* (8), but remarked that the number of persons who entered into the

(11) 16 C. 194.
(12) 18 B. 342.
(13) 19 M. 315.

agreement could make no difference. This decision was confirmed by the Privy Council in *Mahomed Mira Ravuthar* v. *Savvasi Vijaya* (14). The judgment of their Lordships proceeds mainly on other grounds, and as to this part of the case they merely express their concurrence with the finding of the High Court. It would appear that the facts found in that case were that there was a written agreement by the purchaser to reconvey to the *zemindar*, a verbal agreement that the *zemindar* should dissuade persons from bidding, and that some persons were in fact dissuaded. The result is that all these cases are in point of fact distinguishable from this case. The closest are *Jyotiprakash Nandi* v. *Jhowmull Johury* (2) and *Ambica Prasad Singh* v. *R. H. Whitwell* (4). The reasoning in the latter case commends itself to us. The present case is plainly a stronger case in view of the fact that there was a show of bidding in order to make the Executive Engineer believe that there was no combination but rather a keen competition among the bidders. In *Aaron's Reefs Ltd.* v. *Twiss* (15) Lord Halsbury says: —

"I should say, taking the whole thing together, was there a false representation? I do not care by what means it was conveyed—by what trick or device or ambiguous language: all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be difficulty in showing that any specific statement is untrue." Applying this test we are of opinion that the conduct of these partners was dishonest.

The next point for consideration is the question of public policy. It is a principle that the Courts will look to the interests of the public in giving effect to contracts. The result of the agreement between the parties here was a loss of Rs. 8,200 to the public purse. This fact must distinguish this case from those in which the interests of individuals are alone concerned. In *Tamarasheri Sivithri Andarjanom* v. *Maranat Vasudevan Nambudripad* (16) the facts were as follows. The mother of the plaintiff No. 2 and the plaintiff had a qualified estate in certain property. They had no power to alienate to the prejudice of the Crown claiming by escheat. Plaintiff and her mother alienated the property to defendant with the object of defeating the rights of the Crown. Plaintiff sued to set aside the deed. It was held by Innes, J., that the deed was contrary to public policy because it aimed at defeating the right of escheat. This is an instance of the general rule which is thus stated in Halsbury's Laws of England, Volume VII, page 304: "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy." It is clearly to the interest of the public that a fair price should be realized at auctions of public property held by public servants. The doctrine of public policy is no doubt one to be applied with caution, but the Court cannot shrink from doing so in a proper case. The duty is indeed laid upon the Court by section 23 of the Contract Act. It is true that the loss here is small, but if artifices of this kind are to be tolerated in all the many auctions held by Government Officers in this country, serious detriment to the public purse is an inevitable result. The Courts ought not, therefore, to give effect to contracts founded upon such practices.

The third point is, what is the effect of the above findings? It appears that the act of the partners here was done with intent to deceive the Executive Engineer, a party to the contract, and that act amounts to a "suggestion as to a fact which is not true by one who does not believe it to be true." Therefore there was fraud as defined in section 17 of the Indian Contract Act. It also appears that the object of the agreement was opposed to public policy. It follows that by virtue of section 23 of the Indian Contract Act the agreement between plaintiff and defendant is void, *cf.* illustration (*e*) to that section. The rule applicable in such cases appears to be that stated by Lord Mansfield *Holman* v. *Johnson* (17):—

(14) 23 M. 227; 27 I. A. 17; 4 C. W. N. 228; 10 M. L. J. 1 (P. C.).

(15) (1896) A. C. 273 at p. 281; 65 L. J. P. C. 54; 74 L. T. 794;

(16) 3 M. 215.

(17) 1 Cowp. 341; 98 E. R. 1120.

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed but it is founded on general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this, *ex dolo malo non oritur actio.* ...If, from the plaintiff's own statingor otherwise the cause of action appear to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted." It is upon that ground that the Court goes, not for the sake of the defendant but because they will not lend aid to the plaintiff. So if the plaintiff and the defendant were to change sides and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault: "*potior est conditio defendentis.*" In this case the agreement between the parties was wholly carried out and in such cases it is settled law that a party cannot recover where the contract is unlawful. [*Begbie* v. *Phosphate Sewage Co.* (18).]

Mr. Wadhumal urged that in any event he should not be made to bear respondents' costs. But we see no reason to depart from the settled rule so far as this appeal is concerned, while in the lower Courts the orders passed appear to be appropriate.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(18) (1875) 10 Q. B. 491 at p. 499; 44 L. J. Q. B. 233; 33 L. T. 470; 24 W. R. 115; affirmed 1 Q. B. D. 679; 35 L. T. 350; 25 W. R. 85.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1137 OF 1913.

December 22, 1914.

Present:—Mr. Justice Spencer and Mr. Justice Napier.

THE MUNICIPAL COUNCIL OF KUMBAKONAM—DEFENDANT—APPELLANT

versus

VEERAPERUMAL PADAYACHI—PLAINTIFF—RESPONDENT.

Madras District Municipalities Act (IV of 1884), s. 261, applicability of—Suit to recover compensation for breach of contract—Notice under s. 261, whether necessary—Plaint, amendment of—Defendant made plaintiff—Limitation, starting point of—Limitation Act (IX of 1908), s. 22, Sch. I, Art. 2—Contract entered into by one member of joint undivided family, suit on—Other members, whether necessary parties.

Section 261 of the Madras District Municipalities Act IV of 1884) does not apply to suits for compensation for breach of contract. [p. 46, col. 1.]

Therefore, as an interference by Municipal servants with a contractor to remove rubbish gives rise to a claim for compensation for breach of contract, a suit to recover such compensation need not be preceded by a notice prescribed by section 261 of the Madras District Municipalities Act. [p. 48, col. 2.]

Ranchordas Moorarji v. *Municipal Commissioners of the City of Bombay*, 25 B. 387; 3 Bom. L. R. 158; *Garton* v. *G. W. Railway*, 120 E. R. 721; El. Bl. 837; 27 L. J. Q. B. 375; 4 Jur. (N. S.) 1036; 6 W. R. 677. 31 L. T. (o. s) 233; 1 3 R. R. 916; *Municipality of Faizpur* v. *Manak Dulab Shet*, 22 B. 637, *Mayandi* v. *McQuhae*, 2 M. 124; 3 Ind. Jur. 309; *Muthya Chettiar* v. *Secretary of State for India*, 31 M. 522; 4 M. L. T. 224; *Chundur Sikhur Bundopadhya* v. *Obhoy Churn Bagchi*, 6 C. 8; *Syed Ameer Saheb* v. *Venkatarama*, 16 M. 296, followed.

President of the Taluk Board of Sivaganga v. *Narayanan*, 16 M. 317; *Srinivasa* v. *Ratnasabapathi*, 3 M. L. J. 124; 16 M. 474; *Municipal Council of Kurnool* v. *Subbanna Chetty*, 13 M. L. J. 426, distinguished from.

Eales v. *Municipal Commissioners of Madras*, 14 M. 386, referred to.

Where the really contracting party, though at first made a defendant, is afterwards added as plaintiff, whatever defect there may originally be in the suit as at first instituted, it is cured by such subsequent amendment. [p. 48, col. 2.]

Article 2 of Schedule I of the Limitation Act does not apply to suits founded on contract. Section 22 of the Limitation Act, 1908, has no application to a case where a defendant is made a plaintiff, and the starting point of limitation as against him is not, therefore, the date on which he is so made a plaintiff. [p. 48, col. 2.]

In a suit on a contract entered into by a member of a joint Hindu family the other members of the family are not necessary parties. [p. 49, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 410 of 1912, preferred against that of the Court of the District Munsif of Kumbakonam, in Original Suit No. 387 of 1910.

Mr. *V. S. Govindachariar*, for the Appellant.

Mr. *G.S. Ramachandriar*, for the Respondent.

JUDGMENT.

NAPIER, J.—In this case the plaintiff brought a suit originally against the Municipality of Kumbakonam and another, a contractor, claiming to be interested in a contract made by his brother with the defendant Municipality, which contract was still in force, asking for an injunction

against the defendants to restrain them from interfering with the work being done under the contract, and for a small amount of damages for extra expense to which the contractor had been put owing to past interference, the person with whom the contract was made not being joined as plaintiff but being made a defendant on the ground that he was at the time in jail and unable to bring the suit himself. Subsequently, leave was granted by the District Munsif to amend the plaint and to make the contractor-defendant a plaintiff. This was done and a claim, alternative to that for an injunction, in the form of a claim for damages for Rs. 312-8-0 was added in the view that possibly the conditions had changed in such a manner that an injunction would not or could not be granted. The District Munsif decreed the amount against the Municipality and dismissed the suit against the other parties, holding that they were in no way responsible for the damage. The Municipality appealed on the ground that notice required by section 261 had not been given and that the suit was barred by limitation on the merits. The Subordinate Judge dismissed the appeal.

The points taken in this appeal are that no proper notice under section 261 had been given, that the District Munsif erred in law in permitting the plaint to be amended, that the first plaintiff had no *locus standi* to file the suit and that the suit is barred by limitation.

On the question of notice, various points were raised which are only important if notice is necessary; but, I am satisfied that section 261 does not require notice in a suit of this nature. It provides that no action shall be brought against the Council or any Councillor or any servant or any person acting under the directions of the Council, Councillor or servant, on account of any act done or purporting to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act, until the expiration of one month after notice in writing has been delivered at the office of the Council or at the place of the abode of the Councillor or such person, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and other particulars. Sub-section (2) provides that if such Council or person to whom notice has been given has before action commenced tendered sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered; sub-section (3) provides that except in the case of a suit for recovery of immoveable property or declaration of title thereto, the action shall be commenced within six months after the accrual of the cause of action; and sub-section (4) provides that no action shall be brought against the Chairman on account of any act done in pursuance or execution or intended execution of this Act or in respect of any alleged default on his part in the execution of this Act, if such act was done or if such default was made in good faith, but that such actions shall be brought against the Council.

The suit in this case was one for damages in respect of a contract entered into between the Municipal Council and the contractor for the removal of the rubbish. The act alleged to have been done was interference by the Council through its servants with the contractor, which interference prevented his collecting and disposing of at a profit the rubbish, the subject of the contract. The damages are estimated at the value of the manure which he was unable to collect and so dispose of. The contract is not of such a character as must necessarily arise out of the statutory powers given to a Municipal body although, of course, apart from the Act, the Municipality would have no existence and would, therefore, be unable to enter into such a contract.

The question now is, whether the interference by the Municipality giving rise to the breach is "done or purports to be done in pursuance or execution of this Act" or whether the action is brought in respect of "alleged neglect or default in the execution of this Act."

The words used are wide and it may be said are also vague, for, in one sense if a statutory body does any act or makes any contract it may be said that that act was done or contract made in execution of the act. But in my opinion this reading of the words is not what is contemplated by the Legislature.

Some slight indication of the meaning may be gathered from sub-section (2) which speaks of the Councillor or servant having tendered sufficient amends to the plaintiff. It would be a natural use of the word "amends" to apply it to any tortious act injuring a person or his property, such as for instance, trespass. But the word seems inapplicable to breaches of contract where the natural and legal phrase is compensation or damages. This point alone would not be sufficient to decide the case, but there appears to be fairly uniform authority both in England and in India for exclusion of contracts of this nature from the purview of the section.

In *Ranchordas Moorarji* v. *Municipal Commissioners of the City of Bombay* (1), this point was considered and it was held as settled law that a suit on a specific contract was not within the section. Reference is made to the case of *Garton* v. *G. W. Railway* (2). The action was on a contract, the plaintiff suing for money had and received and on accounts settled. Earle, J., held that the notice given under the section was bad. In the Court of Exchequer Chamber the point was taken that no notice was required and it was held by the Court that an action for money had and received or upon accounts stated was not within the section which provided for notice for anything "done or omitted in pursuance of the Act or in execution of powers or authorities made, given or directed in, by or under the Act." It has to be noted that the section does not contain the words "in respect of any alleged neglect or default in the execution of the Act", but the words considered by the Court were "in pursuance of the Act or in execution of the powers under the Act", which words govern the additional words in section 261 "alleged neglect or default." The ratio of the decision in *Ranchordas Moorarji* v. *Municipal Commissioners for the City of Bombay* (1) is stated by the Chief Justice as follows: "Conduct leading to the action is a wrongful act or omission under the contract, as distinct from one in the execution of the Act, and it is the breach of a specific contract that is the occasion of the right to sue."

Municipality of Faizpur v. *Manak Dulab Shet* (3) was a suit for specific performance of an alleged contract by the Municipality under which the plaintiff permitted the Municipality to pull down some constructions, they undertaking to rebuild them; there was a breach by the Municipality and damage was sought in addition to the suit for specific performance. It was held that section 48 of the Bombay Municipal Act of 1884, which was in the same terms as section 527 of the Bombay Municipal Act of 1888 considered by the Chief Justice, did not apply to suits for damages in respect of specific contracts.

Reliance is also placed on *Mayandi* v. *McQuhae* (4), a suit for money due on a timber contract. It was held that the suit was not within section 168 of the Town Improvents Act of 1871; but that section is in much narrower words—a suit against the Commissioners, etc., for anything done under the Act—and it would hardly be safe to rely on the construction of such words as an authority for the construction of section 261. The same objection applies to another case relied on, *Muthya Chettiar* v. *Secretary of State for India* (5). The Act considered there was the Salt Act IV of 1889, the words of section 87 being "for anything done or ordered to be done under this Act." Two cases relied on by the appellant were *President of the Taluk Board of Sivaganga* v. *Narayanan* (6) and *Srinivasa* v. *Ratanasabapathi* (7). The first was a suit for an injunction restraining the *Taluq* Board from interfering with a wall built by the plaintiff. The Court held that a suit for declaration of title and for an injunction was not within the scope of the section, but used the followed words: "the cases contemplated in that section are suits for compensation and for damages and the principle is to allow public bodies time for tender of amends to parties to avoid litigation." The words "compensation and damages" are certainly wide enough to cover suits for breach of contract, but they can be applied to the narrower limits laid down in the 25 Bombay case and certainly it did not decide that a suit will be for breach of a specific contract. The case at page 474 was a suit to recover from a Muni-

(1) 25 B. 387; 3 Bom. L. R. 158.
(2) 120 E. R. 72 ; El. Bl. & El. 837; 27 L. J. Q. B. 375; 4 Jur. (N. S.) 1036; 6 W. R. 677; 31 L. T. (O. S.) 233; 113 R. R. 916.
(3) 22 B. 637.
(4) 2 M. 214; 3 Ind. Jur. 309.
(5) 31 M. [illegible]; 4 M. L. T. 224.
(6) 16 M. 317.
(7) 16 M. 474; 3 M. L. J. 124.

cipality money deposited for the due performance of a contract. The Court decided without giving reasons that the suit was not within section 261, quoting the words "the cases contemplated in that section are suits for compensation and damages." It has to be noted that this was a suit on a contract but for money had and received under the contract. It is, therefore, not an authority against the application of the section to a suit for damages for breach, but at the same time the words cannot be held necessarily applicable to such suits. These cases, therefore, are no authority for the appellant's proposition. The case of *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (8), quoted by the learned Judges, is one in which Garth, C. J., decided that "the section...is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise...of their statutory powers." These words can hardly include a suit for damages for breach of a contract.

The last case that is relied on is *Municipal Council of Kurnool* v. *Subanna Chetty* (9). In that case the point was taken in a petition under section 25 of the Act IX of 1887, that a certain notice sent to the Council was defective, and the High Court was asked to set aside the decree obtained by the plaintiff. It does not appear from the report on what basis the loss or damage that was sustained was ascertained. But reference was made to the case of *Eales* v. *Municipal Commissioners of Madras* (10), which was a suit in tort. So far as it appears, therefore, this case is no authority in favour of the appellant. Even if the case was one on contract, the point was not decided as the Court declined to interfere in revision when the objection to the notice was then raised for the first time.

As against the inference sought to be made from the language of the Court in the above cases, there is the language used by this Court in *Syed Ameer Saheb* v. *Venkatarama* (11) where in construing section 156 of the Local Boards Act of 1884, which is in similar terms to section 261 under construction, the Court adopts the language of Garth, C. J., in *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (8) above referred to, that the section is only applicable to suits for compensation claimed for wrongful acts committed under colour of the Act. It can hardly be claimed that this language is applicable to suits for damages for breach of contract. On a careful consideration of the authorities I have come to the conclusion that there is no conflict between the view taken by this Court and that held in Bombay and on the words of the section and on the view taken in England on analogous words, I am satisfied that the decision in 25 Bombay is correct and should be followed by me. I, therefore, hold that no notice was necessary.

On the second point it is clear that under the rules of Order VI, the District Munsif had full power to allow the amendments. The point as to limitation is that the amendment of the plaint was made more than 90 days after the alleged breach by the defendants and that, therefore, the suit is barred by Article 2 of the Limitation Act, the language of which is "suit for compensation for doing an act alleged to be in pursuance of any enactment". The reasons above given for holding that this suit is not one for an act done in pursuance or execution of this Act or in respect of any alleged neglect or default in the execution of this Act apply equally to the construction of this Article. It is, therefore, unnecessary to decide whether the date when the 3rd defendant became the 2nd plaintiff should be the starting point of limitation or the date on which the plaint was originally filed, but it would appear that section 22 of the Limitation Act is conclusive on the point. The old Act which makes the date from which the limitation runs, where a new plaintiff is substituted or added, the date when he was so made a party, has been amended and the section has no application where a defendant is made a plaintiff, as has been done in this case.

The last question is whether the original plaintiff had any cause of action. Reliance is placed on *Iswaram Pillai* v. *Tavegan* (12), where it was held that a stranger to the contract, although entitled to a benefit under it, is not entitled to sue. The lower Appellate

(8) 6 C. S.
(9) 13 M. L. J. 426.
(10) 14 M. 386.
(11) 16 M. 296.
(12) 23 Ind. Cas. 951; 26 M. L. J. 127.

Court has found that the first plaintiff was the undivided brother of the second plaintiff, the actual party to the contract and that he was the person who actually carried out the contract. He was as such entitled to bring the suit, provided that the actual contracting member of the family was made a party. This was done in the plaint as originally framed. After the 3rd defendant had become the 2nd plaintiff there was no necessity to join the other members of the family as the party in whose name the contract was made was entitled to bring the suit. This objection, therefore, fails. This second appeal is dismissed with costs.

SPENCER, J.—I concur.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 1 OF 1913.
September 11, 1914.
Present:—Mr. Fawcett, J. C. and Mr. Crump, A. J. C.

HIROMAL AND ANOTHER—APPELLANTS
versus
TAHILIOMAL AND ANOTHER—RESPONDENTS.

Mortgage—Prior mortgagee acquiring equity of redemption—Puisne mortgagee, whether entitled to bring property to sale—Transfer of Property Act (IV of 1882), s. 56, scope of—Marshalling.

A puisne mortgagee is not bound to redeem a prior mortgagee who has acquired the equity of redemption of the mortgagor in legal proceedings to which the puisne mortgagee was not a party. He is entitled to bring the property to sale without redeeming, subject, however, to the prior mortgage. [p. 50, col. 1.]

Section 56 of the Transfer of Property Act is limited in its operation to cases in which the party claiming the marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. [p. 50, col. 1.]

Second appeal against the decree of the District Judge, Sukkur-Larkana.

Mr. *Rupchand Bilaram*, for the Appellants.

Mr. *Wadhumal Oodharam*, for the Respondents.

JUDGMENT.

FAWCETT, J. C.—The main question raised in this appeal is whether a puisne mortgagee is bound to redeem a prior mortgagee, *who has acquired the equity of redemption of the mortgagor in legal proceedings to which the puisne mortgagee was not a party*, or whether he is entitled to bring the mortgaged property to sale without redeeming, but subject to the prior incumbrance.

The first part of this question is specifically answered in the negative and the second part in the affirmative, in theCalcutta Full Bench ruling of *Debendra Narain Rao* v. *Ramtaran* (1). This ruling mainly proceeds on the Privy Council case of *Umes Chunder Sircar* v. *Zahur Fatima* (2) where their Lordships upheld the view that in such a case the puisne mortgagee was entitled to redeem *or to have the property sold*, and observed :—

"Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties."

This ruling has been to some extent dissented from by the Allahabad High Court in *Manohar Lal* v. *Ram Babu* (3) which takes the view that the Court is not bound to allow a sale of the property subject to the prior incumbrance, but can direct either such sale or redemption of the prior mortgages according to the equities of the case, and says that, as a general rule, if the prior incumbrancer is a party and so desires, it will be convenient to direct redemption.

This view also appears to be in accordance with that taken by the Madras High Court in *Cangayam Venkataramana Iyer* v. *Gompertz* (4), where reference is made to the English practice, which allows the puisne mortgagee to show sufficient reason for not directing him to redeem the prior mortgage. The Bombay High Court have also recently given effect to the principle on which the Calcutta Full Bench ruling is based, in *Shanker* v. *Sadashiv* (5).

The view that is urged by Mr. Rupchand for the appellant is no doubt supported by some authority, but after the best consideration I can give to it, I think that the *via media* which has been adopted by the

(1) 30 C. 599; 7 C. W. N. 766.
(2) 18 C. 164; 17 I. A. 201.
(3) 14 Ind. Cas. 674; 34 A. 323; 9 A. L. J. 323.
(4) 31 M. 425, at p. 428; 3 M.L.T. 397; 18 M.L.J 298.
(5) 21 Ind. Cas. 39; 38 B. 24 at pp. 28, 29; 15 Bom. L. R. 817.

KAISTH BANK, LTD., v. IQBAL HUSSAIN.

Allahabad High Court is the safest; and that in view of the Privy Council ruling already cited, the puisne mortgagee cannot properly be held to be necessarily deprived of his ordinary right of sale, subject to the prior mortgage, by the fact that the prior mortgagee acquired the equity of redemption in proceedings to which the puisne mortgagee was not a party.

In this particular case appellants' acquisition of the equity of redemption was subsequent to the decree which it is sought to execute, the nominal amount for which it was transferred was only Rs. 373, and appellants thereby acquired not the whole interest, but a partial interest, as owners in one survey number only. I do not think this is a case where respondents should be called upon to redeem the appellants. In my opinion there is no reason to disturb the orders of the lower Courts allowing sale as applied for in the application of execution.

On the only other point argued, I agree with the lower Appellate Court. Section 56 of the Transfer of Property Act is limited in its operation to the case in which the party claiming the marshalling is a purchaser and the party against whom it is claimed is the original mortgagor; and neither this section nor section 81 helps appellants.

The appeal is accordingly dismissed with costs.

CRUMP, A. J. C.—I concur.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 663 OF 1913.

December 1, 1914.

Present:—Mr. Justice Scott-Smith.

THE KAISTH BANK, LTD.—DECREE-HOLDER—DEFENDANT—APPELLANT

versus

IQBAL HUSSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pleadings—Issues—Evidence, opportunity to produce—Appellate Court, duty of—Second appeal.

The plaintiff sued for a declaration that a house belonged to him. His claim was dismissed on the ground that he was estopped from denying having sold away the house. On appeal the Appellate Court decided in his favour on the ground that the plaintiff had proved his title by adverse possession;

Held, that the Appellate Court should not have decreed the claim without allowing an opportunity to the defendant to produce evidence on the question of adverse possession, for no issue had been framed on the question of adverse possession.

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 7th January 1913, reversing that of the District Judge, Delhi, dated the 31st October 1912, dismissing the claim.

Mr. *Santanam*, for the Appellant.

Mr. *Fazal Ilahi*, for the Respondents.

JUDGMENT.—The facts of this case are clearly given in the judgment of the lower Appellate Court and need not be recapitulated here. The first Court dismissed the plaintiffs' suit for a declaration that a certain house is not liable to attachment, on the ground that the plaintiffs were estopped from repudiating the sale by them of the house to Sayed Ali and that no re-sale had been proved. The lower Appellate Court agreed with the first Court on the question of estoppel, but held that the plaintiffs had remained in adverse possession of the house since the date of the sale and, therefore, decreed their claim.

The Kaisth Bank, defendant, has filed a second appeal to this Court and Mr. Santanam urges on its behalf that the learned Divisional Judge should not have decided the case in plaintiffs' favour on the ground of adverse possession when no issue was framed by the first Court on this point, and that there should have been a remand in order to enable the defendant to produce evidence that the plaintiffs' possession is not adverse. The learned Divisional Judge himself remarks in his judgment that it is unfortunate that no clear issue was framed upon the question of adverse possession, but he was of opinion that there was no reason to remand the case because the parties had already given evidence on the point. It is true that some evidence as to possession was produced in the first Court, but defendant-appellant was never clearly confronted with any claim by the plaintiffs based upon adverse possession, and I think he has been prejudiced by the question being decided against him without being given an opportunity of producing evidence. In my opinion the interests of justice require that the case should be remanded for further inquiry upon the point.

I, therefore, accept the appeal and setting aside the decree of the lower Appellate Court direct it to re-decide the appeal after remanding the case to the first Court for decision of the question whether the plaintiffs and their predecessors have been in adverse possession of the house since the time of the sale to Sayed Ali.

Stamp in this Court will be refunded and other costs will be costs in the case.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 855 OF 1914.

December 22, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

DEVARAMANI BHOGAPPA—DEFENDANT—APPELLANT

versus

PEDDA BHIMAKA GOWD—PLAINTIFF—RESPONDENT.

Darkhast Rules—Standing orders of Board of Revenue, S. O. No. XV, r. 16—Grant, whether subject to revision—Tahsildar making grant under mistake of fact—Power of Deputy Collector to cancel grant—Mistake of fact contemplated by rule, nature of—Contract Act (IX of 1872), s. 20—Planting of trees before grant of land—Cancellation of grant—Grantee, whether entitled to value or compensation—Transfer of Property Act (IV of 1882), s. 51.

A grant of land made under the *darkhast* rules is subject to revision under the conditions laid down in clause 16 of Standing Order XV of the Board of Revenue. The proviso regarding the interests of Government or of the public is only intended to apply to cases in which the grant exceeds the limits of authority possessed by the officer making it—not to decisions passed under a mistake of fact or owing to fraud or misrepresentation. [p. 52, col. 1.]

The mistake of fact contemplated in the rule is not such a mistake as would render an agreement void under section 20 of the Contract Act. [p. 51, col. 2.]

Where, therefore, a Tahsildar makes a grant under the mistaken impression that plaintiff's *darkhast* is only for a portion of the survey number, while in fact it is for the whole, the Deputy Collector does not act without jurisdiction in cancelling the grant. [p. 52, col. 1.]

Where it appears that both the planting of trees and the removal of prickly pear took place before the grant of land to the defendant, *i. e.*, at a time when he could not be said to have believed in good faith that he was absolutely entitled to the land:

Held, that the defendant was not entitled to the benefit of section 51 of the Transfer of Property Act and could not claim the value of the trees or any compensation for the amount spent in clearing the prickly pear. [p. 52, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Bellary, in Appeal Suit No. 96 of 1913, preferred against that of the Court of the District Munsif of Bellary, in Original Suit No. 415 of 1911.

Messrs. *K. Pandalai* and *S. Ranganadha Iyer*, for the Appellant.

Mr. *K. Sundara Row*, for the Respondent.

JUDGMENT.

AYLING, J.—The chief contention raised in appeal is that the order of the Deputy Collector, Exhibit III, cancelling the assignment of the suit land to defendant is *ultra vires*. The order in question, which bears date the 27th August 1909, is evidently passed under clause 16 of the Board's Standing Order XV, which would empower the Deputy Collector to cancel the grant, if at any time within three years of the date thereof he is "satisfied that the decision was passed under a mistake of fact."

These requirements appear to be satisfied. The Tahsildar's order was passed on 9th May 1908 and Exhibit III makes it clear that the Deputy Collector was satisfied that the Tahsildar's order was passed under the mistaken impression that plaintiff's *darkhast* (which preceded defendant's) was only for a portion of the survey number. No authority is quoted in support of appellant's contention that the mistake of fact contemplated in the rule is such a mistake of fact as would render an agreement void under section 20 of the Contract Act, *i. e.*, that it must be one shared by both parties. I can see no reason for adopting such an interpretation.

Appellant relies on a passage in the judgment of Bhashyam Aiyangar, J., in *Secretary of State for India in Council* v. *Kasturi Reddi* (1). But this passage only deals with the conditions under which a grant of land, which had become final under the rules then in force regulating the powers of subordinate Revenue Officers, could be subsequently annulled. At the time of that decision, the grant was only subject to revocation on appeal: the liability to which is distinctly recognised in the very passage relied on. Since that time, the rules have been modified so as to allow

(1) 26 M. 268 at p. 283; 12 M. L. J. 453

of revision within three years: and any grant made under the existing rules is subject to the liability to revision under the conditions laid down in clause 16 above quoted.

It is further argued that revision is only allowed if the Collector or the Divisional Officer is satisfied that the interests of Government or of the public are affected by the grant and that Exhibit III contains no expression to this effect. Reading the clause as a whole, it appears to me that this proviso regarding the interests of Government or of the public was only intended to apply to cases in which the grant exceeded the limits of authority possessed by the officer making it—not to decisions passed under a mistake of fact or owing to fraud or misrepresentation.

I, therefore, hold that the order of the Deputy Collector (Exhibit III) was not passed without jurisdiction.

Appellant's last contention is that under section 51 of the Transfer of Property Act, he is entitled to the value of the trees planted by him and compensation for the amount spent in clearance of prickly pear. The value of the trees appears to have been collected by Government from plaintiff and from Exhibit I, it appears that both the planting of the trees and the removal of the prickly pear took place before the grant of the land to the defendant, *i.e.*, at a time when he could not be said to have believed in good faith that he was absolutely entitled to the land. Defendant is, therefore, not entitled to the benefit of section 51 of the Transfer of Property Act.

I would dismiss the second appeal with costs.

NAPIER, J.—I entirely concur. The arguments addressed to us proceed upon a misunderstanding of *Secretary of State for India in Council* v. *Kasturi Reddi*(1). That case decided two points: *First*, that where Government has given authority to a Tahsildar to grant land subject only to a right of appeal, the grant of such land within the scope of his authority is binding on Government. The *other* is that a grant like any other disposition arising out of contract can be set aside if it is procured by "fraud, misrepresentation or mutual mistake as to any matter of fact essential to the agreement."

After the decision of this case Government thought fit to limit the authority given to certain Revenue Officers by conferring on the appellate authority a power of revision. It was open to Government to do this to any extent, and the *extent* to which they chose to do it is found in the language of Standing Order XV, rule (16). That revisional power is quite outside the scope of the power vested in a Court enunciated in the second proposition of Sir Bhashyam Aiyangar's judgment and there is no connection between them.

It is clear to me that the words in the rule "and that the interests of Government or of the public are affected thereby" are limited to the cases mentioned in the sentence immediately preceding, namely, "it exceeded the limits of authority possessed by the officer passing it," the reason being this—the limitation of authority to dispose of land on *darkhast* is based on the nature of the land sought to be affected, that is to say, the character assigned to it by departmental orders or by its situation. Thus assessed land which has been reserved for special purposes can only be granted by a Divisional Officer: land reserved under section 26 of the Forest Act can only be granted by the Collector. Lands in the vicinity of Railway stations can be granted by the Collector only after he has ascertained that the Railway authorities have no objection, and so on, the reason being that the interests of Government or of the public require to be specially considered, a position which does not exist in the granting of ordinary assessed land. Where such land has been granted by an unauthorized officer in error, it is open to the Appellate authority in revision to consider the case on its merits and decide whether it would have made the grant itself had the application been properly made to it. These considerations are obviously not applicable to grants made under mistake of fact or owing to fraud or misrepresentation.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL NO. 1468 OF 1914.

December 23, 1914.

Present:—Mr. Justice Shadi Lal.

PIARA SINGH—OBJECTOR—APPELLANT

versus

THE PESHAWAR BANK, LTD., IN LIQUIDATION—DEFENDANT—RESPONDENT.

Companies Act (VII of 1913), s. 184—Contributory—Share-holder—Repudiation of liability—Waiver—Acquiescence—Interpretation of Statute—Person agreeing to take share upon special conditions—Conditions precedent and subsequent, effect of—Allottee, conduct of—Estoppel.

Where the provisions of the Indian Companies Act are not at variance with the law obtaining in England, decisions of the English Courts may be followed to interpret the provisions of the Companies Act. [p. 53, col. 2.]

The appellant contended that the General Manager of the Company, who allotted the shares to him not having been properly given the authority in this behalf, the allotment was not valid. It appeared that the appellant not only paid money at the time of allotment but also subsequently acted as a share-holder without any objection having been raised as to the validity of the allotment:

Held, that the contention could not be allowed. [p. 54, col. 1.]

The law recognizes that the observance of formalities may be dispensed with, and irregular, as distinguished from void, transactions may be confirmed. Consequently, a person may become a share-holder to most, if not to all, intents and purposes, without complying with all the formalities prescribed in that behalf by the Statute, Charter, or deed of settlement constituting the Company and although there may have been irregularities in the issue of the shares to him; for if, notwithstanding these circumstances, he has been treated as a share-holder, by the Company, and has acted as a share-holder, both he and the Company will be estopped from denying that he is a share-holder. Once the shares have been registered in the name of the allottee and he has done acts only consistent with his being a member, he will be taken to have agreed to take the shares or at any rate he will be estopped from denying that hed ha so agreed. [p. 54, cols. 1 & 2.]

But even where the agreement is void, if the applicant's name is put on the register and he, with full knowledge of all the facts, does acts which are only consistent with his being a share-holder in respect of such shares, he will be bound as a share-holder. In such a case, the placing of the applicant's name on the register would seem to amount to an offer and the acts done with full knowledge to be an acceptance of such offer. [p. 54, col. 2.]

A contract induced by fraud or misrepresentation is not void but voidable at the option of the party whose consent has been so obtained. But the right of rescission which is ordinarily available against the Company cannot be enforced against its creditors who are the persons vitally interested in the winding-up. [p. 54, col. 2.]

The share-holder who seeks to be discharged must have repudiated the contract and have got his name taken off the register, subject to the qualification that if he has before the commencement of the winding-up taken proceedings to have his name removed, that will be sufficient. [p. 55, col. 1.]

If one share-holder commences a litigation to have his name removed and there is an agreement between the Company and other repudiating share-holders that all the cases shall stand or fall by the result of his litigation then if that case is decided in favour of the litigant share-holder the others will be relieved. [p. 55, col. 1.]

A person cannot be settled on the list of contributories if before the commencement of winding-up he has not only repudiated his shares but has also asserted his right to repudiate them in an action by the Company to enforce calls upon him. [p. 55, col. 2.]

The position of a person who has agreed to take shares upon special conditions depends upon the determination of the question whether the conditions are conditions precedent to his becoming a share-holder or conditions subsequent. In the latter case or where the condition precedent has been waived, the applicant for shares is a share-holder. [p. 56, col. 1.]

If the allottee transfers his shares or attends meetings and accepts dividends, he will be bound by his acts and cannot rely upon the non-performance of a condition precedent. [p. 56, col. 2.]

Miscellaneous first appeal from the order of the Additional District Judge, Multan, dated the 9th June 1914, rejecting the objections.

Mr. *B. Bevan Petman*, for the Appellant.

Mr. *Santanam*, for the Respondent.

JUDGMENT.—This is an appeal under section 169 of the Indian Companies Act VI of 1882, from the order of the Additional District Judge, Multan, rejecting the objections of the appellant, Piara Singh, to the settlement of his name on the list of the contributories of the Bank of Peshawar, Limited, which is being wound-up by Court. I have heard the case argued at length by Messrs. Petman and Santanam on behalf of their respective clients and considered the law bearing on the subject. The points which require determination are of some importance, in view of several cases of winding-up now pending in this Province. The Indian Case-law on the subject is meagre and does not render much assistance in arriving at a solution of all the points involved in the appeal. I have, therefore, consulted the decisions of the English Courts which contain a lucid exposition of the law, and which should be followed by the Courts in India in so far as the Indian Statute is not at

variance with the law obtaining in England. It seems to me that the Indian Act is almost wholly in *pari materia* with the English Law on the subject and the points of difference are few and far between.

The first matter urged in this appeal relates to a defect in the authority of the person who allotted the shares to the appellant on behalf of the Company. It appears that he (the appellant) applied for 50 shares on the 9th October 1911, which were allotted to him on the 18th October 1911, and that the share-certificates were duly issued to him. These shares were allotted by the General Manager of the Company to whom the Directors, acting under Article 95 of the Articles of Association, had delegated their authority in that behalf. It is contended by the learned Counsel for the appellant that, as the resolution of the Directors, dated the 20th November 1908, conferring the authority upon the Manager was passed at a meeting which was not attended by at least four Directors required for constituting a quorum, it was *ultra vires*, that the Manager was not, therefore, lawfully invested with the authority which he purported to exercise, and that the appellant was never a share-holder in the eye of law. This contention is, in my opinion, erroneous and must be overruled. It is abundantly clear that the appellant not only applied for shares, but paid a deposit of Rs. 100 on his application, that the shares were allotted to him and the share-certificates were duly issued, and that the appellant paid some more money after allotment. There is no doubt that his name was placed on the register of shares and that he acted and was treated all along as a share-holder. Neither the Company, nor any of its officers ever raised the slightest objection to his acting as a share-holder. On these facts it seems to me that it is too late for the appellant to raise the objection that the shares were not properly issued.

It is not disputed that the Directors had full power to issue the shares and that the act was not *ultra vires* as regards either the Company or its Directors. The only thing which can be said in favour of the appellant is that there was a technical defect in the authority of the person who issued the shares. Now the law recognizes that the observance of formalities may be dispensed with, and irregular, as distinguished from void, transactions may be confirmed. Consequently, a person may become a share-holder to most, if not to all, intents and purposes, without complying with all the formalities prescribed in that behalf by the Statute, Charter, or deed of settlement constituting the Company, and although there may have been irregularities in the issue of the shares to him; for if, not withstanding these circumstances, he has been treated as a share-holder by the Company, and has acted as a share-holder, both he and the Company will be estopped from denying that he is a share-holder (*Vide* Lindley on Companies, Volume I, page 65, sixth Edition). Once the shares have been registered in the name of the allottee and he has done acts only consistent with his being a member, he will be taken to have agreed to take the shares or at any rate he will be estopped from denying that he has so agreed.

But even where the agreement is void, if the applicant's name is put on the register and he, with full knowledge of all the facts, does acts which are only consistent with his being a share-holder in respect of such shares, he will be bound as a share-holder. In such a case, the placing of the applicant's name on the register would seem to amount to an offer and the acts done with full knowledge to be an acceptance of such offer (Stiebel's Company Law and Precedents, page 210). I have, therefore, no hesitation in holding that the defect in the issue of the shares has been condoned and cannot now be avoided by the appellant for the purpose of getting his name removed from the list of the contributories.

The second contention of the learned Counsel for the appellant is to the effect that his client had been induced to take shares by the misrepresentation and fraud of the Agents of the Company and that he had repudiated the shares before the Company went into liquidation. These allegations of facts are disputed by the learned Counsel for the respondent, but assuming them to be correct, I am clear that the right of repudiation, if any, has been lost by the commencement of the winding-up. A contract induced by fraud, or misrepresentation, is not viod, but voidable at the optioin of the party whose consent has been so obtained. But the

right of rescission, which is ordinarily available against the Company cannot be enforced against its creditors who are the persons vitally interested in the winding-up. The law on the subject is laid down in clear terms in *In re Scottish Petroleum Company* (1). "If we look," says Lord Justice Lindley, "at these cases to see what principle is to be deduced from them, I think, we find that the shareholder who seeks to be discharged must have done two things." He must have repudiated the contract, and have got his name taken off the register, subject to the qualification that if he has, before the commencement of the winding-up, taken proceedings to have his name removed, that will be sufficient. There is a further encroachment on this rule, namely, that if one share-holder commences a litigation to have his name removed, and there is an agreement between the Company and other repudiating share-holders that all the cases shall stand or fall by the result of his litigation, then, if that case is decided in favour of the litigant share-holder the others will be relieved: *Pawle, Ex parte, Estates Investment Co., In re,* (2). But there is no authority that can be relied on for carrying the modification of the rule any further. I say none that can be relied on, for there is a case, *Fox's* case (3), which it is difficult to reconcile with the principle established by *Oakes* v. *Turquand* (4) and *Kent* v. *Freehold Land Company* (5). The general principle was carried out in *Burgess'* case, which is an important case, because there was money in hand sufficient to pay the creditors, so it might forcibly be urged that the doctrine of *Oakes* v. *Turquand* (4) did not apply; but the Master of the Rolls held that as the share-holder had not taken steps before the winding-up to alter his *status* as between himself and the other share-holders, he was bound. The rule is, that the repudiating share-holder must not only repudiate, but also get his name removed, or commence proceedings to have it removed, before the winding-up, but this rule is subject to the qualification, that if one repudiating share-holder takes proceedings, the others will have the benefit of them, if, but only if, there is an agreement between them and the Company that they shall stand or fall by the result of those proceedings, but not otherwise.

Upon the rule enunciated above, a further encroachment has been made by the decision in *Whiteley's* case; *General Railway Syndicate, In re* (6), which lays down that a person cannot be settled on the list of contributries, if before the commencement of winding-up he has not only repudiated his shares, but has also asserted his right to repudiate them in an action by the Company to enforce calls upon him. To the same effect is a judgment of this Court reported as *Secretary of State for India* v. *Hakim* (7). There must, consequently, be not only repudiation but also one of the active acts specified above, and in the present case it is not even alleged that any such act, which alone makes the repudiation effective as against the Liquidator, was ever taken. I must, therefore, hold that the appellant's right, if any, to rescind the contract has been destroyed by the commencement of the winding-up.

The last ground, upon which the appellant wants to be relieved from his liability, deals with the alleged contingent nature of the contract to take shares. It is argued that he was given a promise that if he took shares he would be appointed a local Director of the Amritsar branch of the Bank, that the promise constituted a condition precedent, that the condition was not fulfilled, and that the contract to take shares which was to come into existence on the performance of the condition, did not become an accomplished fact. Here again, the parties are at issue and the material on the record is not sufficient to enable me to decide whether the allegations upon which appellant's argument is based have been established. But it is unnecessary to remand the case for further inquiry, because taking the matter in the best light for the appellant and proceeding upon the admitted or undisputed facts of the case, I am of opinion that the appellant's contention is untenable in law.

(1) 23 Ch. D. 413 at p. 436; 49 L. T. 348; 31 W. R. 846.

(2) 4 Ch. 497; 38 L. J Ch. 412; 17 W. R. 599.

(3) L. R. 5 Eq. 118; 37 L. J. Ch. 257.

(4) 2 H. L. 325; 36 L. J. Ch. 949; 16 L. T. 808; 15 W. R. 1201.

(5) 3 Ch. 493; 37 L. J. Ch. 553; 16 W. R. 899.

(6) (1900) 1 Ch. D. 365; 64 L. J. Ch. 250; 48 W. R. 440; 82 L. T. 134; 16 T. L. R. 176.

(7) 25 Ind. Cas. 448; 64 P. R. 1914; 244 P. L. R. 1914; 158 P. W. R. 1914.

The position of a person who has agreed to take shares upon special conditions, depends upon the determination of the question whether the condition is a condition precedent to his becoming a share-holder or a condition subsequent. I admit the correctness of the proposition of law, and there is ample authority in English Law in support of it, that if the condition is precedent and has not been performed and its performance has not been waived, the applicant for shares will not be a contributory. To this category belong the cases cited by the learned Counsel for the appellant, namely, *In re National Equitable Provident Society, Ex parte Wood* (8), *Roger's case, Universal Banking Co., In re* (9), *Pellatt's* case (10) and *Thomas Edward Brinsmead and Sons, Limited, In re*; *Temlin's* case (11).

Where, however, the condition is not precedent to a person becoming a share-holder, or in other words the condition is subsequent, then the person who agreed to become a share-holder will be liable to be entered as a contributory, whatever his rights may be by reason of the breach by the Company of the condition. Each case of this kind must be decided on the construction of the particular agreement, and no safe guide can be given as to what will and what will not amount to a condition precedent. but the fact that appellant's name has been entered on the register to his knowledge and without any protest from him will be strong evidence that the case is not a condition precedent case [*Elkington's* case (2)]. Now in this case, the facts which have already been set out above leave no doubt in my mind that this is not a case of a condition precedent, and that it comes within the rule laid down in *Elkington's* case (12). The learned Counsel for the appellant has strongly relied upon the *dicta* in *In re London and Provincial Provident Association, Limited: In re Mogridge* (13). But the facts of that case are materially different from those of the case before me. In that case, the applicant, Mogridge, though he received the notice of the allotment of shares, never received any share-certificates, nor did he pay any part of the price for the shares. It appears that the Company wanted to impose new terms departing from the original terms, to which Mogridge did not give his consent. In these circumstances, it was held that he was entitled to refuse the shares, and that his repudiation of all connection with the Company, which had been made before it went into liquidation, was valid, and that he could not be liable as a contributory. I do not, therefore, think that Mogridge's case has any application to the present case.

Even if I accept the argument that the condition in this case was a condition precedent, the appellent cannot, in my view, derive any benefit from it, because the facts show that the condition has been waived. It is clear that he received, on the 1st May 1913, dividend on his shares and the document acknowledging the receipt of the dividened is signed by him in English. He seems to be a man of some education and I cannot entertain for one moment the suggestion that the appellant thought that he was receiving not the dividend on his shares, but interest on the money which he had paid on the shares, and to which he was entitled on their cancellation for the non-performance of the condition. It is a well-established principle of the Company Law that if the allottee transfers his shares or attends meetings and accepts dividends, he will be bound by his acts, and cannot afterwards rely upon the non-performance of a condition precedent. This ground alone is, in my opinion, fatal to the case set up by the appellant.

For the reasons stated above, I am clearly of opinion that the appellant has failed to establish any ground for removing his name from the list of the contributories and that his liability in respect of 50 shares has been fully proved. He was rightly put on the list by the lower Court and must remain there. I must, accordingly, dismiss the appeal with costs.

Appeal dismissed.

(8) 42 L. J. Ch. 403; 5 Eq. 236; 21 W. R. 645.
(9) 3 Ch. 633; 18 L. T. 779; 16 W. R. 556.
(10) 36 L. J. Ch. 613; 2 Ch. 527; 16 L. T. 442.
(11) 1 Ch. 104; 67 L. J. Ch. 11; 77 L. T. 521; 4 Manson 385; 14 T. L. R. 53; 46 W. R. 171.
(12) 2 Ch. 511; 36 L. J. Ch. 593; 16 L. T. 301; 15 W. R. 665.
(13) 57 L. J. Ch. 932; 58 L. T. 801.

CHITTURI SURAYYA *v.* BODDU RAMAYYA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1005 OF 1913.

December 22, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

CHITTURI SURAYYA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BODDU RAMAYYA—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), *ss.* 14, 19, 64, 65—*Fraud at time of entering into a contract and subsequently, effect of—Material alteration in terms of contract, effect of—Contract, whether enforceable—Void contract—Party deriving benefit, duty of.*

Section 19 of the Contract Act read with section 14 deals only with fraud so far as it affects the free will of the parties *at the time* of entering into a contract; therefore, the explanation to section 19 must not be taken as meaning that any subsequent fraud will not affect the validity of the original contract. [p. 58, col. 2.]

A contract is vitiated by a material fraudulent alteration of its terms and is not enforceable at the instance of the party making the alteration. [p. 59, col. 1.]

Any one who has received any benefit or advantage under a void contract is bound to make it good. [p. 59, col. 2.]

Govindasami v. *Kuppusami*, 12 M. 239; *Gulabchand* v. *Fulbai Harichand*, 3 Ind. Cas. 748; 33 B. 411; 11 Bom. L. R. 649; *Chirstacharlu* v. *Karibasayya*, 9 M. 399; *Gour Chandra Das* v. *Prasanna Komar Chandra*, 33 C. 812, 3 C. L. J. 363; 10 C. W. N. 788, followed.

Pattison v. *Luckley*, 44 L. J. Ex 180; 33 L. T. 360: 10 Ex. 330; 24 W. R. 224, distinguished from.

Second appeal against the decree of the Court of the Subordinate Judge of Masulipatam, in Appeal Suit No. 43 of 1913, preferred against that of the Court of the principal District Munsif of Tanuku, in Original Suit No. 235 of 1911.

Mr. *T. Prakasam*, for the Appellants.

Mr. *P. Narayanamurthi*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—After giving my best consideration to the matter, I am of opinion that the plaintiffs' suit was based on the contract which was reduced to writing and entered over defendant's signature in the plaintiffs' cash book. The material alteration made in it by the plaintiffs vitiated the contract and made it incapable of its being enforced at their instance. "The cause of the obligation which it was desired" (by plaintiffs) "to enforce" was the contract as set out by the plaintiffs and not the fact that the contract became "void" or was "discovered to be void" (Section 65 of the Contract Act). I was at first inclined to hold that as "on grounds of public policy", no plaintiff "should be allowed to take the chance of committing a fraud without running the risk of loss on detection," the plaintiffs in the present case could not be allowed to recover any portion of the sum obtained from them by the defendant under that same contract by taking advantage of section 65 of the Contract Act after their fraud was detected. In other words the plaintiffs could not say: "You have discovered our forgery. All right. Treat the deed of contract as void and give us a decree for the money received from us by the defendant under that void contract." That, I thought, would be allowing them to take advantage of their own wrong which rendered the contract void and on general principles of jurisprudence, I thought they ought not to be allowed to do so. That was probably the ground of the decision in *Govindasami* v. *Kuppusami* (1), where the learned Judges refused to accede to the argument advanced on the plaintiffs' side that the altered document might be received in evidence to prove the defendant's indebtedness for the sum mentioned in it and that a decree might be passed for recovering that debt. But having regard to illustration (*c*) to section 65 of the Contract Act, I do not feel myself strong enough to dissent from my learned brother's decision on this point. In that illustration, though *A* wilfully absented herself from the theatre on the 6th night and thus led to the result of the contract being made void at the instance of the other party, she was held entitled to recover remuneration for the five previous nights in which she did perform [see also *Gulabchand* v. *Fulbai Harichand* (2)]. I do not intend to say that where if the contract had remained unaltered, the defendant would have been liable *for a less sum than* Rs. 400 (as, for instance, if the price of the paddy had fallen during the 15 days), the defendant should even then pay back the whole of Rs. 400 under the provisions of section 65 of the Contract Act and that he could not rely on the unaltered terms of the contract and could not claim to pay only the difference in price. Penalizing the defendant

(1) 12 M. 239.

(2) 3 Ind. Cas. 748; 11 Bom. L. R. 649; 33 B. 411.

in that manner and benefiting the plaintiffs for the forgery committed by the plaintiffs would undoubtedly come within the prohibition of the legal maxim that a man cannot take advantage of his own wrong.

In the result, I agree in the award of Rs. 100 made by my learned brother in the plaintiff's favour.

SPENCER, J.—This suit purports to be a suit brought upon an account or *khata* (ledger). It is so stated at the beginning of the plaint, and at the end the amount due to the plaintiffs as per *khata* is mentioned; but the cause of action is stated as having arisen on the date when according to plaintiffs the defendant failed to supply grain which he had contracted to supply and on the date when he asked for an extension of time.

The facts which are not disputed are that the plaintiffs on 9th January 1910 advanced Rs. 800 to the defendant on an agreement that defendant should supply 300 bags of paddy at the rate of Rs. 3-11-0 per bag, that defendant was unable to perform and did not perform that contract and that he refunded Rs. 400 on the 26th August 1910.

The parties differ on the questions (1) whether the contract was to deliver the paddy within 45 days or within 15 days of the receipt of the advance; (2) whether they afterwards came to an agreement when the defendant failed in business, that defendant should compound with his creditors by a payment of annas 6 in the rupee and that the plaintiffs should receive accordingly Rs. 150 in full discharge of the balance of Rs. 400 out of the sum advanced by them.

Both the lower Courts have found that there was a material alteration in the figures in the ledger (Exhibit A) in which the terms of the contract were entered and that the motive of the plaintiffs in making the alteration was fraudulent as owing to the rise in the price of paddy between the 24th January 1910, when according to the defendant the contract was to have been performed, and the 24th February 1910, when according to the plaintiffs it was to have been performed, the plaintiffs stood to gain more in damages by adopting the later date. Holding that the transaction vitiated the contract, the District Munsif dismissed the plaintiffs' suit, and in appeal the Subordinate Judge agreed with him.

On these concurrent findings of fact we must proceed on the assumption that the plaintiffs did make a material alteration in the date and we also agree in thinking that there was no waiver or novation of contract. It is argued that even if there was a material alteration it did not make the contract void, and *secondly*, that the whole suit should not have been dismissed seeing that the defendant admittedly offered to pay Rs. 150.

The explanation to section 19 of the Contract Act declares that a fraud which did not cause the consent to a contract of the party on whom such fraud was practised does not render a contract voidable.

In this case the parties admittedly assented to the contract on the 9th January 1910 when the money was advanced, and it is the defendant's case that the figure 15 was altered to 45 after his signature had been taken in the ledger, so that it is plain that the alteration had nothing to do with either party's giving their consent.

It appears that section 19 read with section 14 deals with fraud so far as it affects the free will of the parties at the time of entering into a contract, and the explanation to the section, therefore, must not be taken as meaning that any subsequent fraud will not affect the validity of the original contract.

The principle which this Court followed in *Christacharla* v. *Karibasayya* (3), where there was a fraudulent alteration of the terms of a mortgage bond between its execution and its registration, was that a plaintiff who attempts to support a claim by forgery should be penalised by not allowing him to recover on his contract through Court. The instrument in that case as originally signed was never registered and, therefore, created no interest in the land. The instrument as registered did not represent the agreement between the parties. As one of the Judges observed, the parties having by contract in writing fixed the amount of debt and the periods for its payment, and that contract having become by the fraudulent act of one

(3) 9 M. 350.

of the contracting parties incapable of being enforced, how can the Court now declare what is the debt and when and how it is to be paid? Similarly in *Gour Chandra Das* v. *Prasanna Kumar Chandra* (4) the learned Judges held that by an alteration in the terms of a convenant which had the effect of changing the legal identity or character of the instrument, not only the covenant but the whole deed would become void. They held that a plaintiff who sued to recover money on a bond, in which the name of an additional executant had been fraudulently inserted after execution, was not entitled to succeed on the basis of the original consideration, and they based their decision on two grounds, *first*, that no man on grounds of public policy should be allowed to take the chance of committing a fraud without running the risk of loss on detection and *secondly*, that the identity of the instrument being destroyed, to hold one of the parties liable would be to make for him a contract to which he never agreed.

So in the present case the lower Courts have found that the terms of the contract as evidenced by Exhibit A are not in one particular *viz.*, the date of performance, the terms which the parties originally agreed to and, therefore, they cannot be enforced; and as for the original agreement the plaintiffs have by their act destroyed evidence as to its terms and, therefore, they cannot now be allowed to enforce the contract or recover damages on the strength of it. A similar view was taken of the effect of altering a date in a bond in *Govindasami* v *Kuppusami* (1). The case of *Pattison* v. *Luckley* (5) cited for the appellants has really no bearing on this case. In it the act of a defendant who erased a material part of a contract was considered to afford no justification for the plaintiff, who had to make out what were the real terms of the contract, ignoring one of the conditions, which was that he must get the certificate of an architect before he could be paid for any work done by him.

It remains to be considered whether the plaintiffs' suit should have been dismissed altogether on the contract being found void. Sections 64 and 65 of the Contract Act provide that when a voidable contract is rescinded or when a contract becomes void, any party to it who has received any benefit or advantage thereunder is bound to restore or make it good.

The defendant's written statement contains the following admissions:—

4. "Being unable to perform the contract, the defendant failed in business and for the Rs. 800 received by the defendant from the plaintiffs he returned on 26th August 1910 Rs. 400, and therefore Rs. 400, the balance of amount and the difference in price as it stood on the 24th January 1910, is due to the plaintiffs."

7. "Thus defendant is always ready to pay to the plaintiffs the sum of Rs. 150 due to them for the Rs. 400 due by the defendant to the plaintiffs according to the rate referred to in paragraph 6 (*i.e.*, 6 annas in the rupee)".

On this independent admission of liability for a debt of Rs. 400, the plaintiffs are *prima facie* entitled to recover that sum, seeing that the defendant has had the benefit of the money without rendering any return for it.

The District Munsif found that the defendant had failed to prove the agreement set up by him that the plaintiffs should receive Rs. 150 in full discharge of the debt. The Subordinate Judge has not recorded a finding on this point, but I consider it unnecessary to remand the case in order to call for a finding as the said agreement, even if true, was obviously on the defendant's showing one without consideration.

I would, therefore, reverse the lower Court's decrees and give the plaintiffs a decree for Rs. 400 but without interest or costs.

Decree reversed.

(4) 33 C. 812; 3 C. L. J. 663; 10 C. W. N. 788.
(5) 10 Ex. 330; 44 L.J. Ex. 180; 33 L. T. 360; 24 W. R. 234.

SEUMAL NIHALCHAND v. MULOMAL RAHUMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 60 OF 1912.

September 21, 1914.

Present:—Mr. Pratt. J. C., and Mr. Crouch, A. J. C.

SEUMAL NIHALCHAND—DEFENDANT-APPLICANT

versus

MULOMAL RAHUMAL—PLAINTIFF—OPPONENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 17—Application to file reference, whether suit—'Suit,' meaning of—Order setting aside award, whether a decree—Appeal.

A suit is a process for the recovery of a right or claim and can be prosecuted either in a regular Court of Law or partly before a private tribunal and partly in a Court of Law. [p. 61, col. 1.]

An application to file in Court an agreement to refer to arbitration merely asks the Court for assistance to prosecute a claim before a p ivate tribunal and cannot be converted into a "suit" by the mere process of numbering and registering the application as a suit. [p. 61, col. 2.]

An order setting aside an award is not a decree within the meaning of the Code and is not appealable. [p. 61, col. 2.]

Application for revision against the order of the District Judge, Hyderabad.

Mr. *Fatehchand Asudomal*, for the Applicant.

Mr. *Rupchand Bilaram*, for the Opponent.

JUDGMENT.

CROUCH, A. J. C.—In this case, plaintiff Mulo applied to the Court of the Sub-Judge, Hala, under section 17 of the second Schedule, Civil Procedure Code, to have filed an agreement of reference. The Court ordered the argreement to be filed. The arbitrators sent in their award, but the Court at the instance of defendant set it aside, on the ground that the arbitrators had acted unfairly to defendant in not giving him sufficient time to enable him to collect his witnesses and to travel to the place where his attendance was required and in not giving him notice of postponement of the hearing.

Against this order plaintiff appealed and the preliminary objection was taken that no appeal lay. The learned District Judge, relying on the *dictum* of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (1) held that appeal lay and dealing with the order of the lower Court on its merits, reversed it and pronounced judgment according to the award.

(1) 29 C. 167 at p. 184; 29 I. A. 51; 4 Bom. L. R. 161; 12 M. L. J. 77; 6 C. W. N. 226; 25 P. R. 1902.

Against this order the defendant appeals, and urges, *firstly*, that the lower Court erred in holding that an appeal lay.

Now, admittedly, no appeal against an order setting aside an award passed on a reference filed under clause 17 has been granted in obvious terms by the Civil Procedure Code, 1908, and it is not contended that any appeal lies except under the provisions of the Code. Respondent's case is that, inasmuch as the application under clause 17 must be in writing and is numbered and registered as a suit, and the order setting aside the award conclusively determines the rights of the parties with regard to the question whether or not the matters in controversy between them shall be decided by arbitrator, such order is a decree within the definition given in section 2 (2) of the Code. Support to this contention is given by a *dictum* of Lord Macnaghten in *Ghulam Khan* v. *Muhammad Hassan* (1): "It would seem that the order made is a decree within the meaning of that expression as defined in the Civil Procedure Code."

It is important to bear in mind that this *dictum* of Lord Macnaghten was purely an *obiter dictum*; it has not the authority of a decision of the Privy Council and though entitled to great respect as being the expression of an eminent Judge, is not a declaration of law by which this Court is bound.

The Civil Procedure Code of 1908 was drafted several years after the decision in *Ghulam Khan* v. *Muhammad Hassan* (1) and it may be presumed that the *dictum* was present to the minds of those drafting it. There was, undoubtedly, an attempt made to place beyond the region of possible controversy the question whether an appeal lay against the several kinds of orders which can be passed in civil proceedings; and, if it was intended that there should be an appeal from an order such as we are now dealing with, we should expect that it would be granted in clear and unmistakeable terms. The alleged foundation of this right of appeal, on careful examination, turns out to be extremely frail.

In the first place, a party who makes an application under clause 17 does not file

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a suit. A suit is a process for the recovery of a right or claim and can be prosecuted either in a regular Court of Law or partly before a private tribunal and partly in a Court of Law. When a party applies under clause 17 that an agreement of reference be filed in Court, and that an order of reference to the named arbitrator be made, he thereby asks the Court to grant him the assistance of legal process in the prosecution of his suit before a private tribunal. It is before the private tribunal that he seeks a decision on his substantive rights and claims.

When the arbitrators have caused their award to be filed in Court and the Court under clause 16, pronounces judgment according to the award and the decree follows on the judgment so pronounced, the decree embodies not only the Court's commands that the adjectival or processual law shall be enforced on behalf of the successful party, but also a final and conclusive determination of the substantive rights of the parties with regard to the matters in controversy between them. But, where the award is set aside, the Court does no more than finally decide the question whether or not the adjectival law shall be put into operation in order to give effect to the award, the substantive rights of the parties with regard to the matters in controversy are left undetermined. The claimant is left to prosecute his suit either in a Court of Law, or, if it be still open to him, by means of fresh arbitration proceedings.

"Decree" is defined by section 2 (2) of the Civil Procedure Code as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." There can be little doubt that the rights there referred to are substantive rights as distinguished from rights of a merely processual character: (see Woodroffe and Ameer Ali, pages 38 to 40). The Code of Civil Procedure contains no definition of "suit." but there is sufficient indication that it means the process of recovering or enforcing a substantive right or claim by the procedure laid down in the Code; and an application to the Court which merely asks for assistance to prosecute a claim before a private tribunal cannot be converted into a "suit" by the mere process of numbering and registering the application as a suit. Nor can an order setting aside an award be said to be "the formal expression of an adjudication conclusively determining the rights of the parties with regard to the matters in controversy in the suit" unless the actual facts be deliberately ignored, for there is no formal adjudication and the rights of the parties, that is, their substantive rights, are not determined at all. I consider, therefore, that it is impossible to hold that an appeal lies against an order rejecting an award as a "decree" within the meaning of section 2 (2), Civil Procedure Code, unless we impute to the Legislature a vagueness of definition and an obscurity of expression which are wholly foreign to the Code. Where an appeal is given, it is given in an appropriate place and in prefectly clear language; it is wholly improbable that the Legislature deliberately left the public to discover that the right of appeal against a particular order was concealed in several distinct portions of the Code, and so successfully concealed that even after discovery its existence could reasonably be disputed.

I would reverse the decree of the lower Court and affirm the order of the original Court. Costs of both Appellate Courts to be borne by the respondent in this appeal.

PRATT, J. C.—I concur. In the case of *Alim* v. *Moledino* (2) I pointed out that while the *dic um* of Lord Macnaghten in *Ghulam Khan* v. *Muhammad Hassan* (1) appeared to treat an order under section 521 as a decree and, therefore, appealable, no such provision has been made in the present Code. Mr. Rupchand's contention is that no such provision is necessary, for the order is appealable as a decree. The obvious answer to this is that the definition of a decree has been altered since the case of *Ghulam Khan* v. *Muhammad Hassan* (1) and that under the definition in the present Code such an order would not be a decree, for as said in *Udharam* v. *Secretary of State* (3) an essential part of the definition is that the decision or

(2) 19 Ind. Cas. 348; 6 S. L. R. 168.
(3) 19 Ind. Cas. 922; 6 S. L. R. 287.

adjudication must have received formal expression as a decree—such formal expression is lacking to the order under consideration. It is, therefore, not a decree as defined by section 2 (2) of the Code of 1908 and is not appealable.

Application accepted.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 41 AND 42 OF 1914.

December 8, 1914

Present: —Mr. Justice Oldfield and Mr. Justice Tyabji.

IN A. A. O. No. 41 OF 1914

KAMISETTI PEDDA VENKATASUBBIAH AND ANOTHER—DEFENDANTS—APPELLANTS

IN A. A. O. No. 42 OF 1914.

KAMISETTI CHINNA VENKATASUBBIAH - DEFENDANT—APPELLANT

versus

TANGATOOR SUBBIAH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 57, 64—Attachment, determination of—Dismissal of execution application, whether determines attachment—Moveable property, attachment of—Sale, whether production of property necessary—Dismissal of application for non-payment of batta—*Attachment, whether raised.*

An attachment by a prohibitory order previously existing can be determined only by proper steps taken under the Code. [p. 63, col. 2.]

Under Order XXI, rule 57, a previously existing attachment ceases to exist on the dismissal of an application for execution only when the circumstances required by the rule are established. [p. 63, col. 1.]

The object of the rule is to prevent the continuance of an attachment for an indefinite period on the practice of "striking off" an application for execution previously in vogue for statistical purposes and the operation of the rule must, therefore, be confined within the smallest possible limits. [p. 63, cols. 1 & 2.]

To order the sale of moveable property, it is not necessary under Order XXI, rule 64, that the Court should have the property before it. Where a non-payment of *batta* results in the dismissal of the application for sale there is no legal order of dismissal and the attachment previously existing is not determined but continues effective. [p. 63, col. 1.]

Nomuna Bibi v. *Roshan Meah*, 9 Ind. Cas. 558; 15 C. W. N. 428; 38 C. 482; 13 C. L. J. 62; *Kashi Nath Roy Choudhry* v. *Surbanand Shaha*, 12 C. 317, followed.

Appeals against the order of the District Court of Cuddapah, in Appeal Suit No. 116 of 1912, preferred against that of the Court of the District Munsif of Proddatoor, in Execution Petition No. 29 of 1912 in Original Suit No. 210 of 1908.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswamy Iyer*, for Messrs. *K. Srinivasa Iyengar* and *C. Krishnamachariar*, for the Appellants.

JUDGMENT.

OLDFIELD, J.—These appeals arise out of the attachment of certain jewels in execution of a decree against appellant in Appeal against Order No. 41 of 1914. Appellant in Appeal against Order No. 42 of 1914 is his brother, Chinna Venkatasubbiah, co-owner of the jewels. They were in the latter's possession; but it is not disputed that the former's share in them was under attachment by the issue of a prohibitory notice under section 268 of the Code then in force, when Execution Petition No. 1423 of 1908 was presented. Plaintiff-respondent, in that petition, asked for an order to Chinna Venkatasubbiah to produce them and for proclamation and sale. Chinna Venkatasubbiah objected to doing so, but his objection was disallowed. As, however, he had also claimed them all as his own, nothing further was done on the petition, and though it should have been adjourned in order that the prayers for proclamation and sale might be complied with, it was left without further disposal. On 25th October 1910, plaintiff presented Execution Petition No. 1049 of 1910 for proclamation and sale. It contained no prayer for production of the jewels. But the District Munsif, on whose motion it is not clear, ordered issue of a notice to Chinna Venkatasubbiah to produce them. *Batta* not having been paid for this notice, the petition was dismissed on 21st December 1910. The present petition, Execution Petition No. 19 of 1912, is for sale of the property alleged to be already under attachment.

The general question is whether the lower Appellate Court was right in holding that the attachment, which admittedly at one time existed, was still in force and had not been terminated by the dismissal of Execution Petition No. 1049 of 1910. In particular

appellants, the debtor and Chinna Venkatasubbiah, argue that (1) the formal dismissal in the order on that petition necessarily terminated any attachment, because it must be taken to have been passed under Order XXI, rule 57, though that provision is not referred to in it, and whether or no the circumstances would have authorised its application, (2) the circumstances in fact authorised its application, the Court having been unable to proceed owing to the decree-holder's default.

The first of these contentions has been supported by very little argument or authority. And in fact argument for it must be difficult, since such argument involves disregard of the specification in the rule of the circumstances in which it applies, and an attempt to read it as though the references to the decree-holder's default and to "such" (instead of "any") application had not been made. It has been urged that no dismissal of an execution application in consequence of the Court's inability to proceed with it can be conceived except after and in consequence of the decree-holder's default and that, therefore, all such dismissals must take place under the rule and involve the raising of the attachment. But that is unsustainable. Other conceivable cases, in which the Court is disabled from proceeding being, apart from these (such as this is alleged to be), of inability arising from the Court's mistake as to its powers, those in which (1) the wrong method of execution has been asked for, sale of a debt, for instance, instead of appointment of a Receiver, or (2) the method of execution originally proposed has become impracticable, as for instance, when perishable attached property has had to be sold and the remedy is against the proceeds. And when other cases of the Court's disability can be conceived unconnected with the decree-holder's default, it cannot be assumed that rule 57 applies to every case of dismissal. The mischief against which it was directed on its introduction in 1908, is well known and is referred to expressly in *Nomuna Bibi* v. *Roshan Meah* (1) as the practice of "striking off" applications for statistical purposes, and when its language is carefully directed against that mischief, there is no reason for extending its operation to all cases, includin those in which that mischief has not occurred. Naturally there have so far been few decisions regarding it; and appellants rely only on the case just mentioned. In it no doubt one of the learned Judges observed that it was not open to the Courts to consider what the Judge or the parties intended by the word "dismissed" and both Judges attached the full consequence to its use, in spite of the fact that it was accompanied by an explicit maintenance of the attachment. But there the case was one covered and held to be covered by the order, affording in fact a clear example of the evil, it was made to prevent; and, therefore, that decision gives no support to the debtor's present contention, the occurrence of a default being disputed. The order is in itself easily intelligible and it must be read as providing for the dismissal of execution applications in certain circumstances and for the consequent raising of the connected attachments. That consequence can follow only when the dismissal has taken place legitimately under the order. That is when the circumstances required by it are established.

It was, therefore, proper and necessary that the lower Appellate Court should inquire whether the conditions, in which the consequences attached to a dismissal under rule 57 could follow, were fulfilled. That is whether the District Munsif could not proceed to order proclamation and sale owing to the decree-holder's default. It is not clear whether his orders of 30th November 1910, directing notice to Chinna Venkatasubbiah for production of the jewels were passed on the plaintiff's motion or his own. But it cannot matter which was the case, because in either event plaintiff's failure to pay *batta* for it could constitute a default of the kind in question only if the issue of notice was indispensable to the further progress of the petition. It is not suggested that plaintiff, even if he originally applied for the notice, ever refused to go without the jewels being produced or that he was in fact given an opportunity to do so. It is no doubt the case that a sale of jewels which were not available for inspection by bidder and had not been described in

(1) 9 Ind. Cas. 558; 38 C. 482; 15 C. W. N. 428; 13 C. L. J. 621.

the proclamation after verification by the Court, would have been disadvantageous to the debtor and plaintiff, if not absolutely futile. But the former could have obtained possession of the jewels and produced them in virtue of his co-ownership; and if plaintiff chose to risk a sale in such circumstances, it was not for the Court to refuse it. It was not disabled by considerations of the nature referred to from holding it. What, however, is really relied on is its alleged duty not to sell property not actually before it; and, as admittedly Order XXI contains nothing regarding that duty and no provision enabling it to obtain production of property, like this, in the possession of a co-owner, it is argued that the Court was entitled to refuse to sell without production of the property in the exercise of its discretion and could have obtained its production on plaintiff's paying *batta*, either by the exercise of its inherent powers or by issue of process under Order XXI, rule 66 (4) or section 30. The short answer is that, though Order XXI, rule 64, prescribes that a Court "may" order sale, it is obligatory on it to do so when a valid application for such order and a valid attachment have been made: *Kashi Nath Roy Chowdhry* v. *Surbanand Shaha*(2), and that the Code makes production or seizure of the property essential to a valid attachment, only when it is in the debtor's possession (rule 43) or is a negotiable instrument (rule 51), not when, as here, it is in the possession of a co-owner. The argument based on the Court's right to postpone the sale in its discretion failing, it is unnecessary to inquire whether the provisions referred to or its inherent powers would have enabled it to carry out the object of such postponement by issuing process. The conclusion must be that reached by the lower Appellate Court, that the District Munsif's duty was to proceed with proclamation and sale, although the jewels were not before him, and that plaintiff's failure to pay *batta* was not a default, which disabled him from doing so. The application of rule 57 was, therefore, not legitimate, and the existing attachment on the jewels was not raised by the order of dismissal.

(2) 12 C. 317.

Appeal against Order No. 41 of 1914 must, therefore, be dismissed with costs. Appeal against Order No. 42 of 1914 is dismissed with the further observation that, there being no question of a sale of Chinna Venkatasubbiah's property, he could in any case have had no right to intervene. There will be no order as to costs as respondent is not represented.

TYABJI, J.—I have read the judgment prepared by my learned brother and I agree.

Appeals dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 15 OF 1913.

November 24, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

SRINIVASA RANGA ROW PANTULU BY THE OFFICIAL ASSIGNEE, HIGH COURT—PETITIONER—APPELLANT

versus

Rajakumara VENKATA PERUMAL RAJU BAHADUR VARU, MINOR RAJA OF KARVETINAGAR, BY GUARDIAN, W. A. VARADACHARIAR—RESPONDENT.

Letters Patent (Mad.), s. 15—Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 8, 19—Rules of Practice—High Court Appellate Side Rules 48 (a), 75—Case posted before single Judge in admission Court for orders Non-appearance—Dismissal of appeal by Judge Application to restore dismissed appeal to file—Dismissal of application Appeal against order—Practice Procedure—Limitation Act (IX of 1908), s. 14.

A single Judge sitting in the admission Court can, under rule 75 of the Rules of Practice of the High Court, Appellate Side, only post an appeal to a Bench for disposal and cannot himself dismiss it. [p. 65, col. 1.]

Where, therefore, he so dismisses an appeal, for non-appearance of the appellant, and an application to restore the dismissed appeal to file is also dismissed, the proper course is to appeal against the order dismissing the appeal, and not against the order refusing to restore the dismissed appeal to file. [p. 65, col. 1 & 2.]

An appeal filed against the order dismissing the application for restoration cannot be treated as an appeal against the order dismissing the appeal if it is beyond time, nor can any question as to deduction of time, under section 4 of the Limitation Act, arise when no appeal against that order is before the Court. [p. 65, col. 2.]

Per *Tyabji, J.*—(dissenting)—Both orders can, for the purpose of this appeal, be treated as one, and an Appellate Court can itself pass the order which the Court of first instance should have passed. [p. 66, col. 2.]

The words "failing to satisfy the Court that there was just and reasonable cause" include also a case where there is no appearance of the party himself. [p. 67, col. 1.]

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Sankaran Nair, in Civil Miscellaneous Petition No. 2128 of 1912 to direct the re-admission to the file of the High Court Appeal against Order No. 107 of 1912, preferred against that of the District Court of North Arcot, dated the 4th of December 1911, in Civil Miscellaneous Petition No. 148 of 1911 in Execution Petition No. 132 of 1905.

Mr. *T. Narasimmha Iyengar*, for the Appellant.

Mr. *L. A. Govindaraghava Iyer*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver and I agree with him that the learned Judge's dismissal of the appeal cannot be supported on its merits and that the order he should have passed under rule 75 of the Appellate side rules was to direct the posting of the appeal before a Bench of two Judges for disposal or orders under Order XLI, rule 18, of the Code of Civil Procedure.

But while the learned Judge took the mistaken course of himself dismissing the appeal, the appellant did not at once appeal against that dismissal and obtain the decision of a Bench under the Letters Patent, but chose instead to apply under Order XLI, rule 19. Then the learned Judge could consider only whether it was proved that the appellant was prevented by sufficient cause from making the necessary deposit, and, as he did not find sufficient cause established, he could only dismiss the application. We also dealing with an appeal against his order are, in my opinion, confined to the grounds of decision open to him, and have no jurisdiction to consider others. On those grounds the Letters Patent appeal is unsustainable.

We ought not, in my opinion, in this case to treat an appeal from one order passed on one date, as we are asked to do, as from another order passed on an earlier date, on the ground either that the appellant's mistake is merely formal or is pardonable. For it is not a matter of form to consider a ground of appeal which is inadmissible in the appeal actually preferred or to deprive the respondent of the valuable advantage he has obtained in consequence of the appellant's failure to appeal against the earlier order in time. The question whether the appellant's mistake is pardonable can be considered with reference to section 14 or any other provision of the Limitation Act, when an appeal against the earlier order is filed. It would be premature to deal with it at present.

In my opinion this appeal should be dismissed with costs.

TYABJI, J.—On the 8th of August 1912 Civil Miscellaneous Appeal No. 1079 of 1912, out of which the present Letters Patent appeal arises, was posted under rule 75 of the High Court (appellate jurisdiction) for the orders of the admission Court presided over by Sankaran Nair, J. On the case being called on no one appeared. The learned Judge then passed the order that the civil miscellaneous appeal be dismissed.

Subsequently on 6th September 1912 a petition (Civil Miscellaneous Petition No. 2118 of 1912) was filed, praying that the civil miscellaneous appeal so dismissed for non-appearance should be re-admitted on the file and disposed of "in the usual course under Order XLI, rule 19." This petition came on for hearing before the same learned Judge on 6th December 1912, who dismissed it saying that no reason was alleged for re-admission of the civil miscellaneous appeal. It is argued before us that under rule 75 the learned Judge had no power to pass the order dismissing the civil miscellaneous appeal but he could only have directed (in the words of the rule) that the appeal be posted before a Bench of two Judges for disposal or orders under Order XLI, rule 18, and that we ought in this Letters Patent appeal to vary the order passed by the learned Judge so as to make it conform with the rule.

The respondent objects that the petition,

Civil Miscellaneous Petition No. 2118 of 1912, was misconceived, purporting as it did to be under Order XLI, rule 19, of the Civil Procedure Code. That rule, it is argued, is applicable only to the three cases mentioned in it, and that it has consequently no application to the dismissal of Civil Miscellaneous Appeal No. 1079 of 1912 on 8th August 1912. It is argued that the only course open to the appellant was to have filed a letters patent appeal immediately from the order of August 1912 and not to have made any intermediate application for the re-admission of the appeal. The result of the misconceived petition for re-admission is stated to be that the short period of limitation allowed by rule 48 of the High Court (appellate side) is in this manner violated, and that the letters patent appeal is thus sought to be filed on 2nd January 1913 from an order that should have been appealed against within 30 days of 8th August 1912.

This objection may be considered under two heads. In the *first* place it is urged that the present appeal purports to be from the order rejecting the petition to re-admit the appeal, that it should have been from the first order dismissing the appeal for want of appearance. This is a matter at best merely of form. It has not prejudiced the respondent, certainly not prevented the whole of his case being presented in exactly the same manner as if the appeal had been from the earlier order. The argument adduced to us on behalf of the respondent included all the arguments he had to urge in support of the first order. Besides I confess I am by no means clear that there was any error in assuming that the appeal should be from the last order made by the learned Judge who was seized of the matter, especially as the final order was a restoration of the earlier; and in each case the learned Judge did not purport to pass an interlocutory order but dismissed the appeal, being evidently under the impression that he was proceeding under Order XLI, rule 17. The learned Judge having wrongly assumed the proceedings to be under Order XLI, rule 17, it was his error, it seems to me, that attracted Order XLI, rule 19, and allowed of an application for restoration.

The form of the learned Judge's order made an application under Order XLI, rule 19, open to the appellant. Taking advantage of this opportunity the appellant applied for restoration, and as the learned Vakil informs us he also drew the attention of the admission Court to the incorrectness of the order, even accepting the correctness of the facts found by it. Therefore, the proper course for the learned Judge sitting in the admission Court was, it seems to me, to have rectified the error in the record, though he might not have been willing to hear the application or to change his opinion on the merits of the application for extension of time. On this ground it seems to me that a Court hearing an appeal from the latter order of the learned Judge might do that which the learned Judge himself might have done, and alter his first order to the extent of bringing it into conformity with rule 75: in appeal we might deal with the correctness of the order of December 1912 as it stands, and are not restricted to a consideration of the question whether any order at all should have been made without giving to the appellant an opportunity to be heard. We may consider the question whether, assuming that the learned Judge was right in refusing to hear the appellant's reasons for extension of time, he was right in passing the order without hearing the appellant. The order passed on 6th December 1912 must, it seems to me, be taken to have incorporated into itself the earlier order of August 1912: and in appeal we ought to consider the correctness of the whole order—subject to a question of limitation with which I shall deal immediately. If this had been a Letters Patent Appeal from the order dismissing the appeal in the first instance without any application for restoration, it might have been reasonably, though I do not say successfully, urged that there was an easier remedy available to the appellant which he ought to have first exhausted. Even if for the purposes of this part of the argument it is assumed that the application was miconceived, under rule 48 (1) of the High Court Rules (appellate side), it seems to me that the pendency of the petition for restoration would be good cause for granting further time. I am certainly not prepared to say that the

petition for restoration in the present case would not fall within the principle laid down in section 14 of the Limitation Act.

There remain two other arguments by which the respondent seeks to support the order dismissing the appeal. These are based on the interpretation of rule 75. It is argued that the learned Judge had power to dismiss the appeal on 8th August 1912, *first*, because rule 75 applies only on the appellant or his Pleader "failing" to satisfy the Court that there was just and reasonable excuse, and that there cannot be "failure" when there is no appearance at all. It is enough to state this argument. It is not necessary to refuse it. The *second* argument is that the rule says that the Court "may" direct that appeals be posted before a Bench and that this cannot be construed as having the effect of "shall direct"; so far the argument may be accepted. But the result of this interpretation is alleged to be that the Court had the power also to dismiss the appeal. This result does not follow. The rule expressly lays down the more limited power of the Court to have the appeal posted for disposal or orders, and this must imply that the Court has not any wider powers which are not expressed *viz.*, the power of itself dismissing the appeal.

Shortly stated, it seems to me that the learned Judge had no power to dismiss the appeal, and that the form of the order entitled the appellant to apply to the learned Judge by petition for restoring the appeal; but even if he was not entitled, he has not lost his remedy by Letters Patent appeal; and that for the purposes of this appeal it is reasonable to construe the order of 6th December 1912 as incorporating the earlier order, so that when the correctness of the latter order is considered the earlier order may also be referred to as part of the latter, and be varied if necessary.

In my opinion, therefore, the only order that can be made in this Letters Patent appeal is the order that the learned Judge should have made on the 8th August 1912 and 6th December 1912, *i. e.*, that the appeal be posted before a Bench of two Judges for disposal or orders under Order XLI, rule 18.

BY THE COURT.—In the result the Letters Patent appeal is dismissed with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 11 OF 1912.

September 21, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

Musammat CHANDULBAI WIFE OF DHALUMAL—PLAINTIFF—APPELLANT

versus

BASARMAL TOPANMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Purchasers under different mortgage decrees—Right to possession—Priority—Suit by first mortgagee—Right of puisne mortgagee to redeem.

Where mortgages are without possession, the right to possession of purchasers under different mortgage decrees depends upon priority of purchase and not priority of mortgage. [p. 68, col. 1.]

Nanak Chand v. *Teluckdye Koer*, 5 C. 265; 4 C. L. R. 358; 5 Ind. Jur. 81, referred to.

A puisne mortgagee is entitled to redeem the prior mortgage whether or not he is made a party to a suit by the first mortgagee. [p. 68, col. 2.]

There can be no merger unless the holder of the incumbrance becomes absolutely entitled. The purchaser at a first mortgagee's sale can always use the first mortgage as a shield against the puisne mortgagee. [p. 68, col. 2.]

Second appeal against the decision of the Assistant Judge, Hyderabad.

Mr. *Isardas Oodharam*, for the Appellant.

Mr. *Kimatrai Bhojraj*, for Respondent No. 1.

Mr. *Tejumal Hassomal*, for Respondents Nos. 3 to 5.

JUDGMENT.—Two fields, a house and Survey No. 393 were mortgaged without possession in 1898 to plaintiff's husband, Dhalumal. In 1904 an award decree was obtained by one Lalchand against the mortgagor, which created a second mortgage on one field and Survey No. 393. In 1905 another award decree was obtained by one Ramchand against the mortgagor, which constituted a third mortgage on the whole of the property.

Plaintiff obtained a decree for sale on the 1st mortgage in Suit No. 45 of 1905. To this decree the two puisne mortgagees were not parties. The decree was, therefore, imperfect as the puisne mortgagee had the

right to reopen the proceedings and redeem the plaintiff.

Plaintiff on the 22nd March 1906 took a conveyance by two sale-deeds of the whole of the mortgaged property from the mortgagor.

Subsequently the second mortgagee executed his mortgage decree by the sale of Survey No. 393 which was purchased at a Court sale by Basarmal, the first defendant, on the 8th February 1910.

Plaintiff claimed to have obtained possession of all the property under the sale-deeds passed by the mortgagor in 1906 and brought this suit for a declaration of her superior title and for an injunction restraining the puisne mortgagees and Basarmal from interfering with her possession.

This relief was granted in respect of all the property except Survey No. 393, for the lower Courts have found this survey number was in the possession of Basarmal.

Plaintiff appeals as regards Survey No. 393. The other parties have not appealed and so the question with which we are concerned in this appeal is the contest between plaintiff and defendant No. 1 as to Survey No 393.

Now plaintiff accepted the finding that Survey No. 393 was in the possession of defendant No. 3 and she was allowed to amend her plaint. One of the prayers in the amended plaint was that she should be decreed possession until redemption. It seems to me that the lower Courts were wrong in refusing this relief.

It is well settled that where the mortgages are without possession, the right to possession of purchasers under different mortgage decrees depends upon priority of purchase and not priority of mortgage, *Nanak Chand* v. *Teluckdye Koer* (1). *Prima facie* the same rule would apply to plaintiff's private purchase in 1906 and give it priority over defendant's purchase in 1910. But plaintiff's purchase is affected by the rule of *lis pendens*, for it was made before the conclusion of the execution proceedings in the 2nd mortgagee's suit and this is, no doubt, the reason why plaintiff did not pray merely for possession.

The defendant's purchase was not affected by the sale to the plaintiff, but it is admittedly subject to the plaintiff's prior mortgage.

(1) 5 C. 265; 4 C. L. R. 358; 5 Ind. Jur. 81.

The rights of the parties are, therefore, clear. Plaintiff has a valid decree on a prior incumbrance subject only to this imperfection that she is liable to be redeemed by the 1st defendant. The first defendant's right is to redeem the plaintiff's mortgage. This is the only right he could have had if he had been a party to the plaintiff's suit on the 1st mortgage. The fact that he was not a party can neither add to nor subtract from his rights.

Why then should not these respective rights be settled in the present suit? The lower Appellate Court thought that the suit was not to enforce the mortgage, but the prayer for possession until redemption was virtually a prayer for foreclosure. In this Court it is faintly suggested that the first mortgage was merged in the purchase of the property in 1906. But there is no merger unless the holder of the incumbrance becomes absolutely entitled. Here part at least of the equity of redemption was outstanding in the 2nd mortgagee's auction-purchaser, defendant No. 1. The purchaser at a first mortgagee's sale can always use the 1st mortgage as a shield against a puisne mortgagee.

As poinetd out by the Allahabad High Court in a similar suit, *Ram Prasad* v. *Bhikari Das* (2), the decree to which plaintiff is entitled will be a foreclosure decree.

The lower Court will have to ascertain the amount of the 1st mortgage that is chargeable by rateable contribution to Survey No. 393 and declare what is due to plaintiff in respect of that amount. It should then decree that defendant should pay that amount within a time limited by the Court or in default deliver possession of Survey No. 393 to the plaintiff.

We reverse the decree of the lower Appellate Court and remand the suit under Order XLI, rule 23, to that Court for disposal in accordance with the judgment. Costs to abide the result.

Decree reversed; Case remanded.

(2) 26 A. 464; A. W. N. (1904) 108.

KALLIANI AMMA *v.* NARAYANAN NAMBIAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1080 OF 1912.

December 18, 1914.

Present:—Mr. Justice Spencer, Mr. Justice Tyabji and Mr. Justice Sadasiva Aiyar.

P. K. KALLIANI AMMA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

M. T. NARAYANAN NAMBIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), *s.* 91—*Secondary evidence when can be given—Original document tendered found to be a forgery—Written admissions, how far secondary evidence—Limitation Act (IX of* 1908), *s.* 19.

Per *Sadasiva Aiyar, J.*—Where the plaintiff brought a suit for redemption of a particular mortgage in renewal of a prior mortgage and the lower Courts found that the mortgage sued on was a forgery:

Held, that the plaintiff, failing to establish the mortgage on which the suit was based, should not be allowed to fall back upon the earlier mortgage which might be established by admissions made by defendants during the proceedings without the plaint being amended and that no evidence primary or secondary of the earlier mortgage could be given for obtaining relief. [p. 78, col. 2, p. 79, col. 1.]

Per *Tyabji and Spencer, JJ.*—For the purpose of section 19 of the Limitation Act it is not necessary that all the legal consequences that may flow from the thing acknowledged should be specified to constitute an acknowledgment. [p. 70, col. 1, p. 72, col. 1.]

Per *Spencer, J.*—When a contract has been embodied in a document the parties to it are precluded by section 91 of the Evidence Act from enforcing by way of suit obligations arising out of such contract except by proving the original document itself or by letting in secondary evidence of its contents when the original is lost or withheld by the opposite party knowing that they will be required to produce it. [p. 70, col. 1.]

Secondary evidence is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible, secondary evidence of its contents is not admissible. An admission cannot be made use of as secondary evidence of a document inadmissible in evidence for want of stamp or registration; and similarly it cannot be used as secondary evidence of the contents of a document when the document put forward as an original is found to be a forgery. The provision for receiving written admissions as proof of the contents of a document is confined to cases where the original is in existence and might be, but is not, produced. It will not apply to cases where the original is put forward as primary evidence of the terms of a contract and that original is found to be a forgery. It will not be available against persons other than the person who made the written admission and his successors-in-interest. [p. 71, cols. 1 & 2.]

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 13 of 1911, preferred against that of the District Munsif of Tellicherry, in Original Suit No. 388 of 1909.

Mr. *J. L. Rosario*, for the Appellants.

Messrs. *M. O. Parthasarathy Aiyangar* and *V. Ryru Nambiar*, for the Respondents.

This second appeal coming on for hearing in the first instance before the Hon'ble Mr. Justice Spencer and the Hon'ble Mr. Justice Tyabji on the 16th and 17th April 1914, respectively, and the case having stood over for consideration till the 29th July 1914, the Court delivered the following

JUDGMENT.

SPENCER, J.—The plaintiffs brought this suit to redeem a *kanom* (Exhibit B) of the Malabar year 1025, corresponding to 1850 A. D.

According to the allegations in the plaint, Exhibit B was a renewal of a prior *kanom* (Exhibit A) of 1012 (1837), which was transferred to defendants' ancestors in 1022 (1847) through Exhibit G.

Both the lower Courts have found against the genuineness of the plaint *marupat* (Exhibit B). They are also agreed that the *jenm* title is in plaintiffs' *tarwad*, and that the defendants have not proved the existence of any *jenm* title in their *tarwad* or *tavazhi*. These are findings on questions of fact which we must accept.

The District Munsif gave the plaintiffs a decree for redemption on the strength of the prior *kanom*-deed of 1837, Exhibit A, about which he remarked that it was "a very suspicious looking document" but "might be genuine," as plaintiffs had, in his opinion, succeeded in showing a subsisting right in the year 1861.

The District Judge has not distinctly found in so many words that Exhibit A is not a genuine document, but I think the effect of paragraph 7 of his judgment is to that effect, as he begins it by observing: "The case must depend entirely on the question whether Exhibit A is accepted as genuine," and he ends it by saying: "The document is unstamped and the evidence about its custody is not very satisfactory," and he thereon proceeds to allow the appeal and dismiss the plaintiffs' suit.

Mr. Rosario for the plaintiffs-appellants relies on certain admissions contained in Exhibits C and E, which are written statements filed in Original Suit No. 412 of

1888 and Original Suit No. 202 of 1901 by Cherunni Amma, mother of 6th defendant and predecessor-in-title of defendants Nos. 5, 6 and 8, who claim as donees from her. He wishes to make the statements of fact made in these documents serve the double purpose of acknowledgments of liability saving limitation under section 19 of the Limitation Act and as evidence of the mortgage transaction.

For the former purpose, I consider that they are sufficient as they state the facts that Govindan Embrandiri took this property from P. K. R. Nambiar and Rairappan Nambiar on *kanom* for a sum of Rs. 808, that Cherunni Amma's deceased brother took an assignment of that right from Embrandiri and that Cherunni Amma got *patta* transferred in her name and was holding the property under that title.

For the purpose of section 19 of the Limitation Act, it is not necessary that all the legal consequences that may flow from the thing acknowledged should be specified to constitute an acknowledgment. [*Vide Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (1), *Maniram Seth* v. *Seth Rup Chand* (2) and *Kadri Pakirappa* v. *Manki Husan Saheb* (3).]

On the second point, it appears that it is plaintiffs' case that the relationship of mortgagor and mortgagee was created by the transaction which was expressed in writing in Exhibit B, which superseded the prior mortgage Exhibit A.

Now when a contract has been embodied in a document, the parties to it are precluded by section 91 of the Evidence Act from enforcing by way of suit obligations arising out of such contract, except by proving the original document itself or by letting in secondary evidence of its contents in cases where secondary evidence is admissible, as when the original is lost or withheld by the opposite party with the knowledge that they will be required to produce it. [*Vide Pothi Reddi* v. *Velayudasivan* (4), *Sheik Akbar* v. *Sheik Khan* (5), *Kodali Mallayya* v. *Tarigopala Ramayya* (6) and *Muthu Sastrigal* v. *Viswanatha Pandara Sannadhi* (7).]

Of course if there is a pre-existing independent liability, the plaintiff can base his cause of action on that and may enforce the obligations arising out of such liability without proving the genuineness of any particular document, which may serve merely as one piece of evidence of the existence of the defendant's liability. For instance, if a loan has been given of which there is an independent admission and a *hundi* or promissory note is taken to secure its re-payment and the *hundi* is inadmissible in evidence through being unstamped, the plaintiff can sue on the original consideration, which was the case in *Krishnaji* v. *Rajmal* (8), *Pramatha Nath Sandal* v. *Dwarka Nath Dey* (9) and *Yarlagadda Veeraraghavayya* v. *Goranatla Ramayya* (10).

There is another case in *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree* (11), the circumstances of which are not so clear from the report.

As stated in *Pothi Reddi* v. *Velayudasivan* (4), there is no doubt as to the principle of the authorities and the only difficulty is in the determination in individual cases, to which class a particular case belongs.

This Court has always held that where the cause of action is complete in itself and inseparable from the giving of the bond or note, the plaintiff must lose his suit if he fails to prove the document upon which his cause of action is based, and that to hold otherwise would be to defeat the provisions of section 91 of the Evidence Act. This point was not raised in *Uppi Haji* v. *Mammaran* (12), the only question there considered being whether the acknowledgment saved the bar of limitation. It was admitted by the defendants in that suit that the mortgage was true.

(1) 25 C. 844; 25 I. A. 95; 2 C. W. N. 402.
(2) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 33 I. A. 165; 2 N. L. R. 130 (P. C.).
(3) 3 Ind. Cas. 19; 19 M. L. J. 650; 6 M. L. T. 155.
(4) 10 M. 94.
(5) 7 C. 256; 8 C. L. R. 533.
(6) 10 Ind. Cas. 177; 21 M. L. J. 462; 10 M. L. T. 55.
(7) 21 Ind. Cas. 864; (1914) M. W. N. 58; 14 M. L. T. 520; 26 M. L. J. 19.
(8) 24 B. 360; 2 Bom. L. R. 25.
(9) 23 C. 851.
(10) 29 M. 111; 15 M. L. J. 484.
(11) 3 C. 314; 2 C. L. R. 412 *note*; 2 Ind. Jur. 601.
(12) 16 M. 366; 3 M. L. J. 191.

In the present case, the plaintiff's right to redeem is inseparably bound up in Exhibit B, which both Courts have found to be not genuine. Exhibit B is itself primary evidence of the matter contained in it, as it purports to be a counter part of the *kanom*-deed which should be in the possession of the defendants, if they are the mortgagees.

Secondary evidence, as a general rule, is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents. [*Vide Queen-Empress* v. *Viran* (13) and section 64 of the Evidence Act.] If an admission cannot be made use of as secondary evidence of a document inadmissible in evidence for want of stamp or registration [*cf. Varada* v. *Krishnasami* (14) and *Somu Gurukkal* v. *Rangammal* (15)], *a fortiori* the Court cannot allow admissions to be used as secondary evidence of the contents of a document when the document put forward as an original is found to be a forgery.

I may here state that I have had the advantage of reading my learned brother's judgment and I am quite willing to concede that the Evidence Act places written admissions on a higher footing than oral admissions of the contents of a document, and that the description of several kinds of secondary evidence given in section 63 is not exhaustive. The advantage of written admissions over oral admissions appears to consist in the fact that it is not necessary for a party producing a written admission to give notice to the opposite side to produce the original of the document, but a party intending to rely on an oral admission of its contents must comply with the provisions of section 66. Nevertheless even written admissions must be classed as secondary, not primary, evidence of the contents of a document so that proof of the original having been duly executed is indispensable. The provision for receiving written admissions as proof of the contents of a document is confined to cases where the original is in existence and might be, but is not, produced. [*cf.* note on clause (*b*) of section 65 in Mr. Ameer Ali's Evidence Act, 3rd Edition, page 600.]

It will not apply to cases where an original is put forward as primary evidence of the terms of a contract and that original is found to be a forgery (*cf.* note at page 700 of the same commentary on the principle of section 91). Nor will it be available against others than the person who made the written admission and his successors-in-interest (see section 65*b*).

It is thus difficult to see how the interests of defendants Nos. 1, 2 to 4, 7 and 9 and 10 in any case can be affected by the admission of Cherudni Amma in Exhibit C, when their case stands upon a denial of the truth of the *marupat* sued on.

Again, the plaintiffs, having failed to prove Exhibit B to the satisfaction of the two Courts which are arbiters of questions of fact, cannot fall back on Exhibit A, as the finding of the lower Appellate Court is that this document also is not genuine. The plaintiffs' suit being for redemption, they must, in order to succeed, establish their right to redeem and the terms under which such right can be exercised. For the purposes of this suit, it is not sufficient for the plaintiffs to have proved their title of *jenmi* and to rely on the defendants' failure to show that the *jenmi* right lies with them. Plaintiffs cannot even be given a decree for recovery of possession of immoveable property on the strength of their *jenmi* title without proof of possession within twelves years of suit against the defendants, who have admittedly been in possession and enjoyment of the properties for more than the statutory period.

The appeal should, therefore, in my opinion be dismissed, but in the circumstances without costs.

As my learned brother takes a different view, and the questions of law upon which we differ are of some importance, the case will be referred under the proviso to section 98, Civil procedure Code, to a third Judge for a decision upon the following points of law: —

(1) Whether, having regard to the terms of the plaint and the fact that Exhibit B has been found not to be genuine, the plaintiffs can be permitted to rely on secondary

(13) 9 M. 224; 2 Weir 125.
(14) 6 M. 117; 7 Ind. Jur. 76.
(15) 7 M. H. C. R. 13.

evidence of the mortgage referred to in the plaint?

(2) If the answer to the first question is in the affirmative, then whether the documents relied upon by the plaintiffs are legally admissible as secondary evidence of the said mortgage ?

TYABJI, J.—The appellants' suit for redemption was dismissed as being barred by limitation. It is argued before us that limitation is saved by a series of acknowledgments each made by the mortgagors or their successors-in-title when the right to redeem was subsisting: *Atmaram* v. *Govind* (16), *Venkataratnam* v. *Kamayya* (17), *Mohesh Lal* v. *Busunt Kumaree* (18), *Sukhamoni Chowdrahni* v. *Ishan Chunder Roy* (1).

It has to be considered, therefore, whether each of these alleged acknowledgments was in its terms such as would fall within section 19 of the Limitation Act and whether it was made before the expiration of the period prescribed or of the "fresh period" referred to in the section.

The last of such acknowledgments was that contained in Exhibit C., the written statement of a predecessor-in-title of the defendants, filed in Original Suit No. 412 of 1888, dated 9th November 1888. The first question that has to be decided, therefore, is whether Exhibit C is a sufficient acknowledgment under section 19 of the Limitation Act. Exhibit C contains a statement that "while the predecessors-in-title of the plaintiffs were holding this property for a long time with the assessment in their names, the predecessors-in-title of the defendants took this on *kanom* (mortgage) for the sum of Rs. 808;" the document goes on to state that an assignment of the mortgage was taken by another person, and through that person the writer of Exhibit C obtained possession of the property, and was holding and enjoying the property. Exhibit C is, therefore, an acknowledgment of the existence of a *kanom* for Rs. 808. The acknowledgment under section 19 of the Limitation Act need not specify every legal consequence of the thing acknowledged: *Sukhamoni Chowdhrani* v. *Ishan Chunder Roy* (1).

Two objections are taken to Exhibit C as an acknowledgment on behalf of the respondents.

First. it is agued that the statements contained in it are mere recitals of a liability that once existed, not amounting to an acknowledgment of a present liability existing at the date of the acknowledgment: *Narayana Aiyar* v. *Venkataramana Aiyar* (19). But in Exhibit C it is stated that the predecessor-in-title of the defendants took the property on *kanom*, and that the same right devolved upon the writer of Exhibit C through an assignee. The reference to the *kanom* was for the purpose of showing how the lands were then held by the declarant, clearly implying that the *kanom* was subsisting. The effect of Exhibit C, therefore, seems to me to be similar to that of the statement in *Uppi Haji* v. *Mammavan* (12). These lands were described by a testator in his Will as "demised to me on *kanom*" and this description was held to be a sufficient and valid acknowledgment. The soundness of that decision has not been doubted in any case brought to our notice : it has been followed in *Lachhmi Chand* v. *Allah Dia* (20)

Next, it was argued for the respondent that Exhibit C cannot avail as an acknowledgment as it purports to be signed only by one of two co-mortgagees: *Narayana Aiyar* v. *Venkataramana Ayyar* (19). Exhibit C is no doubt signed by Kunhi Amma alone; and it it stated in the course of Exhibit C itself that the property had devolved upon Kunhi Amma and her elder sister Kunhoonha. It appears, however, that the elder sister had predeceased the younger, leaving the latter the sole surviving mortgagee. The prior death of the elder sister, is not recited in Exhibit C, but the defendants themselves claim to derive their title through Kunhi Amma (the younger sister) alone. Hence there can be no objection to Exhibit C as an acknowledgment on the ground of the person making it.

Assuming that Exhibit C was a sufficient acknowledgment in regard to its contents as well as the persons making it, it is

(16) 11 B. 282.
(17) 11 M. 218.
(18) 6 C. 340; 7 C. L. R. 121.
(19) 25 M. 220 at pp. 231, 232.
(20) A. W. N. (1908) 226.

argued for the appellants that it was made "before the expiration of the period prescribed," because it was made within 60 years of the next preceding acknowledgment which again was made within 60 years of the date of the mortgage.

The acknowledgment next preceding Exhibit C that is relied upon is contained in Exhibit G, a transfer of the mortgage rights in 1847 by the then mortgagee. It is therein stated: "As I have paid 40 *fanams* (*i.e.*, Rs. 8 08).....and have obtained a *kanom* demise in respect of those lands.....I have this day received from you.....and have relinquished the right to you."

It seems to me that Exhibit G is also a sufficient acknowledgment as regards its contents for reasons similar to those given with reference to Exhibit C

Hence the question arises whether the Exhibit G was made "before the expiration of the period prescribed"—in other words, whether the mortgage was of some date more than 60 years prior to Exhibit G —*i. e.*, prior to 1788? If it is of a later date than 1788, then a fresh period of limitation has to be computed from the date of Exhibit G, and similarly from the date of Exhibit C, and it would follow that the suit is not barred. If on the other hand, the mortgage is not shown to be of a date later than 1788 then the right to redeem was barred at the date of Exhibit G and, therefore, no fresh period can be counted from that date.

The appellants contend that the mortgage is proved to have been of a date after 1808, by the reference contained in Exhibit C to the mortgagors as "holding this property for a long time with the assessment in their name;" the statement that the mortgagors were so holding, it is argued, shows that they must have continued to hold it till the period when assessment was first payable; and that assessment was first payable in 1808 is shown by the fact that the British Government acquired the territory in 1792, and that the first survey was made in 1808. The proclamation for the survey is given in Logan's Malabar Manual, Volume II, page CCLIII.

As against this contention, it is argued for the respondents that Exhibit C does not prove that the mortgagors had been paying assessment prior to the mortgage. For this purpose, it is argued first that the words above cited (and relied upon by the appellants) must be read in connection with the latter part of Exhibit C, in which it is stated that "this property is in my possession by virtue of the possessory right extending for the last 100 years and more." This, it is argued, would take the mortgage to some date prior to 1798, when there was no assessment, and that it consequently contradicts the earlier statement relied upon by the appellants. The latter portion of Exhibit C, however, when read with what precedes, seems to me to refer to the possession of the mortgagors (from whom title was derived by the mortgagees) no less than to the direct possession of the mortgagees themselves. It was necessary for the declarant of Exhibit C to show that the mortgagor, through whom the declarant claimed, had acquired title by adverse possession as against the alleged mortgagor of the opponent of the declarant. This also makes it clear that the statement that the predecessors-in-title of the declarant were "holding this property for a long time with the assessment in their name" (on which the appellants rely) was not a casual statement but was deliberately made, with the intention of showing the title of the mortgagors whose mortgagee the declarant claimed to be.

Next it is questioned whether such a statement, made under such circumstances as are above referred to, is evidence of the facts stated. The fact whether or not the alleged mortgagors of the declarant of Exhibit C paid assessment is a relevant fact, as appears from what has been already said. The statement in question "suggests an inference" as to that relevant fact within the meaning of the Indian Evidence Act, section 17. It will, therefore, be an admission as defined in that section, if "it is made (*a*) by any of the persons, and (*b*) under the circumstances" mentioned in the Indian Evidence Act. (*a*) The person making the statement was one "from whom the parties to the suit have derived their interest in the subject-matter of the suit." as required by section 18 (2). (*b*) The circumstance under which it ought to be made is that it must be made during the continuance of the interest of the person making the state-

ment. This requirement is also satisfied. The statement is, therefore, an admission. Hence it can be proved under section 21 against the person who made it, or his representatives-in-interest (though it could not have been proved by or on behalf of the person who made it, unless it had come within the three exceptions contained in section 21). It is, therefore, evidence against the respondents, who are the representatives-in-interest of the person that made it.

The issue of fact, whether the mortgagor referred to in Exhibit C paid assessment, has not been determined by the lower Appellate Court and under section 103 of the Civil Procedure Code, I determine it, answering it in the affirmative.

Hence in my opinion the appellant succeeds on the third issue: the suit is not barred by limitation.

It is argued for the appellants that this would entitle them to the decree passed in their favour by the Court of first instance. For the respondents it is argued that the plaintiffs cannot succeed as their plaint is on the basis of Exhibit B, which has been held not to be genuine by both the Courts. The District Judge says:—"The Munsif's finding was that the property belongs in *jenm* to the plaintiffs, but is not held under Exhibit B. I agree with these findings." He then considers the question whether the suit is barred. With that question I have already dealt. The mortgage is identified in the plaint as being one dated 9th of August 1837, and also as being the mortgage of which an assignment was granted under Exhibit G. The mortgage being a contract or disposition of property, the terms of which were reduced to writing, the evidence that could be given in proof of its terms would consist either of the document itself or secondary evidence of its contents in cases in which secondary evidence is admissable (Indian Evidence Act, section 91). When, therefore, the plaintiffs came to Court alleging that they would rely on a mortgage identified in the manner above referred to, the defendants had, in my opinion, sufficient intimation that the mortgage would be proved in either of the two modes provided in the Indian Evidence Act. In fact, the real issue on which the parties went to trial, appears from the pleadings to be that which is referred to in the first part of the 2nd issue—whether the property belonged to the plaintiffs. The judgments of both the lower Courts proceed on this basis, the point on which they differ being only whether or not the suit was barred by limitation.

For these reasons, it seems to me that no formal objection based on the frame of the suit is open to the defendants, by which the plaintiffs can be precluded from adducing secondary evidence of the mortgage.

Owing to the opinion of my learned brother, I must here refer to such cases as *Sheikh Akbar* v. *Sheikh Khan* (5), *Pramathanath Sandal* v. *Dwarkanath Dey* (9), *Krishnaji* v. *Rajmal* (8), *Pothi Reddi* v. *Velayudasivan* (4), *Yarlagadda Veeraraghavayya* v. *Gorantla Ramayya* (10). In these decisions, as I understand them, it is laid down that if the claim of the plaintiff is based on an agreement which the law requires to be reduced to writing and to be stamped, but which is invalid on account of want of writing or of stamp, then the contract itself being incapable of proof, the plaintiff must fail. But on the other hand, if wiping out of consideration the contract—which is incapable of proof and must, therefore, be taken to be non-existent,—the plaintiff can show that he has other rights on which he may base his claim, then he may succeed, if and to the extent that he would have succeeded had there been no contract. If the plaintiff is unable to establish the existence of those other rights also, then it need hardly be said that he must fail in any case. He may fail on this second head because no such other rights exist apart from the abortive agreement—abortive in the eye of the law, because incapable of proof. He may also fail because those other rights may be of such a nature that a registered document is the only means permitted by the law for the creation of those other rights—and no such registered document having been made, those alleged other rights never came into existence. The two alternative kinds of claims are stated succinctly and clearly in several cases, notably in the case last cited.

In the case before us, however, no such alternative claim on the basis of rights apart from the contract is set up. The plaintiffs do not say: We do not rely upon one contract but on rights apart from the contract. They do not say: We must succeed even on the basis that there never was any con-

tractual relationship. The claim that the plaintiffs put forward rests on the agreement alone—the consensus *ad idem*. That consensus, the plaintiffs say, was expressed in a contract reduced to the form of a stamped, and otherwise valid, document as required by law. On the other hand, the defence has not been that the agreement is ineffectual to create any rights by reason of its not being expressed in a stamped document or for want of some essential required by law. The defence has been that the persons entitled to the *jenm* right are not the plaintiffs, and that even if the plaintiffs are so entitled their suit is barred by limitation. It is true that the defendants did take up the argument before us that the plaintiffs had not proved their case. This the defendants were entitled to do, for the plaintiffs cannot succeed unless they show that they have proved all that constitutes their cause of action. The plaintiffs' answer to such objection is that they are able to prove that the document was valid, and duly executed and that they have *prima facie* evidence (*viz.*, the admission in Exhibit C) which is sufficient at least to shift the burden on the party attacking the validity of the transaction on the ground that the document evidencing it failed in some essential particular required by law. The plaintiffs contend that in view of the real issues on which the case was tried they cannot, at this stage, be required to give more than *prima facie* proof of this part of their cause of action. As I have already said, the objection on the part of the defendants in the lower Courts was not that the document was unstamped and thus invalid. I, therefore, accede to this contention on the part of the plaintiffs.

The conclusion at which I arrive is that if satisfactory *prima facie* evidence is given of the existence of the mortgage and its terms, it will be enough for the plaintiffs to succeed, although it is only secondary evidence and does not, in direct and express terms, prove that the document had been stamped.

Though the District Judge held that the property belonged in *jenm* to the plaintiffs, yet he held (erroneously in my opinion) that the suit was barred. He did not consider whether the plaintiffs had proved that the defendants held it as mortgagees of the plaintiffs, and if so on what terms. I must, therefore, deal with this question.

An argument was addressed to us that evidence other than that of the document itself which the plaintiffs were permitted to give, need not consist of secondary evidence of the document. For this purpose, it was contended that what had to be proved was the mortgage transaction, and not the document evidencing it and hence that any evidence that would be relevant for the purpose of proving that transaction would be available to the plaintiffs. I am unable to accept this argument. It is true that what has to be proved is the transaction. It is provided, however, by section 91 of the Indian Evidence Act that when the transaction to be proved consists of a contract or grant or other disposition of property the terms of which have been reduced to the form of a document, no evidence can be given of its terms, except either the document itself or secondary evidence of its contents. Exemption is sought in the present case from this rule, on the ground that what the appellants desire to prove is not the terms of the mortgage, but the fact that there was a mortgage. But it is only by proving what the terms of the particular contract or grant or disposition of property were, that it can be discovered whether the transaction consisted of a mortgage. Hence the operation of the rule cannot be carried in the way sought by the appellants. They cannot succeed unless they prove the terms of the mortgage transaction, either by proving the document itself, or by secondary evidence of the contents of the document (sections 64 and 92 of the Indian Evidence Act).

Proof by secondary evidence of the document is admissible only in cases mentioned in the Indian Evidence Act. Section 63 purports to define what secondary evidence means and includes: section 65 refers to cases in which secondary evidence may be given. It would seem, however, that the five clauses of section 63 referring to secondary evidence are not exhaustive: for though section 65 expressly purports to enumerate the cases in which secondary evidence may be given, the evidence which is rendered admissible in cases (*b*) and (*g*) would not apparently fall under any of the five clauses of section 63, referring to what secondary evidence means and includes. However that may be, we have it clearly laid down that "when the existence, condition or contents of

the original have been proved to be admitted in writing by the person against whom it is proved or by his representative-in-title... the written admission is admissible;" section 65 (*b*). This express rule laying down a means by which the contents of such documents may be proved, would be inconsistent with the more general provisions of section 91 (which lays down that the terms of such documents can be proved only by proof of the document itself or secondary evidence of its contents) unless "a written admission" can be considered to be secondary evidence of the contents of such documents (within the meaning of that expression as used in section 91), notwithstanding that section 63 does not refer "to a written admission" but only to copies or counterparts and oral accounts. That such a written admission as is refered to in section 65 (*b*) was intended to be considered as secondary evidence within the meaning of that term in section 91 is indicated by the fact (already adverted to) that section 65 purports to refer to cases where secondary evidence may be given, and thus by implication a written admission is in section 65 described as secondary evidence. On principle it is difficult to conceive that while oral admissions of the contents of a document may come within the definition of secondary evidence, and thus take the place of primary evidence, written admissions should be incapable of so taking the place of primary evidence.

If Exhibit C is such a written admission as is referred to in section 65 (*b*), then it is secondary evidence within the terms of section 91. I have already referred in detail to the reasons why Exhibit C falls, in my opinion, within sections 17, 18 and 21 of the Indian Evidence Act relating to the definition and proof of admissions. Sections 22, 63 (5) and 65 (*b*) seem to indicate that the Legislature has applied somewhat different rules to admissions as to the contents of a document when they are in writing from the rules applicable to such admissions when they are oral.

Three classes of evidence must be distinguished:

First, oral admissions are relevant under section 22 when secondary evidence is admissible or the genuiness of a document produced in Court is in question. Such admissions must fall within the rules laid down in sections 17, 18 and 21, which require, amongst other things, that the admission should have been made by the person against whom it is sought to be proved.

Secondly, written admissions are relevant under section 65 (*b*). The definition contained in section 65 (*b*) seems to be self-contained and independent of the provisions of sections 17, 18 and 21; though the said definition is less elaborate, it does not seem to conflict with the provisions referred to in any material point.

It is objected that in this view written admissions become evidence without preliminary proof of the fact that the document itself cannot be produced, or even that the person relying on the written admission is not himself in possession of the document. But the answer to this objection seems to me to be plain. If it is shown that the person relying on the written admission withholds the document itself or otherwise takes no steps to have the original produced, then section 106 and illustration (*g*) to section 114 would come into operation and the effect of the written admission would in many cases be nullified. Compare *Goss* v. *Quinton* (21), per Tindal, C. J.

Thirdly, oral accounts of the contents of a document given by some person who has himself seen it are secondary evidence under section 63 (5). Here the requirements are different from those necessary in the first two classes: the guarantee for reliability of the account is not that it is given by some person against whom it is sought to be proved, but that the person has himself seen the document, and that his account will be subject to oath and cross-examination (section 60) or to something considered by the Act as equivalent to them (*e. g.* under section 32).

Hence Exhibit C is evidence of the mortgage relied upon by the plaintiffs if it falls within the class of admissions secondly mentioned above; but not otherwise. It seems to me that Exhibit C does fall within that class; for by means of Exhibit C the contents of the original mortgage are proved

(21) (1842) 3 Man. & G. 825 at p. 841; 4 Scott. (N. R.) 471; 12 L. J. C. P. 173; 7 Jur. 901; 133 Eng. Rep. 1372; 60 R. R. 616

to be admitted in writing; the person by whom the admission is made is the representative-in-interest of the defendants, and the persons against whom it is sought to be proved are the defendants.

For these reasons, in my opinion, the plaintiffs' suit is not barred by limitation, and a decree should have been given to them in the terms of the original decree given to them by the District Munsif on 26th September 1910, with a slight modification as against those defendants who are bound by the admissions of the contents of the mortgage-deed. The plaintiffs came to Court asking that they should be permitted to redeem the properties on payment of Rs. 820. They cannot, therefore, have a decree for redemption on payment of Rs. 808 as given to them by the District Munsif. The decree of the District Munsif should, in my opinion, be therefore modified by altering Rs. 808 mentioned therein to Rs. 820 and the appellants should have their costs in the lower Appellate Court and in this Court, but the order for costs made by the Munsif should stand.

As my learned brother takes a different view on the questions stated in his judgment, I agree that those questions should be referred to a third Judge under section 98 of the Civil Procedure Code.

This case coming on for hearing on the 17th and 22nd September 1914, under section 98 of the Code of Civil Procedure, before the Hon'ble Mr. Justice Sadasiva Aiyar, and having stood over for consideration till this day the Court delivered the following

JUDGMENT. The two questions which have been referred to me by my learned brothers, Spencer and Tyabji, JJ., have been formulated by them as follows:—

(1) Whether, having regard to the terms of the plaint and the fact that Exhibit B has been found not to be genuine, the plaintiffs can be permitted to rely on secondary evidence of the mortgage referred to in the plaint?

(2) If the answer to the first question is in the affirmative, then whether the documents relied upon by the plaintiffs are legally admissible as secondary evidence of the said mortgage?

It is necessary to mention a few of the material facts in order to state intelligibly my answer to these questions. As I understand the second paragraph of the plaint, the plaintiffs sued for redemption of a mortgage for Rs. 820 made in 1850. They, no doubt, also refer to a prior mortgage of 1837 for Rs. 808 in that paragraph, but they expressly add that 60 *fanams* (or Rs. 12) more was paid in 1850 and a new document for the total sum of Rs. 820 was obtained in that year. The suit, as I said before, was for redeeming this new mortgage for the larger sum which superseded the old mortgage of 1837 and the valuation of the suit is given in the plaint as Rs. 820, the amount of the new mortgage. In the list of documents attached to the plaint, the counterpart of the alleged mortgage of 9th August 1837 for Rs. 808 and the counterpart of the alleged mortgage of 18th January 1850 for Rs. 820 are both entered. I am satisfied from the plaint that the older document of 9th August 1837 was filed merely as evidence to support the document on which the suit was brought, namely the document of January 1850. The defendants, in their written statement, denied both the first document of 1837 and the second document of 1850. The District Munsif found the second document of 1850 on which the suit was brought to be false, while he thought that the first document of 1837, though very suspicious, "might be genuine" and gave a decree for redemption on payment of Rs. 808, the sum mentioned in the first document, though the plaintiffs in the prayer portion of their plaint were prepared to pay Rs. 820 for redemption, as their suit was to redeem the second mortgage for Rs. 820 and not the first mortgage for Rs. 808 which the plaintiffs treated as superseded by the later document for Rs. 820. The lower Appellate Court found both the counterpart documents of 1837 and 1850 produced by the plaintiff to be not genuine and dismissed the suit. I take it that my learned brothers, though they differ on a question of law, accept the finding of the District Judge that both the documents, Exhibits A and B, are false. I do not intend to deal in detail with the reasons given by my learned brothers for their differing opinions, as I am of opinion that there is a former decision of a Division Bench of this Court on this point which is binding upon me.

I shall, therefore, before referring to that decision, content myself with a few brief observations. The counterpart, Exhibit A, must be treated as put forward by the plaintiffs not as secondary evidence of the mortgage of 1837, but as primary evidence. The second paragraph of the Explanation 1 to section 62 of the Evidence Act says: "Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is *primary* evidence as against the parties executing it." When that primary evidence is found to be a forgery I do not think any question of secondary evidence comes in. Even if it does, secondary evidence can, no doubt, be admitted where the original has been destroyed or lost. [See section 65 clause (*c*). The plaintiffs' case is that the original has not been destroyed or lost but that the original is the document, Exhibit A, produced by him. If Exhibit A is not that original document as has been found by the lower Appellate Court, then the plaintiffs must still have the original with them, as they do not allege that it has been destroyed or lost and hence they cannot give secondary evidence of the original. If it, however, be taken that they wish to give secondary evidence of the counterpart in the possession of the defendants and if we assume that they are entitled to give secondary evidence of that counterpart, then they ought to give notice to the other side to produce that counterpart [see section 65, clause (*a*), Evidence Act, concluding portion], unless from the nature of the case the defendants must know that they will be required to produce it. [Section 66, clause (2).] I am not satisfied that when the plaintiffs put forward a forged document as primary evidence, the defendants must know that they would be required to produce the counterpart of the genuine document.

The question whether the plaintiffs should or should not be allowed to amend their plaint by suing in the alternative to redeem a mortgage for Rs. 808 of some date between 1808 and 1847 (which is all, I believe, that could be proved from Exhibits C and G taking them as secondary evidence) has not been referred to me and I need not say anything about it. I might, however, refer to a case reported in *Karam Chand* v. *Sultan* (22), which decides that "when a plaintiff sues to redeem a certain mortgage, that particular mortgage is his cause of action, and to shift the attack to a later mortgage is to change the suit into one based on a different cause of action." Where the cause of action is changed, I think there must be an amendment before the plaintiff could be given relief on that cause of action. However liberally the plaint in this case might be construed, I do not think it could be treated as it stands as praying for relief on a mortgage document of uncertain date between 1808 and 1843 for a sum of Rs. 808. Their Lordships of the Privy Council say in *Mahomed Zahoor Ali Khan* v. *Musammat Thakooranee Rutta Keer* (23): "Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit."

In *Krishna Pillai* v. *Rangasami Pillai* (24), the plaintiff sued for redemption of a *kanom* mortgage of a particular date in 1859. That *kanom* was not proved by him (as in this case). The plaintiff relied, however, in the lower Appellate Court upon certain admissions contained in certain documents as proving an earlier mortgage of some uncertain date after 1823. The lower Appellate Court gave a decree for the redemption of this earlier mortgage of uncertain date relying on these admissions. The learned Judges (Best and Subramania Aiyar, JJ.) held, following *Govindrav Deshmukh* v. *Ragho Deshmukh* (25), that a plaintiff failing to establish the mortgage on which the suit was based should not be allowed to fall back upon some other mortgage as to which admissions might have been made by the defendants in other proceedings.

As I said before, I think this decision is binding upon me and I hold that the plaintiffs, having failed to prove the mort-

(22) 13 Ind. Cas. 650; 72 P. W. R. 1912; 92 P. L. R. 1912.

(23) 11 M. I. A. 468 at pp. 473, 474; 9 W. R. (P. C.) 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320; 25 Eng. Rep. 177.

(24) 18 M. 462; 5 M. L. J. 187.

(25) 8 B. 543.

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gage of 1850 for Rs. 820 on which the suit was based, could not be allowed to succeed on some earlier mortgage which might be established by admissions made by the defendants in other proceedings unless the plaint is amended. My answer to the first question, therefore, is that the plaintiffs cannot rely, without an amendment of the plaint, on any other mortgage than the mortgage of 18th January 1850 on which the suit was brought and as that document (Exhibit B) has been found to be not genuine, they cannot give either primary or secondary evidence of the earlier mortgage referred to in the plaint for obtaining relief on the basis of that earlier mortgage.

It becomes unnecessary to answer the second question referred to me, as an answer to that question is required only if the answer to the first question is in the affirmative.

The second appeal coming on for hearing after the expression of the opinion of the Third Judge to whom the second appeal was referred, the Court delivered the following

JUDGMENT.—In consequence of the decision of the Hon'ble Mr. Justice Sadasiva Aiyar, this second appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 696 OF 1913.

October 14, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

ARUNACHALAM CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RANGASAMY PILLAI—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv)-(c)—Suit for declaration that decree passed against plaintiff is not binding on him—Consequential relief—Court bound to accept valuation put by plaintiff—Ad valorem *Court-fee.*

A suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree passed against the plaintiff for a debt is not binding on him, is not a mere declaratory suit, but is one with consequential relief falling under section 7 (*iv*) (*c*) of the Court Fees Act and the Court is bound to accept the valuation put by the plaintiff, on which *ad valorem* fee should be paid. [p. 82, col. 1.]

Parathayi v. Shankumani, 15 M. 294; *Samiya Marali v. Minammal*, 23 M. 490; 10 M. L. J. 240; *Kalabhai v. The Secretary of State*, 29 B. 19; 6 Bom L. R. 648; *Chinnammal v. Madarasa Rowther*, 27 M. 480; 14 M. L. J. 343; *Chingacham Vitil Sankaran Nair v. Chingacham Vitil Gopala Menon*, 30 M. 18; 1 M. L. T. 412; *Malikka Meladathil v. Kunji Achammal*, 5 Ind. Cas. 927; 20 M. L. J. 791; 7 M. L. T. 177; *Haribar Prasad Singh v. Shyam Lal Singh*, 21 Ind. Cas. 404; 40 C. 615, followed.

Thakoordeen Tewary v. Nawab Syed Ali Hossein Khan, 21 W. R. 340; 13 B. L. R. 427; 1 I. A. 192; *Narayana Putter v. Aya Putter*, 7 M. H. C. R. 372; *Karam Khan v. Daryai Singh*, 5 A. 331; A. W. N. (1883) 55, distinguished from.

Second appeal against the decree of the District Court of Trichnopoly, in Appeal Suit No. 297 of 1912, preferred against that of the Court of the District Munsif of Srirangam in Original Suit No. 264 of 1910.

This second appeal coming on for hearing on 1st September 1914 and having stood over for consideration till 16th September 1914, the Court (Sankaran Nair and Ayling, JJ.), made the following

ORDER OF REFERENCE TO A FULL BENCH.

The question for decision in this second appeal is whether the plaintiffs are bound to pay *ad valorem* Court-fee on their plaint.

The allegations in the plaint are that their father executed a hypothecation bond, on which a suit was brought by the creditor against the father as 1st defendant in that suit and the present plaintiffs as defendants Nos. 2 and 3, that these plaintiffs were really minors at that time, though they were not described as such in the plaint, and that a decree was passed both against the plaintiffs' father as well as against the plaintiffs. They now allege that the debt is not binding on the family and that the decree itself is a nullity. They, therefore, seek for a declaration to that effect and for an injunction to restrain the defendant from executing the decree. The lower Courts were of opinion that *ad valorem* Court-fee should be paid. The contention in second appeal is that the suit is only for a declaratory decree and if the prayer for injunction is regarded as a consequential relief, then they are entitled to value it as they like and that the lower Courts were not right, therfore, in holding that the Court-fee must be paid on the amount of

the decree which is sought to be declared not binding on the plaintiffs.

The earliest case decided by the Madras High Court is reported in *Narayana Putter* v. *Aya Putter* (1). In that case, the plaintiff had executed a document whereby he created a charge of Rs 4,500 on certain immoveable property and the suit was brought to cancel the document. The question for decision was whether the suit should be valued for purposes of jurisdiction upon the sum secured by the document sought to be cancelled and whether institution fee should be paid on that sum. The first Court held in that case that the plaintiff merely sought for a declaration without any consequential relief and that, therefore, Rs. 10 was the proper institution fee. The High Court held that as the plaintiff in that suit had executed a document of legal validity, it created a charge of the amount of Rs. 4,500, that the cancellation of that document was a relief of a very substantial description and very far from being a mere declaration. It was a suit, in their opinion, really to get rid of a charge and for the removal of a burden legally created. In *Thakoordeen Tewary* v. *Nawab Syed Ali Hossein Khan* (2) their Lordships of the Privy Council held that a prayer for setting aside a deed is a prayer for substantial relief, taking apparently the same view as was subsequently taken by the Madras High Court. To the same effect is a decision in *Parathayi* v. *Shankumani* (3).

In *Samiya Mavali* v. *Minammal* (4), their Lordships cited apparently with approval those two decisions. At any rate no dissent was expressed from them. The latest case in the Indian Law Reports that has been cited to us is *Chinnamal* v. *Madarsa Rowther* (5). The plaint in that suit for the cancellation and delivery of a mortgaged-deed for Rs. 4,000 executed by the plaintiff to the defendant was valued by the plaintiff at Rs. 50. The learned Judges, Messrs. Boddam and Bhashyam Aiyangar, held that the valuation given by the plaintiff must be accepted. This decision seems to us to be entirely opposed to those in 7 Madras High Court Reports and 15 Madras Series. In a later case, *Malikka Meladathil* v. *Kunji Achammal* (6), a different view was taken. The suit was brought by 25 plaintiffs, Nos. 2 to 25 of whom were parties to a sale-deed regarding which a declaration of invalidity was sought. The learned Judges held that, so far as these plaintiffs who were parties to the deed were concerned, if a declaration were given, the result would be the same as if the deed were cancelled and, therefore, *ad valorem* stamp-fee must be paid by them.

The decisions, therefore, appear to be in direct conflict with one another. The decisons in 7 Madras High Court Reports, 15 Madras Series and 20 Madras Law Journal hold that where there is a liability which is sought to be got rid of, then *ad valorem* fee must be paid. The decision in 27 Madras certainly and possibly the case in 23 Madras are in conflict with them. Where a party executes a document, or a decree is passed against him, *prima facie* such deed or decree is binding on him. Until it is set aside it cannot be treated as void. The decree, therefore, declaring that the deed or decree is not binding on the plaintiff has the effect of the cancellation of the deed or decree. It does not appear to us to be a mere declaratory decree The case might be different where a declaration is sought by a person who is not a party to the bond or the decree. In a case like that, the suit may properly be regarded as one for declaration, but in the other case, it is more properly a suit to get rid of an already existing obligation.

We think that in this state of authorities as the question is one of procedure and great practical importance, it is desirable to have a final decision. We, therefore, refer to a Full Bench the questions—

(1) Whether a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff for a debt is not binding on him, is a declaratory suit only? or

(2) Whether it is a suit with consequential relief falling under section 7, paragraph 4 (c) of the Court Fees Act under which the Court is bound to accept such valuation as may be fixed by the plaintiff? or

(3) Whether it is a suit in which the

(1) 7 M. H. C. R. 372 at p. 374.
(2) 21 W. R. 340; 13 B. L. R. 427; 1 I. A. 192.
(3) 15 M. 294.
(4) 23 M. 490; 10 M. L. J. 240.
(5) 27 M. 480; 14 M. L. J. 343.
(6) 5 Ind. Cas. 927; 20 M. L. J. 791; 7 M. L. T. 177.

plaint must be valued according to the mortgage or the decree amount?

Mr. *V. Visvanatha Sastri*, for the Appellants.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondents.

This second appeal coming on for hearing before the Full Bench on the 5th October 1914 and having stood over for consideration till 14th October 1914, the Court expressed the following

OPINION.—A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief, *prima facie* comes within clause 4, sub-clause (*c*), of section 7 of the Court Fees Act, but if at the same time it comes within any of the other classes of suits specified in the section it must be treated as a suit of that description and dealt with accordingly. A suit such as the present for a declaratory decree that a decree passed against the plaintiff is not binding on him and for an injunction restraining the decree-holders from executing it against him, cannot be brought within any other part of the section except clause 4, sub-clause (*c*). So too the other class of suits included in the reference, *viz.*, suits to declare a mortgage or sale-deed not binding on the party executing it, cannot be brought within clause 8 or any other part of the section except clause 4(*c*). As the present suit for a declaration and an injunction comes within clause 4 (*c*), the plaintiff is required by the section to state the amount at which he values the relief sought by him in the plaint which he has to verify, and the *ad valorem* fee payable in respect of the suit is to be computed accordingly.

A Full Bench of this Court has held, in a judgment in *Chelasami Ramiah* v. *Chelasami Ramasami* (7), to which one of the referring Judges was a party, that the valuation given by the plaintiff in cases coming under clause 4 is conclusive, and we do not think it was intended to raise that question again in the present reference, nor are we prepared to reopen it.

We have now dealt with the present case of a prayer for a declaratory decree and consequential relief as well, but the terms of the reference include also the case where a declaratory decree of the nature indicated is asked for without any consequential relief. In *Thakoordeen Tewary* v. *Nawab Syed Ali Hossein Khan* (2), such a suit was held not to be a suit for a mere declaration, but for substantive relief. In *Narayana Putter* v. *Aya Putter* (1), a suit for the cancellation of a document obtained from the plaintiff by fraud was held not to be a suit for a mere declaration but also for consequential relief. In *Karam Khan* v. *Darayi Singh* (8) it was held in view of the provisions of section 39 of the Specific Relief Act, that such a suit was a mere declaratory suit and did not involve consequential relief. This was not followed in *Parathayi* v. *Shankumani* (3) and was expressly dissented from in *Samiya Mavali* v. *Minammal* (4), as also in *Kalabhai* v. *Secretary of State for India* (9). In *Chinnammal* v. *Madarsa Rowther* (5), the case mentioned in the reference, was a suit for the cancellation and the delivery up of a bond, and was held, we think rightly, to be a suit for a declaratory decree with consequential relief under clause 4 (*c*). In *Chingacham Vitil Sankaran Naiar* v. *Chingarhan Vittil Gopala Menon* (10), the point was again expressly considered, and it was held that the substance and not the language of the plaint must be looked to, and though the suit in question was held to be a merely declaratory suit not involving consequential relief, the Court at the same time expressed the opinion that where it was incumbent on the plaintiff to get the document set aside before he could question it, it must be treated as involving a prayer for consequential relief and the provisions of clause 4 (*c*) would be applicable. This was followed in *Malikka Meladathil* v. *Kunji Achammal* (6), where it was held that though only a declaration was asked for, the suit was one for cancellation and that clause 4 (*c*) applied. The statement in the judgment that an *ad valorem* fee was payable does not mean that clause 4 (*c*) was not applicable, because the fee payable in suits falling under this clause is *ad valorem*, though under the provisions of the section it is computed according to the amount at which the relief sought is valued in the plaint. The most recent decision in *Harihar Prasad Singh* v. *Shyam Lal Singh* (11) is to the same effect. Following these authorities, we are of opinion that a suit of the nature indicated in the

(7) 18 Ind. Cas. 363; 24 M. L. J. 233; 13 M. L. T. 128; (1915) M. W. N. 105.

(8) 5 A. 331; A. W. N. (1883) 55.

(9) 29 B. 19; 6 Bom. L. R. 648

(10) 30 M. 18; 1 M. L. T. 412.

(11) 21 Ind. Cas. 404; 40 C. 615.

reference, which merely asks for a declaration, is nonetheless a suit for a declaratory decree with consequential relief within the meaning of clause 4 (*c*).

This second appeal coming on for hearing after the expression of the opinion of the Full Bench, the Court (Sankaran Nair and Ayling, JJ.) delivered the following

JUDGMENT.—In accordance with the opinion of the Full Bench we reverse the decrees of the Courts below and direct the District Munsif to restore the suit to his file and dispose of it according to law. Costs will abide the result.

Decree reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 24 OF 1914.
August 31, 1914.
Present:—Mr. Fawcett, J. C., and Mr. Crump, A. J. C.

THE KARACHI TRADING COMPANY—APPELLANTS

versus

FIRM OF TEJBHANDAS JETHANAND—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Mistake of fact—Sufficient cause.

An appellant seeking to take advantage of section 5 of the Limitation Act, on the ground of a mistake of fact, is bound to show that there has been no negligence, inaction or want of *bona fides* before he can claim an extension of time. [p. 82, col. 2.]

Where, therefore, the appellant's Pleader was misled as to the date of the decree, the uncertified copy obtained by the appellant being wrongly dated, and the appeal was consequently filed out of time:

Held, that there was no "sufficient cause" within the meaning of the section. [p. 83, col. 1.]

Appeal against the decree of the Additional Judicial Commissioner, Sind.

Mr. *E. Raymond*, for the Appellants.

JUDGMENT.—The time allowed by law for presenting this appeal expired on July 8th, 1914. The appeal was not, however, presented until July 16th. The cause of delay is said to be that the appellant's Pleader was misled as to the date of the decree. Judgment was pronounced on April 8th, 1914, and it appears that the appellant thereupon obtained an uncertified copy on which the date was wrongly given as "April 18th." This error led the appellant's legal advisers to believe that the time for filing the appeal did not expire until July 17th. At this stage we are satisfied by the affidavit filed that the facts are as alleged. The question for decision is whether these facts constitute sufficient cause within the meaning of those words as used in section 5 of the Indian Limitation Act, 1908.

Section 5 of the Limitation Act has been the subject of many judicial pronouncements, but the only principle of universal application which can be deduced is that it is difficult and undesirable to attempt to define precisely the meaning of the words "sufficient cause" [*cf. Dadabhai Jamsetji* v. *Maneksha Sorabji* (1)], each case must be decided upon its own facts. The cause here alleged is a *bona fide* mistake as to a matter of fact, *videlicet*, the date on which judgment was pronounced. How far a *bona fide* mistake of law is "sufficient cause" within the meaning of the section, has been debated on many occasions. The case already cited is on that point. There the Bombay High Court expressly approve the *dictum* of the Madras High Court in *Krishna* v. *Chathappan* (2), that a *bona fide* mistake of law is "sufficient cause" where no negligence or inaction is imputable to the appellant. The same view was taken by the Full Bench of the High Court of Allahabad in *Brij Mohan Das* v. *Mannu Bibi* (3). Though those cases deal specifically with mistakes of law, the qualification is clearly equally applicable to mistakes as to matters of fact. We think that an appellant is bound to show that there has been no negligence, inaction or want of *bona fides* before he can claim an extension of time.

We must take it that judgment was delivered in open Court on April 8th and it is probable that the appellant or his legal advisers were aware of the fact. If not, they could and ought to have ascertained the fact at the time. If they did not, they were guilty of negligence and inaction. The appellant must of necessity have become acquainted with the fact that judgment had been delivered against him, for he says that soon after the judgment he instructed his Pleaders to obtain an uncertified copy. He ought, therefore, to have been under no misapprehension as to the day on which judgment was delivered. His knowledge

(1) 21 B. 552 at p. 555.
(2) 13 M. 269.
(3) 19 A. 348 at p. 350; A. W. N. (1897) 86.

was not derived from the erroneous copy. This copy was apparently obtained by a Pleader's clerk in consequence of these instructions, but how or on what date we are not informed. In the circumstances it is difficult to hold that the appellant was justified in accepting the date on an uncertified copy without further inquiry. The error in the copy was a gross one which the smallest enquiry could have rectified. And though it is possible that the appellant is not himself primarily to blame, it is impossible in such matters to distinguish between a party and those through whom he acts, and even if he cannot be held liable for the copyist's blunder, his own knowledge or the enquiries which he might and ought to have made would have sufficed to correct it. Persons who are satisfied to take crucial dates from uncertified sources do so at their own risk. We are not, therefore, satisfied that there was here "sufficient cause" for the delay, and in coming to this conclusion we would cite the remarks of Jenkins, C. J., in *Karsondas Dharamsey* v. *Gungabai* (4) that, "when the time for appealing is once passed, a very valuable right is secured to the successful litigant and the Court must, therefore, be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and thus depriving the successful litigant of the advantage which he has obtained."

The appeal is summarily dismissed.

Appeal dismissed.

(4) 30 B. 329; 7 Bom. L. R. 965.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 1792 TO 1795 OF 1914.

December 22, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

P. M. A. M. VELLAYAN CHETTY—PETITIONER IN ALL

versus

IN C. M. P. NO. 1792 OF 1914

JOTHI MAHALINGA AIYER—RESPONDENT.

IN C. M. P. NOS. 1793 TO 1795 OF 1914

ALAGIA SUNDARAM PILLAI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4, cl. (3)—Practice—Re-hearing—Death of respondent before date of hearing—Legal representatives of deceased not brought on record—Appellant, whether entitled to re-hearing of appeal.

It is only a party who has not been heard that can claim a re-hearing on the ground that he has been prejudiced. [p. 84, col. 2.]

Two days before an appeal came on for hearing, one of the respondents died. Neither the appellant's Vakil nor the deceased respondent's Vakil were aware of this and the appeal was heard and dismissed. The appellant claimed a re-hearing of the appeal on the ground that it had been decided without bringing the legal representatives of the deceased respondent on the record:

Held, that the appellant had no claim to a re-hearing of the appeal as in the interest of justice, it is not desirable to give a right to an unsuccessful litigant to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing. [p. 84, col. 2.]

Goda Coopooramier v. *Soondrammall*, 3 Ind. Cas. 739; 6 M. L. T. 271; 33 M. 167; *Janardhan* v. *Ramachandra*, 26 B. 317; 4 Bom. L. R. 23; *Monee Lall* v. *Fazul Hossein*, 14 W. R. 337; *Ramacharya* v. *Anantacharya*, 21 B. 314, distinguished.

Duke v. *Davis*. (1893) 2 Q. B. 260; 62 L. J. Q. B. 549; 4 R. 518; 69 L. T. 490; 41 W. R. 673, followed.

Petitions praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to re-hear Appeal No. 235 of 1911, preferred against the decree of the Court of the Temporary Subordinate Judge of Ramnad, in Original Suit No. 75 of 1910, after bringing on record the legal representatives of the deceased, Muthiah Pillai, the second respondent in the appeal.

FACTS.—One of the respondents in a pending appeal died two days before the hearing thereof in the High Court, but the appeal was heard and dismissed without anybody knowing that the respondent was dead. Some time later the appellant moved the Court for bringing the legal representatives of the deceased respondent on record and for a re-hearing of the appeal.

Mr. *F. H. M. Corbett*, Advocate-General, and Mr. *T. Rangaramanuja Chariar*, for the Petitioner:—The judgment is a nullity as the legal representatives of the deceased respondent were not on record. *Janardhan* v. *Ramchandra* (1), *Monee Lall* v. *Fuzul Hossein* (2) and *Ramacharya* v. *Antacharya* (3).

Mr. *K. V. Krishnaswami Iyer*, for the 2nd Respondent's legal representatives, referred to the provisions of the Civil Procedure Code

(1) 26 B. 317; 4 Bom. L. R. 23.
(2) 14 W. R. 337.
(3) 21 B. 314.

and relying upon *Goda Coopooramier* v. *Soondrammall* (4), contended that the decree was not void but only voidable and that too at the instance of the legal representatives and as they did not want any re-hearing, the appellant who had already been heard and so was not in any way prejudiced, was not entitled to have his appeal re-heard.

JUDGMENT.

IN C. M. P. No. 1792 OF 1914.

This is an application by the appellant for an order to re-hear the appeal under the following circumstances:—Two days before the appeal came on for hearing the 2nd respondent had died. Neither the appellant's Vakil nor the Vakil who filed a *vakalat* on behalf of the 2nd respondent was aware of this. The appeal was heard and we delivered judgment dismissing it with costs. The legal representatives of the 2nd respondent do not ask us to hear the appeal on the ground that they have been prejudiced by the disposal of the case. The learned Advocate-General who appears for the appellant on the present occasion contends that the judgment passed without bringing the legal representatives of the deceased respondent on the record is a nullity and should be set aside. The question involved is one of considerable importance regarding practice.

We have come to the conclusion that the appellant has no claim to a re-hearing of the appeal. Under the Code of Civil Procedure, the death of one of the defendants (the same rule applies to respondents) does not abate a suit. Under Order XXII, rule 4, clause (3), it is provided that if the legal representative of the deceased defendant is not brought on the record within the time limited by law, the suit shall abate as against such defendant, thereby indicating that the suit can proceed against the other parties on the record. Further if a defendant has not been served owing to the default or neglect of the plaintiff, it is open to him to elect to abandon the suit as against the unserved defendant and to proceed to trial with the suit as against the others. The law also makes provision for the legal representatives of a deceased defendant themselves applying to be brought on the record under certain circumstances. The object of these various provisions is to ensure that no party shall be prejudiced by a hearing in his absence. No rule of law has been quoted to us which enables a party who has had the benefit of a full hearing to take advantage of the absence of a party on the record. The dictum of Benson and Sankaran Nair, JJ., in *Goda Coopooramier* v. *Soondrammall* (4), is against such a contention. All the decided cases are reconcileable with the principle that it is only a party who has not been heard that can claim a re-hearing on the ground that he has been prejudiced. The reasoning in *Janardhan* v. *Ramachandra* (1) may appear at first sight to point the other way. The statement that under section 571 of the old Code the Courts are bound to hear both the parties, is not conclusive of the point. *Janardhan* v. *Ramchandra* (1), *Monee Lall* v. *Fuzul Hossein* (2) and *Ramcharya* v. *Anantachariar* (3) are all cases in which the party prejudiced was granted a re-hearing.

The rules of practice in England on which our Code is based are to the same effect. The decision of Bowen, L. J., in *Duke* v. *Davis*(5), lends strong support to the view we have taken. The learned Lord Justice points out that if a party is dead, the records stand good so far as the living parties are concerned; and that any disposal of the case, notwithstanding the death of one of the parties, will be valid subject to its being vacated at the instance of the legal representatives of the person who had died.

In the interest of justice, it is not desirable to give a right to an unsuccessful litigant to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing.

The affidavit in this case does not say in what manner the appellant was prejudiced in the conduct of the appeal before us by the fact that the 2nd respondent was dead at the time. We must decline to re-hear the appeal. The petition will be dismissed with costs.

IN C. M. P. Nos. 1793 TO 1795 OF 1914.

As the appellant has filed applications for

(4) 3 Ind. Cas. 739; 33 M. 167; 6 M. L. T. 271.

(5) (1893) 2 Q. B. 260; 62 L. J. Q. B. 549; 4 R. 518; 69 L. T. 490; 41 W. R. 673.

bringing in the legal representatives on the record, they will be granted. The Vakil who appears for the added representatives does not wish to have the appeal re-argued.

Petition dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION NO. 45 OF 1913.

September 25, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

PAMANMAL HEMANDAS—APPLICANT

versus

Musammat HOTANBAI, WIFE OF PAMANMAL—OPPONENT.

Arbitration Act (IX of 1899), *s.* 12—*Enlargement of time for making award—Discretion of Court, extent of—Interference in revision.*

The discretion given by section 12 of the Arbitration Act is very wide and should be exercised on a consideration of all the circumstances of the case. The Court is bound to consider whether the case is a fit one for granting the indulgence asked for.

The Courts of Law should not lightly interfere with the discretion deliberately exercised by a lower Court.

Jaipal Kunwar v. *Indar Bahadur Singh*, 26 A. 238, (P. C.); 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 249, followed.

Application against an order of the Additional Judicial Commissioner, Sind.

Mr. *Dipchand Chandumal*, for the Applicant.

Mr. *Kimatrai Bhojraj*, for the Opponent.

JUDGMENT.—This is an application for revision of an order passed by the Additional Judicial Commissioner of Sind refusing to file an award under the Arbitration Act IX of 1899, on the ground that it had been made beyond the time limited by paragraph 3 of the first Schedule to the Act.

The Additional Judicial Commissioner in the exercise of his discretion under section 12 refused to enlarge time on the ground that "he was not at all satisfied that justice had been done in the arbitration." It is urged in appeal that the Additional Judicial Commissioner should have confined himself to the consideration of the question whether or not the arbitrator had been diligent and expeditious in the proceedings. No doubt the diligence of

the arbitrator is a matter which should weigh with the Court under section 12, but we are not disposed to limit the discretion given by that section to that point only. It contains no such limitation. It is very wide and the discretion it gives should be exercised on a consideration of all the circumstances of the case. The party practically asks the Court for an indulgence and the Court is bound to consider whether the case is a fit one for the grant of such an indulgence. Even if the case had been before us in appeal, we should have refused to interfere having regard to the remark made by the Privy Council in the case of *Jaipal Kunvar* v. *Indar Bahadur Singh* (1), that the Courts of law should not lightly interfere with the discretion deliberately exercised by a lower Court. If there is no case for interference, even in appeal, still less would we be justified in interfering in revision.

The application is, therefore, rejected with costs.

Application rejected.

(1) 26 A. 238; (P. C.); 31 I. A. 67; 8 C. W. N. 465; 6 Rom. L. R. 495; 14 M. L. J. 149.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2823 OF 1913.

December 15, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

RANGASWAMI KAVUNDAN AND ANOTHER —DEFENDANTS—APPELLANTS

versus

ALAGAYAMMAL—PLAINTIFF NO. 2—RESPONDENT.

Limitation Act (IX of 1908), *Sch. I, Arts.* 109, 120 — *"Wrongfully received," meaning of—Suit for profits of immoveable property—Wrongful possession by decree-holder—Restitution—Appeal—Possession taken during appeal, nature of, if appeal successful—Civil Procedure Code (Act V of* 1908), *s.* 144.

A suit for profits of immoveable property by a person who was dispossessed in execution of a decree which was reversed in appeal and who was subsequently restored to possession, is governed by Article 109 of Schedule I of the Limitation Act, 1908. [p. 87, col. 1.]

The words "wrongfully received" in Article 109 of Schedule I of the Limitation Act include receipt of profits under a claim or title that cannot be legally substantiated. [p. 87, col. 1]

An appeal is only a continuation of the original proceedings and the appellate judgment dates back

RANGASWAMI KAVUNDAN v. ALAGAYAMMAL.

to and stands in the place of the original judgment for all legal purposes. Therefore possession taken by a person pending an appeal is subject to the result of the appeal and must be deemed to have been without legal title if the original decree or order is reversed and is in this sense "wrongful" as against the person dispossessed. p. 87, col. 1.]

F. H. Holloway v. *Guneshwar Singh*, 3 C. L. J. 182, dissented from.

Savarimuthu v. *Aithurusu Rowthar*, 25 M. 103; 11 M. L. J. 428, followed.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 610 of 1912, preferred against that of the District Munsif of Namakal, in Original Suit No. 378 of 1911.

FACTS.—The plaintiff was dispossessed of certain immoveable property in execution of a decree. On appeal this decree was reversed. He then applied to the Court whose decree was reversed for restitution and got it. Thereupon he filed the present suit for mesne profits for the period of dispossession. The District Munsif dismissed the suit, holding that Article 109 of the Limitation Act applied to the case and that the suit was barred. On appeal the District Judge, following *F. H. Holloway* v. *Guneshwar Singh* (1), held that Article 120 applied to the case and reversed the decree of the District Munsif. The defendants thereupon appealed to the High Court.

Dr. *Swaminathan*, for the Appellants:—Article 109 of the Limitation Act is the proper Article applicable. See *Savarimuthu* v. *Aithurusu Rowthar* (2). The wrongful character of the possession is not altered by the circumstance that such possession was taken under a decree. That decree having been set aside, the appellate decree relates back to the date of the original decree and renders possession thereunder wrongful. The new Limitation Act has cut down the old Article 109 of Act XV of 1877, by removing the clause which existed therein giving the plaintiff a period of three years from the time he recovered possession to bring his suit for mesne profits. This is due to a similar change in section 144 of the new Code of Civil Procedure corresponding to section 583 of the old Code. Under the new Code the person applying for restitution must do so by petition and not by suit.

(1) 3 C. L. J. 182.
(2) 25 M. 103; 11 M. L. J. 428.

Mr. *T. M. Krishnaswami Iyer*, for the Respondent:—The District Judge was right in holding that Article 120 applied to the case. The possession, having originated under a decree, cannot be said to be wrongful unless and until that decree is set aside and continues to be lawful so long as that decree is in force. The cause of action for the suit having arisen before the new Code came into operation, any change in the law cannot retrospectively affect the right of the plaintiff to his prejudice. Article 109 applies only to cases where the original receipt was without any claim or title justifying the same at the time of such receipt. The decision in *Savarimuthu* v. *Aithurusu Rowthar* (2) had reference to Article 31 of the Provincial Small Cause Courts Act and has no bearing on Article 109 of the Limitation Act. The decision in *F. H. Holloway* v. *Guneshwar Singh* (1) is directly in point.

JUDGMENT.—The question raised in this appeal is whether a suit for profits of immoveable property by a person who was dispossessed in execution of a decree which was reversed in appeal and who was subsequently restored to possession, is governed by Article 109 or Article 120 of the Limitation Act.

Article 109, which relates to suits for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant, provides for a period of three years from the date when the profits are received. The Article, as it stood in Act XV of 1877, contained a clause to the effect that, when the plaintiff was dispossessed by a decree which was afterwards set aside in appeal, the date was to run from the date when he recovered possession. This clause does not find a place in the Act of 1908, which fixes the starting period in all cases to run from the date when the profits were received. The reason for the omission was probably the change which section 144, clause (2), of the Civil Procedure Code of 1908 introduced, as a separate suit for recovery of such profits was barred by that section. No reservation was made in the case of causes of action which arose previous to the coming into force of the new Code and in respect of which it has been held that a separate suit would lie. The result seems

to be that the Article, as it stands, applies to all such cases.

The District Judge following the case of *F. H. Holloway* v. *Guneshwar Singh* (1) held that Article 120 and not 109 applied to such suits.

The decision of the question turns on whether the words "wrongfully received" in Article 109 should be confined to cases where the possession of the defendant against whom profits are claimed originated in a wrongful act.

In *Savarimuthu* v. *Aithurusu Rowthar* (2), it was held by a Full Bench of this Court that a suit for profits received by a person who was in possession under a decree which was reversed in appeal, fell under Article 31 of the Madras Provincial Small Cause Courts Act, which exempted from the jurisdiction of the Small Cause Courts suits "for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant." The words above quoted are identical with the words of Article 109 of the Limitation Act, and, if possession of such a person was *wrongful* for the purposes of Article 31 of the Provincial Small Cause Courts Act, it would equally be so for the purposes of the Limitation Act. The referring Judges (Justices Davies and Bhashyam Iyengar) were of opinion that the suit was of the nature described in Article 109 of the Limitation Act.

We are of opinion that the words "wrongfully received" in Article 109 of the Limitation Act include receipt of profits under a claim or title that cannot be legally substantiated. An appeal is only a continuation of the original proceedings and the appellate judgment dates back to and stands in the place of the original judgment for all legal purposes. Possession taken by a person pending an appeal is subject to the result of the appeal and must be deemed to have been without legal title if the original decree or order is reversed and is in this sense wrongful as against the person dispossessed. Section 144 of the Civil Procedure Code, which deals with restitution, empowers the Court to pass orders for the payment of "interest, damages, compensation and mesne profits" consequent on the variation or reversal of a decree.

The use of the words "damages, compensation and mesne profits" supports the view taken by us, as they indicate that possession was wrongful even though taken in execution of a decree or order.

Both the cases reported in *F. H. Holloway* v. *Guneshwar Singh* (1) and *Savarimuthu* v. *Aithurusu Rowthar* (2) were decided when the Limitation Act XV of 1877 was in force, and it is not possible to reconcile the views taken as to what wrongful possession or receipt of property means. We do not see sufficient reason to dissent from the view taken by the eminent Judges who composed the full Bench in *Savarimuthu* v. *Aithurusu Rowthar* (2).

In the result we set aside the decree of the District Judge and restore that of the District Munsif with costs in this and th lower Court.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION NO. 67 OF 1914.

January 26, 1915.

Present:—Mr. Justice Rossignol.

GIRDHARI LAL AND OTHERS - PLAINTIFFS—PETITIONERS

versus

ABDUL RAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Report of Tahsildar, when evidence.

The report of a Tashildar when acting as a commissary to the Court is good evidence.

Petition, under section 70 of Act IV o 1912, for revision of the order of the Distric Judge, Multan, dated the 19th November 1913, rejecting the petition for permission to sue in *forma pauperis*.

Rai Bahadur Pandit *Sheo Narain*, for the Petitioners.

Mr. *Nand Lal*, Bhagat *Gobind Das* and Lala *Durga Das*, for the Respondents.

JUDGMENT.—It has been found as a fact that the petitioners have some means. The Tahsildar was acting as a commissary to the Court and his report is good enough evidence.

Further the finding of the lower Court receives strong support from the fact that in this Court appellant has briefed one of the leading Counsel and has paid him a fee of Rs. 100.

I dismiss the petition. No costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 678 OF 1913.

December 10, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

BHAGAVATULU SESHAYYA—PLAINTIFF—APPELLANT

versus

VEDANTAM MALLESAM—DEFENDANT—RESPONDENT.

Madras Hereditary Village Offices Act (III of 1895), s. 13—Village headman, office of—Emoluments, when become attached to office of village headman—Board of Revenue making the office a salaried one—Suit for declaration of right to office filed after date of Board proceedings—Jurisdiction.

Where the Board of Revenue in virtue of the powers conferred upon them by section 32 of Madras Act II of 1894 made the office of village headman a salaried one:

Held, that the emoluments became attached to the office within the meaning of section 13 of Madras Act III of 1895 from the date of the issue of the Board's proceedings. [p. 90, col. 1.]

Where, therefore, after that date a suit was instituted in a Civil Court for a declaration of the plaintiff's right to the office of village headman:

Held, that the Civil Court had no jurisdiction to entertain the suit after that date. [p. 90, col. 2.]

Second appeal against the decree of the District Court of Kistna at Masulipatam, in Appeal Suit No. 209 of 1912, preferred against that of the Principal District Munsif of Masulipatam, in Original Suit No. 644 of 1910.

FACTS.—The suit is in respect of the office of village headman of the village of Kuchipudi, a proprietary estate in the Divi *taluk* of the Kistna District. By a notification published in 1909, the Government made the provisions of Madras Act II of 1894 applicable to this *taluk* and the Collector of Kistna was directed to submit proposals for the revision of the establishments. The proposals relating to the village in question were sanctioned by the Board of Revenue under rules framed by it by virtue of section 32 of Madras Act II of 1894 and contained in Appendix I to Standing Order No. 147, paragraph 5. The defendant was, thereupon, nominated to the said office and was directed by the Tahsildar to take charge of the same on the 1st December 1913. The plaintiff who unsuccessfully tried to be appointed to the said office filed the present suit in the District Munsif's Court of Masulipatam on the 23rd September 1910 for a declaration of his right to the said office. The defendant contended *inter alia* that the Civil Court had no jurisdiction, as the office was one to which emoluments were attached and so taken out of the jurisdiction of Civil Courts. The District Munsif overruled this contention and decreed the plaintiff's suit. On appeal the District Judge disagreed with the District Munsif and upholding the plea as to jurisdiction, dismissed the plaintiff's suit. Against the said decree of the District Judge the plaintiff preferred this second appeal.

Mr. *V. Ramadoss*, for the Appellant:—The emoluments became attached to the office only from the day from which the pay of the incumbent was payable, *i. e.*, from the 1st December 1910. All that the Board's proceedings did was to annex the remuneration to the office but not to attach it to the same. The various orders made by the Government and its officers, were unnecessary and *ultra vires*. The money cess itself was only leviable from 1st April 1910 and on the date of suit none of the contributions mentioned in section 28 existed. The true test is whether the person entitled to the office can draw his pay from 1st April 1910. In any event the District Judge erred in dismissing the suit. He ought to have returned the plaint for presentation to the proper Court.

Mr. *L. A. Govindaraghava Iyer*, for the Respondent:—The office in question is a newly created office because it is a salaried one. The emoluments certainly became attached to the office from the date of the Board's proceedings. Under the Government notification a fund came into existence on 1st April 1910, from which the village officers could be paid within the meaning of section 29 of Madras Act II of 1894. The words of the section are significant, *viz.*, "allowances to

which they may be entitled." The suit wa , therefore, not cognizable by the Civil Court on the 23rd September 1910.

JUDGMENT.

NAPIER, J.—The question raised in this second appeal turns on the construction of the words "provided that emoluments have been attached thereto" in section 13 of Act III of of 1895. The suit was brought in the Court of the Principal District Munsif of Masulipatam by the plaintiff for a declaration of his right to the office of village headman of Kuchipudi *agraharam* and objection was taken that the Civil Court had no jurisdiction to try such a suit. The District Munsif held that the Court had jurisdiction and decreed the plaintiff's claim. The District Judge on appeal reversed his decision on the ground that the Civil Court had no jurisdiction on the date of the suit. Hence the second appeal.

The suit was filed on the 23rd September 1910. The defendant was instructed by the Tahsildar to take charge of his office from the 1st of December. *Vide* Exhibit O, the Tahsildar's *arzi* to the Head-quarters Deputy Collector informing him of his having taken that action. Admittedly if the emoluments became attached to the office of the headman as from that date, then the suit filed in September would have been one for the recovery of a village office to which emoluments had not at that time been attached and as such would have been within the jurisdiction of the Civil Courts. We have, therefore, to see whether the emoluments were attached at a date earlier than September 1910 as decided by the lower Appellate Court. For the purpose of deciding this question we called for the Board's proceedings, No. 3 of January 5th 1910, which had not been produced before the lower Courts but were evidently the basis of the administrative proceedings under which emoluments were attached to this particular office.

It was contended by the appellant that emoluments became attached within the meaning of the section only from the day from which the pay of the incumbent began to run. We asked the learned Vakil for the appellant, *who* in this view attached the emoluments, and we are unable to get any answer to it beyond the argument that the State attached the emoluments either through the Tahsildar who fixed the date or through the Deputy Collector who sanctioned his proceedings for doing so. With reference to the Board's proceedings his contention was that they annexed the remuneration to the office within the definition of the word "emoluments" in section 4 but that the attachment was as above stated. The history of the proceedings appears to be as follows. The Madras Act II of 1894 was passed to amend the law relating to village officers in permanently settled estates, to make better provision for their appointment and remuneration and generally for securing their efficiency. Chapter II deals with the strength, appointment and control of village establishments and Chapters III and IV provide for the enfranchisement of such village office *inams* and the remuneration of the offices by the establishment of a village service fund for that purpose. Section 19 of that Act gives power to the Government to direct, from such date as it may notify, the levy of a money cess the proceeds of such cess to be paid with contributions from other sources into the village service fund; and section 29 provides that on or after the date notified in any estate under section 19, the village officers shall be paid from the aforesaid fund the salaries and other allowances to which they may be entitled according to such scale and in such manner as may be prescribed by the Board of Revenue by rules made under section 32; and section 32 empowers the Board of Revenue to make rules with regard to many matters one of which is "salaries and allowances to be assigned to village officers, and the method of this payment." It was in accordance with this procedure that the office of headman in this village became a salaried office. On some day in 1909—the exact date does not appear here—the Government applied the provisions of Chapters III and IV of Act II of 1894 to the village establishments in the proprietary estates in the Divi *taluk*, Kistna District. The Collector of Kistna was called upon to submit proposals for the revision of establishments and his proposals, dated 26th October 1909, formed the subject of

the Board's resolution above referred to. The resolution sanctions his proposals subject to certain modifications, one of them being that for the *inam* village of Kuchipudi a *karnam* and a headman and a *talaiyari* are sanctioned instead of two officers proposed by the Collector and another being that the standard scale of pay was to be adhered to. The standard scale of pay is fixed by rules made by the Board under section 32 of the Act to be found in Appendix 1 to Standing Order No. 147, paragraph 5. *Vide* the Board's Standing Orders, 1907 Edition, Volume II, page 343. It was contended by Mr. Govindaraghava Aiyar on behalf of the respondent that these proceedings and orders, Exhibits XII*a*, VII and IX, created a new office, because the office becomes from that date a salaried one. We do not think it necessary to go as far as this and we doubt whether the circumstances of the case make the 2nd Chapter of the Act applicable; we think that there is great force in the appellant's contention that these various orders were unnecessary and *ultra vires*, but we have no doubt that from the date of these proceedings of the Board emoluments became attached to an existing office of headman. It is true that until the 1st of April there was no money cess in existence from which contributions could be paid into the village service fund; and it is probable that there were in existence none of the contributions set out in section 28. But on that date a notification was issued under section 19 by the Government directing the levy of a cess from the 1st of April 1910 and it is clear that from that date there was a fund from which within the meaning of section 29 the village officers should be paid. Section 29 provides that the village officers should be paid from the aforesaid fund the salaries and other allowances *to which they may be entitled* according to such scale and in such manner as may be prescribed by the Board of Revenue by rules made under section 32. It seems to us clear that, if there was a fund created in April 1910 for the payment to village officers of salaries *to which they were entitled* under the rules made by the Board of Revenue, then the emoluments must have been attached to that village office by the Board's proceedings making the office a salaried one; and we can give no weight to the orders of the Tahsildar directing the headman to take over his duties as a salaried officer on the 1st December. It is quite an open question whether the officer entitled to hold the office of headman was not also entitled to draw his pay as from the 1st of April 1910. We do not, however, decide that question. We are clear that the emoluments were attached to the office within the meaning of section 13 of Act III of 1895 from the date of the issue of the Board's proceedings, dated 5th January 1910, and that, therefore, the District Judge was right in holding that in September 1910 the Civil Courts had no jurisdiction to entertain the suit. The second appeal must be dismissed with costs. *The plaint will be returned to be presented to the proper Court.*

SADASIVA AIYAR, J.—I concur in the above judgment and in the additional order that the plaint should be returned to the plaintiff to be presented to the Court having jurisdiction over the suit.

Appeal dismissed; Plaint returned.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2176 OF 1914.

November 23, 1914.

Present:—Mr. Justice Shadi Lal.

THAKAR DAS—OBJECTOR—APPELLANT

versus

THE OFFICIAL LIQUIDATOR, THE PESHAWAR BANK, LTD.—OTHER PARTY—RESPONDENT.

Companies Act (VI of 1882), s. 169—Companies Act (VII of 1913), s. 284—Appeal—Notice not served within three weeks—Second appeal incompetent—Procedure under old Act, applicability of—Pending cases.

Section 284 of Act VII of 1913 expressly provides that for the purposes of the pending proceedings the old Companies Act shall be deemed to remain in full force. [p. 91, col. 1.]

Where the Divisional Judge dismissed an appeal on the ground that notices were not served within three weeks on the respondent as required by section 169 of the Companies Act, 1882:

Held, (1) that a second appeal was not competent;

(2) that having regard to the fact that section 169 of the old Act was applicable to the case the first appeal was rightly rejected. [p. 91, col. 1.]

Second appeal from the order of the Divisional Judge, Multan, dated the 20th

July 1914, affirming that of the Additional District Judge, Multan, dated the 15th June 1914, deciding that the name of the appellant may be borne on the list of contributories to the Bank of Peshawar, Limited, at Multan.

Mr. *Nand Lal*, for the Appellant.

Mr. *Santanam*, for the Respondent.

JUDGMENT.—This appeal and appeals Nos. 2177, 2178 and 2179 of 1914 are closely connected and involve the same point. This judgment will, therefore, dispose of all the four appeals.

The learned Divisional Judge has held that the appeals to his Court were barred by the provisions of section 169 of the Indian Companies Act, 1882, because the notices of appeals were not served on the respondent within three weeks from the date of the order of the District Judge, and he has, therefore, dismissed the appeals. It is quite clear that there is no second appeal from the order of the Appellate Court and the matter is placed beyond dispute by a Division Bench judgment reported as *Basheshar Nath* v. *Kanhaya Lal* (1). *Kamaraju* v. *Secretary of State* (2), cited by Counsel for the appellant, deals with a decree and has absolutely no bearing on the point before me. I must, therefore, hold that a second appeal is incompetent.

There is no ground for interference in revision. The proceedings in liquidation began before Act VII of 1913 came into force and section 284 of that Act expressly provides that for the purposes of the pending proceedings, the old Act shall be deemed to remain in full force. The period prescribed by section 169 of the Act of 1882 is, therefore, applicable and as the notices of the appeals preferred to the Divisional Court were not served within that period, the appeals could not be heard. The lower Appellate Court has refused to extend the period and I cannot, in revision, interfere with the discretion which, according to law, vested in that Court.

I, therefore, dismiss the appeal with costs, Counsel's fee Rs. 16.

Appeal dismissed.

(1) 22 Ind. Cas. 250; 34 P. R. 1913; 45 P.L.R. 1914.
(2) 11 M. 309.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1325 AND 1442 OF 1912.

January 12, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

SENNAVA REDDIAR—PLAINTIFF—APPELLANT IN BOTH

versus

IN S.A. NO. 1325 OF 1912

VENKATACHALA REDDIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN S. A. NO. 1442 OF 1912

OVU REDDIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (3)—Suit by reversioner for declaration that certain alienation was not binding, withdrawal of, without permission—Fresh suit for possession, whether maintainable.

A suit for possession by a reversioner on the ground that the alienation made by the widow is not binding on him is barred by Order XXIII, rule 1 (3) of the Civil Procedure Code, 1908, if a previous suit by him for a declaration that the said alienation was not binding was withdrawn without permission to bring another suit. [p. 92, cols. 1 & 2.]

Second appeals respectively against the decrees of the District Court of Tinnevelly, in Appeal Suits Nos. 276 and 280 of 1911 respectively, preferred against the decrees of the Court of the District Munsif of Tuticorin, in Original Suits Nos. 286 and 282 of 1910.

FACTS.—The plaintiff, claiming to be the reversioner to the estate of one Sennava Reddiar, instituted two suits in the District Munsif's Court of Satur for declarations that certain alienations made by Ovammal, the widow of the said Sennava Reddiar, were not binding on him as reversioner. During the pendency of these suits, the widow died. The plaintiff thereupon withdrew both the suits without obtaining the permission of the Court to file fresh suits in respect of the same subject-matter. He then instituted the present suits for possession of the lands basing his suits on precisely the same grounds as before. Both the lower Courts held that the suits were barred by the provisions of Order XXIII, rule 1 (3), Civil Procedure Code. The plaintiff thereupon preferred these second appeals to the High Court.

Dr. *Swaminathan* and Messrs. *V.S. Govindachariar* and *Kallapiran Iyengar*, for the Appellant:—The causes of action for the

present suits are different from the one for the previous suits. The appellant could not have sued for possession on the date of the institution of the previous suits as the widow was then alive.

Messrs. *T. Rangachariar* and *A. Sriranga-chariar*, for the Respondents:—The point is concluded by authority. Vide *Achuta Menon* v. *Achutan Nayar* (1) and *Machana Vajhala* v. *Gorugantulu* (2).

Dr. *Swaminathan*, in reply:—The cases quoted by the other side are inapplicable as they are decisions under the old Code. Section 373 of the old Code has been changed by the substitution of the words 'subject-matter' for 'matter.'

JUDGMENT.

AYLING, J.—The facts of the case are set forth in paragraph No. 12 of the District Munsif's judgment as follows:—"The plaintiff, who has filed these two suits now for recovery of possession of the plaint properties, filed two suits in the Satur District Munsif's Court. Exhibits B and A are his plaints in previous suits Nos. 97 and 96 of 1909 on the file of the Satur District Munsif's Court. The previous suits were filed by the present plaintiff in his capacity as reversioner to the estate of one Sennava Reddiar, the husband of Ovammal, and for declaration that the alienations made by the widow, Ovammal, were not valid and binding on him as reversioner. Pending the disposal of the suits, Ovammal died. The plaintiff simply withdrew the two suits on her death, without obtaining permission to bring fresh suits. There is no allegation in the present plaints that any permission was obtained and, in fact, in the course of the arguments, the plaintiff's Pleader admitted that no permission had been obtained. Exhibits I in both the suits, which are orders in those two suits, also show that no permission was applied for or granted. It is, therefore, clear that these two suits have been instituted without any permission. The present suits are for recovery of possession of the same properties covered by the same alienations on the same ground, that the alienations are not binding on the reversioner, the plaintiff. Excepting the fact that the present suits are for recovery of possession, while the former suits were only for a declaration that the alienations were not binding on the estate, there is no other difference between the allegations in the two suits. The question is whether the present suits are barred under Order XXIII, rule 1, sub-clause (3), old section 373, Civil Procedure Code."

As far as this Court is concerned, the question is concluded by authority. Vide *Achuta Menon* v. *Achutan Nayar* (1) and *Machana Vajhala* v. *Gorugantulu* (2). The facts of the latter case are precisely similar to those of the present case: and the learned Judges accepted without discussion the principles laid down in *Achuta Menon* v. *Achutan Nayar* (1) and held that the second suit would not lie.

The judgment in *Achuta Menon* v. *Achutan Nayar* (1) contains a full discussion of the true meaning of section 373 of the old Code of Civil Procedure and the facts, as it seems to me, were somewhat more favourable to the plaintiff than in the case before us. The substitution of the words "subject-matter" for the word "matter" in Order XXIII, rule 1 (3), of the new Code of Civil Procedure certainly does not improve the case from the appellant's point of view.

I would dismiss the second appeals with costs.

TYABJI, J.—In the face of the decisions cited by my learned brother, I agree that there is no room for any further discussion of the law.

Appeals dismissed.

(1) 21 M. 35.

(2) 8 Ind. Cas. 1066; (1910) M. W. N. 782; 9 M. L. T. 468.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 32 OF 1914.

October 2, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

HUSSEINALI SILLEMANJI—APPLICANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII

SUNDARESA GURUKKAL v. SAMBASIVA AIYAR.

r. 1—*Security bond for appearance of defendant, object of—Enforcement of bond.*

The object of a security bond executed under Order XXXVIII, rule 1, of the Civil Procedure Code, is merely to secure the rights of the judgment-creditor and Government are not interested in the proceedings in any way. It should be enforced only on the application of the judgment-creditor, and then only to the extent of the sum of money found payable under the decree.

Civil revision application against an order of the Joint Sub-Judge, Shikarpur.

Mr. *Isardas Oodharam*, for the Applicant.

Mr. *E. Raymond*, Government Pleader, for the Opponent.

JUDGMENT.—These proceedings have arisen out of a suit filed by one Imambux for restitution of conjugal rights against his wife and two others.

Being apprehensive that the defendants were about to leave the jurisdiction of the Court, he obtained an order for security of their appearance under Order XXXVIII, rule 1, Civil Procedure Code. The applicant was the surety. The date fixed for hearing was the 16th January 1911. On defendants failing to appear on that day application was made for a warrant for their arrest. This application was, however, withdrawn when the defendants appeared in person on the 26th of January. Nevertheless the Sub-Judge, Shikarpur, issued *suo motu* notice to the surety to show cause why his bond should not be forfeited. On the 19th of April he made an order forfeiting the surety's bonds and directing payment of the whole amount of the maximum sums therein stipulated to Government. The order directing the payment to Government is clearly wrong, for the object of such bonds is merely to secure the rights of the judgment-creditor and Government are not interested in the proceedings in any way: See in this connection the case of *Basanti Lal* v. *Cheddu Singh* (1). The principle of the procedure is that the surety should stand in place of the judgment-debtor, so that any amount found payable in the decree can be recovered from him if the judgment-debtor should abscond. With this object the form of the bond as well as Order XXXVIII, rule 2 (2), limits the liability of the surety to such sums of money as the defendant may be ordered to pay in the suit. The bond in the present case made the surety liable to pay any sum of money to the extent of Rs. 500 which may be adjudged to the defendant in the said suit. There was, therefore, no justification whatever for the Sub-Judge ordering the applicant to pay the full sum of Rs. 500 in the case of each surety bond. The enforcement of the bond should only have been made on the application of the judgment-creditor and then only to the extent of the sum of money found payable under the decree. The order of the Sub-Judge in the present case is singularly inconsiderate, for the default was merely a technical default which led to no consequences that prejudiced the plaintiff, Imambux. The Government Pleader very rightly makes no attempt to support the order.

We accordingly set aside the order of the Sub-Judge and direct that the sum of Rupees fifteen hundred (if paid) should be restored to the applicant. This is without any prejudice to any rights that Imambux may have to enforce his decree against the surety.

Application allowed.

(1) 16 Ind. Cas. 118; 16 C.W. N. 664; 39 C. 1048.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 89 OF 1914.

January 7, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

SUNDARESA GURUKKAL—PLAINTIFF—PETITIONER

versus

SAMBASIVA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Promissory note—Signature as agent—Inference—Agent, if personally liable.

Where an executant of a promissory note describes himself as an agent both in its body and in its signature portion, it is a clear indication that he did not intend to make himself personally liable and he cannot, therefore, be made personally liable on such a note. [p. 94, col. 2.]

Koneti Naicker v. *Jatu Gopala Aiyar*, 21 Ind. Cas. 417; 14 M. L. T. 414; 25 M. L. J. 425 and *Chapman* v. *Smethurst*, (1909) 1 K. B. 927; 78 L. J. K. B. 654; 100 L. T. 465; 16 Manson 171; 14 Com. Cas. 94; 53 S. J. 340; 25 T. L. R. 383, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the

decree of the Court of the Subordinate Judge of Mayavaram, in Small Cause Suit No. 1572 of 1913.

FACTS.—The suit was upon a promissory note executed by defendants Nos. 3 and 4, the Manager and Agent respectively of an Abhisheka Kattalai, for moneys borrowed for the purposes of the Kattalai. The 1st defendant, the trustee of the Kattalai, and the 2nd defendant, a Receiver of the temple properties appointed by the Court, were also sought to be made liable thereon. The Subordinate Judge of Negapatam dismissed the suit as against the 2nd defendant on the ground that prior to its institution the sanction of the Court had not been obtained and as against defendants Nos. 3 and 4 on the ground that they incurred the debt only on behalf of the 1st defendant as his agents and were not, therefore, personally liable, and decreed the suit as against the 1st defendant. The plaintiff, thereupon, preferred this civil revision petition against so much of the order of the Subordinate Judge as dismissed the suit against defendants Nos. 2 to 4.

Mr. *G. S. Ramachandra Iyer*, for the Petitioner :—The makers of the note are primarily liable even though the trustee is also liable: *Kanemar Venkappayya* v. *Krishna Charya* (1). This primary liability is not taken away by the fact that some other person is jointly liable with them.

Messrs. *T. V. Gopalaswami Mudaliar* and *S. Muthia Mudaliar*, for the Resondents :—The defendants Nos. 3 and 4 acted only as agents of the 1st defendant and this is apparent from their description as appearing in the body of the note as also below their signatures. They are not personally liable: *Koneti Naicker* v. *Jatu Gopala Aiyar* (2), *Chapman* v. *Smethurst* (3).

JUDGMENT.—The plaintiff is the petitioner in revision. He brought a suit against four defendants on a pro-note executed by two of them, namely, the defendants Nos. 3 and 4, who executed it as manager and agent respectively of a Kattalai under the 1st defendant. Plaintiff got a decree against the 1st defendant alone, who is the trustee of the temple Kattalai. His suit was dismissed as against the defendants Nos. 3 and 4 on the ground that they incurred the debt only as the agents of the 1st defendant. The suit was dismissed as against the 2nd defendant on the ground that he was a Receiver appointed by the Negapatam Sub-Court for the properties of the temple and the sanction of that Court had not been obtained for the institution of this suit against him. The plaintiff has filed this revision petition for the purpose of making the defendants Nos. 2 to 4 (respondents Nos. 1 to 3) also liable for his claim.

As regards the 2nd defendant (1st respondent) nothing was urged before me against the view taken by the Subordinate Judge and I dismiss the revision petition at once as against the 2nd defendant.

Coming to the defendants Nos. 3 and 4 (Respondents Nos. 2 and 3), (1) the promissory note, in the very body, describes the defendants Nos. 3 and 4 as Abhisheka Kattalai manager and agent holding power of attorney for Abhisheka Kattalai ; (2) the money is stated in the note to be borrowed for the said Kattalai expenses ; and (3) the pro-note is also signed with the description of the defendants Nos. 3 and 4 as manager and agent holding power of attorney.

Having regard to the observations of Sir Arnold White, C. J., in *Koneti Naicker* v. *Jatu Gopala Aiyar* (2), concurred in by Oldfield, J., and to the observations of the Court of Appeal in *Chapman* v. *Smethurst* (3), I hold that where in the signature portion also, the executant signs as an agent and it appears from the perusal of the pro-note and from the fact of the signature being placed at the foot of the note as agent that the agent did not intend to make himself personally liable, he cannot be made personally liable under the pro-note. The cases quoted by the petitioner's learned Vakil [including the above case in *Koneti Naicker* v. *Jatu Gopala Aiyar* (2) in which the agent was held personally liable] were cases in which the agent *had not signed as agent* though he was described in the

(1) 17 M. L. J. 613 at p. 615; 2 M. L. T. 529; 31 M. 161.

(2) 21 Ind. Cas. 417; 25 M. L. J. 425 at pp. 430, 431; 14 M. L. T. 414.

(3) (1909) 1 K. B. 927; 78 L. J. K. B. 654; 100 L. T. 465; 16 Manson 171; 14 Com. Cas. 94; 53 S. J. 340; 25 T. L. R. 383.

body of the note as agent. I, therefore, dismiss the revision petition against the defendants Nos. 3 and 4 also, though without costs, as the question of law is (or, at least was till recently) a much mooted question. The petitioner will, however, pay the 2nd defendant's costs.

Petition dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL NO. 2555 OF 1914.

December 7, 1914.

Present:—Mr. Justice Shadi Lal.

KANSHI RAM—APPELLANT

versus

THE PESHAWAR BANK, LTD., IN LIQUIDATION—RESPONDENT.

Res judicata—*Company in liquidation—Contributories, settling list of—Question, whether can be re-opened.*

An order of a Court bringing the name of a person on the list of contributories if not appealed against, becomes final and operates as *res judicata* and the question as to the liability of such person as contributory cannot be re-opened.

Miscellaneous first appeal from an order of the Additional Judge, Multan, dated the 3rd October 1914, calling for Rs. 450 on account of shares.

Lala *Sangam Lal*, for the Appellant.

Mr. *Santanam*, for the Respondent.

JUDGMENT.—Civil Appeals Nos. 2555—2558 are connected and will all be disposed of by this judgment. The appellants are Buta Ram, Hardawari, Karam Chand and Kanshi Ram, who have been settled on the list of the contributories of the Peshawar Bank now in liquidation. The Liquidator issued notices to the share-holders informing them of the date fixed for settling the list of the contributories and the first three appellants filed objections, which were rejected by the District Judge on the 15th June 1914. Kanshi Ram did not file any objections. After disposing of all the objections the Court settled the list on the 7th August 1914 and the names of all the appellants were, as stated above, entered on it.

It will be observed that none of the appellants preferred appeals from the orders passed on the 15th June 1914 and 7th August, 1914, and those orders have now become final and cannot be challenged.

It seems that the contributories were required by the Court to pay calls on their shares by the 30th September 1914, and the four appellants made applications objecting to the calls on the ground that they had ceased to be share-holders before the company went into liquidation. These applications were rejected on the 3rd October. The appeals are against the order of the 3rd October and the objection to their entertainment is that the question as to the liability of the appellants as contributories, having been decided on the 15th June and 7th August 1914, is now *res judicata* and cannot be re-agitated in these appeals. In my opinion, this objection is a valid one and must prevail.

I must, accordingly, hold that the learned Judge of the Court below was right in refusing the applications of the appellants and that these appeals must be dismissed. The appellants must pay the costs of the Liquidator in this Court.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 3 OF 1912.

August 31, 1914.

Present:—Mr. Fawcett, J. C. and Mr. Crump, A. J. C.

GAGANDAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

YUSIF *walad* MONG AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bombay Land Revenue Code (Act III of 1901), s. 56, retrospective effect of—Presumption—Vested right.

The ordinary presumption against retrospectivity of a Statute operates chiefly when a law prejudicially affects vested rights. [p. 96, col. 2.]

Section 56 of the Bombay Land Revenue Code has retrospective effect. [p. 96, col. 2.]

Appeal against the decree of the Additional Judicial Commissioner, Sind.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Mr. *Rupchand Bilaram*, for the Respondents.

GAGANDAS v. YUSIF.

JUDGMENT.—In this case the facts held proved by the lower Court, which are binding on us in second appeal, are:

(1) Defendant Yusif transferred the lands in suit for Rs. 30 to plaintiff Tikiomal in 1884;

(2) the lands were forfeited to Government under the fallow rules some time previous to 1900 (in 1899 according to statements of the Pleaders in this Court);

(3) in 1900 the Assistant Collector, Tatta, authorised the *Mukhtiarkar* to hand them back to defendant on payment of arrears of assessments; but defendant failed to make the necessary payments or take up the lands;

(4) in 1902 the Collector ordered that the lands should be offered to defendant on restricted tenure, but free of past arreas of assessments, but defendant again failed to avail himself of this order;

and (5) it was only in 1907 that on a fresh sanction of the Assistant Collector, the defendant actually took up the lands.

It is clear from these facts that there was no actual disposal of the occupancy of these lands by the Collector, within the meaning of section 56 of the Bombay Land Revenue Code, until 1907. There was an offer by the Collector to dispose of it in 1900 to defendant on certain conditions, with which he failed to comply, and accordingly there was no disposal prior to 5th October 1901, when the amendment of section 56 by Bombay Act III of 1901 came into force.

The appellant's Pleader contends, however, that section 56 as amended cannot apply to any case, unless the forfeiture on which the Collector has acted is one in which he has complied with the provisions as to notice, etc., contained in the proviso to section 153 of the Code, which was added by the same Act of 1901. This is an argument which has been dealt with in the lower Court's judgment and we have no hesitation in thinking that it was rightly overruled. As pointed out by the learned Judge, the plaintiff immediately before the 5th October 1901 had no right, title or interest in the lands whatever, but only the beneficial interest in his vendor's chance of having the lands re-granted to him as the defaulting *khatedar*. Plaintiff had, therefore, no vested right which is interfered with by the amendment of section 56, and he cannot claim the benefit of the ordinary presumption against retrospectivity which, as pointed out in Maxwell's Interpretation of Statutes, 2nd Edition, page 257, and 3rd Edition, page 299, and in *Jogodanund Singh* v. *Amrita Lal Sircar*(1), operates chiefly when a law prejudicially affects vested rights. These lands had already been forfeited when Bombay Act III of 1901 came into force, and the new proviso to section 153 would of course operate only in the case of future forfeitures. There is not the slightest ground for supposing that the Legislature intended the amendment of section 56 to operate only in cases where the forfeiture was after compliance with the new procedure enacted in the proviso to section 153. If there had been any such intention, apt words would doubtless have been used to give effect to it; and as the section stands, it must clearly be construed as empowering the Collector to transfer a forfeited occupancy freed from all equities, etc., in any case where it has been validly forfeited for arrears of land-revenue due on it.

The other points arising have all been sufficiently dealt with in the judgment of the Court below, and we see no reason to differ from its view that in any case the defendant is not liable as a trustee of the lands of the plaintiff under section 90 of the Trusts Act.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 22 C. 767 at p. 777.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 605 OF 1913.

January 7, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

In re AVASARALA VENKATA HANUMANTHA RAO AND ANOTHER—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 476—"Court," meaning of—Officer appointed to record tenants' right, whether Court—Statements, whether evidence—Perjury, offence of, whether committed in making false statements before such officer—Madras Estates Land Act (I of 1908), ss. 164, 166.

An officer charged with the duty of recording tenants' rights under Chapter XI of the Madras Estates Land Act is not a "Court" within the meaning of section 476 of the Code of Criminal Procedure. [p. 98, col. 1; p. 99 col. 2].

Therefore statements made before him are not "evidence" and no prosecution for perjury will lie on such statements. [p. 98, col. 2.]

Muhammad Subhan-ulla v. *Secretary of State for India*, 26 A. 382: A. W. N. (1904) 54; *Nasarulla Mia* v. *Amiruddi*, 3 C. L. J. 133; *Kurban Ali* v. *Jafar Ali*, 28 C. 471; 5 C. W. N. 798, *Durga Das Rukhit* v. *Queen-Empress*, 27 C. 820; *Vijiaraghavalu Pillai* v. *Emperor*, 25 Ind. Cas. 345; 16 M. L. T. 128; 15 Cr. L. J. 593; 27 M. L. J. 227; *Nataraja Aiyer, In re*, 16 Ind. Cas. 755; 23 M. L.J. 393; (1912) M. W. N. 1012; 13 Cr. L. J. 723; 36 M. 72; 13 M. L. T. 367, followed.

Queen-Empress v. *Munda Shetti*, 24 M. 121; 2 weir 170, *Raghoobuns Sahoy* v. *Kokil Singh* alias *Gopal Singh*, 17 C. 872, distinguished from.

Atchayya v *Gangayya*, 15 M. 138; 2 M. L. J. 64, dissented from.

Per *Seshagiri Aiyar, J.*—Persons exercising *quasi*-judicial functions should not be regarded as Courts, and the mere fact that an inquiry is necessary will not constitute the inquiring officer a Court. The test to be applied for ascertaining whether an officer is a Court or not is to see whether there is a power to record evidence and to come to a judicial determination on the evidence so recorded. [p. 99, col. 2.]

Petition, under section 15 of the Charter Act, praying the High Court to revise the order of the Court of the Revenue Officer, Record of Rights, Pittapuram Estate, dated the 24th June 1913, in prosecution proceedings in Original Petition No. 1149 of 1912.

FACTS.—One Mr. Venkatanarayana Naidu was appointed by the Government to survey and to prepare a Record of Rights in the *zemindari* of Pittapur. The notification, dated 3rd May 1910, published in the Fort St. George Gazette Supplement for June 1910, merely appointed him to be a Revenue Officer for the purpose of making a survey of the estate and for preparing a Record of Rights in respect of the same and while declaring what the record so prepared was to show, did not invest the officer so appointed with power to record evidence or with the powers of a Survey Officer under the Madras Survey and Boundaries Act, IV of 1897, nor did it authorise him to settle the rate of rent. Acting under the said notification, the said officer entered the name of one P as an occupancy tenant. The first petitioner (the proprietor) objected to the said entry, as otherwise the matter would become final under section 166 of the Madras Estates Land Act. In the course of an inquiry regarding this objection certain statements were made by the petitioners. The Survey Officer thought that these statements were false and took proceedings under section 476 of the Criminal Procedure Code against the petitioners. The latter thereupon preferred this civil revision petition under section 15 of the Charter Act.

Mr. *P. Narayanamurti*, for the Petitioners:—The Survey Officer is not a Court. He was not authorised to take evidence and adjudicate thereon. *Vide* notification in the Fort St. George Gazette. He is an executive or administrative officer and so cannot take action under section 476, Criminal Procedure Code. See *Muhammad Subhan-ullah* v. *Secretary of State for India in Council* (1), *Nasarulla Mia* v. *Amiruddi* (2), *Kurban Ali* v. *Jafar Ali* (3), *Durga Das Rakhit* v. *Queen-Empress* (4), *Vijairaghavalu Pillai* v. *Emperor* (5), *Nataraja Iyer, In re* (6). The proceedings are, therefore, illegal.

The Government Pleader, for the Crown:—Though there is no express authority to take evidence, as the officer was performing the duties of a Survey Officer, he is authorised by section 164 of the Madras Estates Land Act to exercise all the powers contained in the Madras Survey and Boundaries Act, IV of 1897, and must, therefore, be deemed to have acted as a "Court." Vide *Raghoo-*

(1) 26 A. 382; A. W. N. (1904) 54.
(2) 3 C. L. J. 133.
(3) 28 C. 471; 5 C. W. N. 798.
(4) 27 C. 820.
(5) 25 Ind. Cas. 345; 27 M. L. J. 227; 16 M. L. T. 128; 15 Cr. L. J. 593
(6) 16 Ind. Cas. 755; 36 M. 72; 23 M. L. J. 393; (1912) M. W. N. 1012; 13 Cr. L. J. 723; 13 M. L. T. 367.

In re AVASARALA VENKATA HANUMANTHA RAO.

buns Sahoy v. *Kokil Singh* alias *Gopal Singh* (7), *Atchayya* v. *Gangayya* (8), *Queen-Empress* v. *Munda Shetti* (9).

Mr. *P. Narayanamurti*, briefly replied.

ORDER.

SPENCER, J.—I am of opinion that a Revenue Officer preparing a Record of Rights under sections 164 to 167 of the Madras Estates Land Act is only discharging an executive function of Government and is not a Court within the meaning of section 476 of the Code of Criminal Procedure.

In *Muhammad Subhan-ullah* v. *Secretary of State for India in Council* (1), it was held that a Settlement Officer preparing a Record of Rights was not a Court, but was simply an executive officer acting in his executive capacity.

In *Nasarulla Mia* v. *Amiruddi* (2) and in *Kurban Ali* v. *Jafar Ali* (3), the powers of a Revenue Officer disposing of an objection under section 103A of the Bengal Tenancy Act, which corresponds closely in wording to section 166 of the Madras Estates Land Act, were considered, and it was held that the legal effect of proceedings taken under this section was that the Revenue Officer's order was not a judicial order, was not open to appeal and would not operate as *res judicata*.

Section 106 of the Bengal Tenancy Act provides for the institution of suits before Revenue Officers preparing Records of Rights and for suits instituted before them being transferred by them to a competent Civil Court for trial. Section 107 further provides that they shall adopt the procedure of the Code of Civil Procedure in trying such suits and that their decisions shall have the force and effect of a decree of a Civil Court.

In contradistinction to this it may be observed that the Madras Act provides in section 173 for institution of suits in the Civil Court having local jurisdiction, whenever the correctness of the Record of Rights is impugned in certain particulars.

In fact a Revenue Officer proceeding under Chapter XI of the Madras Estates Land Act is not anywhere referred to in that Act as a Court in the manner that Collectors and other Revenue Officers who hear suits and applications specified in the Schedule, are described in section 189 and elsewhere as Courts.

Mr. Grant relies on the provision in section 164 (3) that the survey made by Revenue Officers proceeding under this Chapter shall be made under the Madras Survey and Boundaries Act, 1897, and on the provision in section 29 of that Act applying the procedure of the Code of Civil Procedure for enforcing the attendance of witnesses and for the recording of evidence, and also on the definition of "Court" in section 3 of the Evidence Act.

He has referred us to several decisions such as *Raghoobuns Sahoy* v. *Kokil Singh* alias *Gopal Singh* (7), *Atchayya* v. *Gangayya* (8) and *Queen-Empress* v. *Munda Shetti* (9), in which officers athourized to receive evidence and decide matters on evidence have been treated as Courts.

But the notification, dated 3rd May 1910, in the Fort St. George Gazette Supplement for June, under which the Revenue Officer, who passed the order under section 476 now under consideration, was appointed, does not invest him with powers to record evidence, nor with the powers of a Survey Officer under Act IV of 1897. It merely appoints him to be a Revenue Officer for the purpose of making a survey of the Pittapuram estate and for preparing a Record of Rights in respect of the said estate and it goes on to declare what particular the Record of Rights shall show.

The said officer's order directing the prosecution of the petitioners for giving false evidence was, therefore, in my opinion *ultra vires* and must be set aside.

SESHAGIRI AIYAR, J.—I entirely agree.

By a Notification dated the 3rd May 1910, Mr. Venkatanarayana Naidu was appointed to survey and to prepare a Record of Rights in the *zemindari* of Pittapur. It is conceded that this notification does not empower the officer to administer oath and to record evidence. In pursuance of this notification the officer entered the name of one Venkataswami Gadu as the occupancy tenant of a holding. This was objected to by the 1st petitioner, the proprietor. And the Survey Officer came to the conclusion that the petitioners had made false statements regarding the right of

(7) 17 C. 872.
(8) 15 M. 138; 2 M. L. J. 64.
(9) 24 M. 121; 2 Weir. 170.

In re AVASARALA VENKATA HANUMANTHA RAO.

Venkataswami Gadu. He took action under section 476 of the Code of Criminal Procedure and directed the prosecution of the petitioners. The point for consideration is whether an officer recording rights under the Estates Land Act is exercising the functions of a Civil or Revenue Court so as to enable him to take action under the Code of Criminal Procedure.

I must answer this question in the negative. Under Chapter XI of the Estates Land Act, the local Government may empower a person to conduct three classes of operations: (*a*) to survey the fields; (*b*) to enter the names of the tenants in respect of the fields surveyed as occupancy *ryots*; and (*c*) to settle the rate of rent. In this case, the officer had no authority to settle the rate of rent. The false statement is alleged to have been made in the enquiry regarding the Record of Rights. Under section 166 of the Act, if the Record of Rights is not objected to, "it shall be conclusive evidence that the record has been duly made." No right to contest the record is given either by bringing a suit in that behalf or by preferring an appeal. The right of suit given by section 173 does not affect the present question. Section 167 lays down in clause (3) that the entry shall be evidence of the tenants' rights. Neither section 166 nor section 167 gives power to the officer to take evidence. *Prima facie*, therefore, the entry as tenant is a purely administrative one and the officer cannot be said to be exercising the functions of a Civil or Revenue Court. The decisions in *Muhammad Subhan-ullah* v. *Secretary of State for India in Council* (1) and in *Nasarulla Mia* v. *Amiruddi* (2), which relate to the construction of similar provisions in the Tenancy Acts of the United Provinces and Bengal, lay down that the officer entrusted with such duties is not acting judicially, but only in his executive capacity. The learned Public Prosecutor draws attention to the fact that the officer was also performing the duties of a Survey Officer, and as under clause (3) of section 164, he is authorised as such to exercise all the powers contained in the Madras Survey and Boundaries Act, he must be deemed to have acted as a Court. In the first place, section 29 of the Boundaries Act, which is relied upon, lays down that the power to take evidence must be either specially or generally conferred. There is no such authorisation in this case. In the second place, whatever may be the officer's duties in regard to survey, in recording rights he is not given power to administer oath to witnesses.

The fact that in section 195 of the Code of Criminal Procedure the Legislature exempts the offices of the Registrar and of the Sub-Registrar from the designation of Courts strengthens my view that persons exercising *quasi*-judicial functions are not generally to be regarded as Courts. The decision in *Queen-Empress* v. *Munda Shetti* (9) proceeds on the language of Act III of 1869, which specially empowers the Tahsildar to take evidence during the course of the enquiry and to give his decision upon such evidence. The decision in *Atchayya* v. *Gangayya* (8) is no longer law and I do not think that the *obiter dicta* of some Judges in that case can be relied upon. On the other hand it has been laid down that the mere fact that an inquiry has to be made will not constitute the inquiring officer a Court. In *Durga Das Rukhit* v. *Queen-Empress* (4), it was decided that an officer enquiring into the value of property under the Land Acquisition Act was not a Court. The proper test for ascertaining whether an officer is a Court or not has been stated in *Queen-Empress* v. *Munda Shetti* (9). There must be power to record evidence, and to come to a judicial determination on the evidence so recorded. Myself and Mr. Justice Ayling had to consider a similar question in the case of *Vijiaraghavalu Pillai* v. *Emperor* (5). Applying the tests suggested in that case and *Nataraja Iyer, In re* (6), I am of opinion that an officer charged with the duty of recording tenant rights in a *zemindari* under Chapter XI of the Estates Land Act is not a Court within the meaning of section 476 of the Code of Criminal Procedure.

Petition allowed.

In re VENUGOPAL REDDY.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 741 OF 1914.

CRIMINAL REVISION PETITION No. 623 OF 1914.

February 10, 1915.

Present:—Mr. Justice Ayling.

In re VENUGOPAL REDDY AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 526—Appeal, adjournment of—Application for transfer made to High Court at earliest opportunity after receipt of notice of hearing.

An appeal was presented by some accused to a District Magistrate on the 15th of May 1914, who transferred it on the same day to a Joint Magistrate. The Joint Magistrate issued the notice of hearing of the appeal on the 15th of July 1914, which was served on the 17th July 1914, fixing the 21st of July 1914 as the date for hearing. The High Court being closed on the 18th and 19th of July 1914, the accused applied to the High Court on the 20th July 1914 for transfer of the appeal and thereafter on the 21st they applied to the Joint Magistrate to adjourn the hearing. The Joint Magistrate refused to adjourn on the ground that the accused had had sufficient time to apply to the High Court but delayed and thereafter heard the appeal on merits and dismissed it:

Held, that the hearing of the appeal should have been adjourned as the accused had applied for transfer on the first day, they could have applied, after receipt of notice.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint Magistrate of Tirupatur, in Criminal Application No. 23 of 1914, preferred against that of the second Class Magistrate of Gudiyatam, in Calendar Case No. 63 of 1914.

FACTS.—The accused (petitioners in this case) were convicted of assaulting public servants in the discharge of their duties and sentenced to pay a fine on 24th March 1914 by the second Class Magistrate of Gudiyatham. An appeal was preferred to the District Magistrate of North Arcot who transferred the same for disposal to the file of Mr. Sykes, Joint Magistrate. The latter issued notice to the accused on 15th July 1914, which was served on 17th July 1914, that the appeal would be heard on 21st July 1914. On that day the accused appeared by a Pleader and applied under section 562, Criminal Procedure Code, for an adjournment of the appeal as an application had been made the previous day to the High Court for transfer of the case from his file. The Joint Magistrate not only refused to adjourn the hearing of the appeal, but heard it on the merits and dismissed it. Hence this revision petition.

Messrs. *R. N. Aiyangar* and *I. V. Ramanuja Rao*, for the Petitioners.

The Acting Public Prosecutor, for the Government.

ORDER.—The accused (petitioners) in this case preferred an appeal to the District Magistrate against their conviction, which was transferred on the same day (15th May 1914) to the Joint Magistrate, Tirupatur. For some unexplained reason notice to accused of the hearing of their appeal was issued only on 15th July 1914 and is said to have been served only on 17th July 1914. On the date of hearing (21st July 1914) a petition was presented under section 526 (8) of the Criminal Procedure Code asking for an adjournment, on the ground that an application for transfer had been presented on the previous day to this Court. This petition was rejected and the appeal was heard and dismissed the same day. The Joint Magistrate accepted the fact that the transfer petition had been presented in this Court, but declined to adjourn the case on the ground that it was not shown why petitioners had not obtained an order from the High Court during the 70 days which had elapsed since 15th May 1914, or that they had not had a reasonable time to do so. The Joint Magistrate entirely overlooks the delay on his own part in issuing notice of hearing and the fact that 18th July 1914 was a Saturday on which this Court does not sit. Twentieth July 1914 was in fact the first day after receipt of notice of hearing on which the application could have been presented. In the circumstances of the case his refusal of an adjournment appears to me most unreasonable; and following the spirit of the ruling in *Queen-Empress* v. *Virasamy* (1), his proceedings cannot be sustained.

I set aside the Sub-Divisional Magistrate's order, and direct the present Sub-Divisional Magistrate to restore the appeal to his file and dispose of it according to law.

Petition allowed; Case remanded.

(1) 19 M. 375; 2 W. Weir 680; 6 M. L. J. 195.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 165 OF 1914.

September 21, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

TAHILRAM LILARAM—COMPLAINANT—APPLICANT

versus

PITAMBERDAS VALABDAS—ACCUSED—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 257—Right of accused to call for prosecution evidence, whether can be exercised before framing of charge—Warrant case.

Where in a case of a criminal breach of trust the Magistrate allowed the application of the accused for inspection of documents in the complainant's possession after the examination-in-chief of the witnesses for the prosecution had concluded but before the charge had been framed:

Held, that the Magistrate should not have entertained the application at that stage of the case but should have informed the accused that he was at liberty to renew it if the charge was framed against him. [p. 101, col. 2.]

Per *Pratt, J. C.*—The accused's right to call evidence, either witnesses or documents, does not arise until after the charge has been framed and read to him. The right is given by section 257 of the Criminal Procedure Code and is subject to the limitations enjoined by that section. [p. 101, col. 2.]

Per *Fawcett, A. J. C.*—The Magistrate should satisfy himself that the documents called for have some bearing on the issues in the case and are relevant before granting a summons for their production. [p. 101, col. 2.]

Application for revision from an order of the City Magistrate, Karachi.

Mr. *F. J. de Verteuil*, for the Applicant.

JUDGMENT.

PRATT, J. C.—This is an application for revision of an order made by the City Magistrate, Karachi, requiring the complainant in the case before him to produce 15 documents from the record of his Bank. The case is one in which the complainant, who is General Manager of the Sind Bank, is prosecuting the accused who is the local Manager of the Bank, for the offence of criminal breach of trust. The examination-in-chief of the witnesses for the prosecution has concluded and the Magistrate has made this order before framing the charge against the accused. We think the Magistrate was clearly wrong in making such an order at this stage of the case. The case is a warrant case and the Magistrate must observe the procedure laid down in Chapter XXI of the Code of Criminal Procedure. Under section 252 the Magistrate shall first hear the complainant and take all such evidence as may be produced in support of the prosecution. The accused's right to call evidence, either witnesses or documents, does not arise until after the charge has been framed and read to him under sections 254 and 255, Criminal Procedure Code. This right is given by section 257 and is subject to the limitations enjoined by that section *i. e.* the application should be refused if the Magistrate considers that it is made for the purpose of vexation or delay or for defeating the ends of justice. The Magistrate should not have entertained the application at this stage of the case, but should have informed the accused that he was at liberty to renew it if charge was framed against him. In that event the Magistrate should deal with it under section 257 and subject to the limitations enjoined by that section.

The accused's cross-examination will not be prejudiced by the Magistrate taking this course, for the accused has a right to recall witnesses for cross-examination after the framing of the charge. On the contrary we consider that it is for the benefit of the accused to know what the case of the prosecution is and to have that case clearly set before him and not clouded by documents which form no part of the case for the prosecution.

I would reverse the order of the Magistrate and direct him to proceed with the case in accordance with the above directions.

FAWCETT, A. J. C.—I concur and would only add that the attention of the Magistrate should be drawn to the ruling reported in *In re Lakhmidas Narainji* (1) and the provisions of section 5, Indian Evidence Act, in accordance with which the Magistrate should satisfy himself that the documents called for have some bearing on the issues in the case and are relevant before granting a summons for their production.

Revision allowed

(5) 5 Bom. L. R. 980.

MANIKA ASARI *v.* EMPEROR.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 660 OF 1914.
March 1, 1915.
Present:—Mr. Justice Ayling.
MANIKA ASARI AND ANOTHER—
PRISONERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 464—"Dishonestly and fraudulently," meaning of—Forgery—Alteration in document—Intention.

An intent to defraud means something more than mere deceit. The object for which the deceit is practised must be considered. The advantage intended to be secured must be something to which the party perpetrating the deceit is not entitled either legally or equitably. [p. 103, col. 1.]

Where, therefore, the accused made an alteration in a document intending thereby to secure a certain plot of land to which he *bona fide* believed himself to be entitled and of which he was in possession at the time:

Held, that his act did not constitute the offence of forgery as no wrongful result was intended or could have arisen. [p. 103, col. 1.]

Appeal against the sentence of the Court of Session of the Tanjore Division, in Case No. 49 of its Calendar for 1914.

FACTS.—Manika Asari and Venbu Aiyar were sentenced to four years' rigorous imprisonment on a charge of forgery by the Sessions Judge of Tanjore.

The prosecution story was that Venbu Aiyar on the 11th December 1913 fraudulently and dishonestly altered an agreement executed in favour of Manika Asari by two others without the lawful authority of the executants, with intent to cause injury to them and to support the claim of Manikka Asari, the first accused. Manika Asari abetted the offence. There were disputes between the two executants and the first accused in regard to the extension of certain walls and certain persons mediated in the dispute and others dictated the agreement, counterparts of which were taken by both the parties. Subsequently when the document was presented for registration certain additions to the agreement towards the end were discovered by the Sub-Registar. It was in respect of these additions that the present charge of forgery was laid. The accused pleaded that the additions were made with the knowledge and consent of the executants and simply contained the decision of the mediators and that the prosecution witnesses were interested.

The Sessions Judge held that the additions were fraudulent and were intended to cheat the complainants, and that they were not made with the consent and knowledge of the parties.

Mr. *J. C. Adam*, for the Appellants, argued that inasmuch as the prosecution had not produced the draft of the original agreement which was in its possession, the case must be regarded with suspicion. He urged that the Judge, having disbelieved the complaints in material particulars, should have also disbelieved their case in other respects as well. There was no dishonest intention in the act done, as the accused honestly believed that the land was his and as the alteration was made with a view to support his title to it.

The *Public Prosecutor*, for the Respondent, argued *contra*.

JUDGMENT.—I see no reason to differ from the view taken by the Sessions Judge of the main facts of the case: that the phrase regarding the bend was inserted in Exhibit B by the 2nd accused with the abetment of the 1st accused without the authority of the executants (P. W. Nos. 2 and 3) after its execution: that it was inserted in order to rebut a claim set up by P. W. Nos. 2 and 3 to a narrow strip of house site referred to in the judgment as the "bend": and that this claim was set up by P. W. Nos. 2 and 3 after the execution of Exhibit B and was not adjudicated on by the mediators. The question is whether these facts disclose the offence of forgery. For this purpose, the case must be brought under clause (2) of section 464 of the Indian Penal Code, and it must be shown that the alteration was made "dishonestly and fraudulently."

The purpose for which the alteration was made has already been indicated. P. W. Nos. 2 and 3 had set up a claim to this "bend": and the accused wished to rebut this claim by showing (what was not true) that the mediators had considered the point and decided it in their favour.

Now the evidence clearly shows that the "bend" was in the possession of the 1st accused at the time of the dispute: and this seems to be the view of the Sessions Judge (*vide* paragraph 5 of his judgment). There is nothing to suggest

that the 1st accused did not *bona fide* believe himself to be entitled to it ; and indeed, there is very good reason for supposing that he did. His object, therefore, certainly cannot be treated as "dishonest" within the definition of the Indian Penal Code, and I do not think it can be held to be fraudulent. The meaning of the word "fraudulently" has been carefully considered in at least two cases to which I may refer, *Emperor* v. *Ali Hasan* (1) and *Kotamraju Venkatrayudu* v. *Emperor* (2), (the latter being a Full Bench case of this Court). In each case a conviction for forgery was confirmed, but it was clearly laid down that an intent to defraud implies something more than mere deceit. The object for which the deceit is practised has to be considered. The advantage intended to be secured or the harm intended to be caused need not have relation to property or be such as is implied in the term "dishonestly", but it must be something to which the party perpetrating the deceit is not entitled either legally or equitably. Richards, J., in the Allahabad case relies on the definition of 'fraud" in Webster's Dictionary: deception deliberately practised to gain unlawful or unfair advantage. As Mr. Mayne puts it in his Criminal Law of India, 3rd Edition, page 817, "of course there can be no intention to defraud where no wrongful result was intended or could have arisen from the act of accused."

If in the present case, the disputed bend belonged to the 1st accused and was in his possession at the time of the alleged offence, it is impossible to say that any "wrongful result" was intended or could have arisen: or that the advantage which the accused intended to secure (that is, the continued possession of the "bend") was one which (to quote the words of Sir James Stephen referred to in the Madras case) "could not have been had if the truth had been known." It was simply what he was entitled to legally and equitably.

I have not in fact been referred to, or been able to discover, any case in which a man has been convicted for forgery, where his intention has been merely to secure something to which he was legally entitled, or (which comes to the same thing) to which he *bona fide* believed himself to be entitled. *Queen-Empress* v. *Sheo Dayal* (3), *Queen* v. *Kishen Pershad* (4) and *Kailas Chandra Das* v. *Crown* (5) are all cases in which the act of the accused person under similar circumstances has been held not to amount to forgery.

I am conscious that this view of the law is open to the objection, that it seems to exempt from liability to punishment acts which are extremely reprehensible: but it appears to me to be the only possible interpretation of the sections and it is supported by authority.

I reverse the conviction and sentences and direct the release of the appellants.

Appeal accepted.

(1) 28 A. 358; A. W. N. (1906) 48; 3 A. L. J. 149; 3 Cr. L. J. 249.
(2) 28 M. 90 (F. B.); 2 Cr. L. J. 283.
(3) 7 A. 459.
(4) 2 N. W. P. H. C. R. 202.
(5) 6 C. W. N. 382.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 961 OF 1914.

December 11, 1914.

Present:—Justice Sir George Knox, Kt.

RAM CHANDRA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 345, 439—Compounding of offence in revision, whether allowed.

Section 345 of the Criminal Procedure Code allows a case in which appeal is pending to be opened to composition with the leave of the Court before which the appeal is to be heard, but the section does not apply to cases coming up in revision. [p. 104, col. 1.]

Criminal reference made by the Sessions Judge of Meerut.

FACTS of the case appear from the following

ORDER OF REFERENCE.

On the 12th October, Umrao Singh was convicted by Mr. Sale, Joint Magistrate of Meerut, under section 325 of the Indian Penal Code, in respect of grievous hurt caused to his mother, *Musammat* Gomti. He has appealed and *Musammat* Gomti has filed an application to be permitted to compromise the case, considering the comparative

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lightness of the injury which constitued grievous hurt and the relation of the parties, I have accepted the compromise and acquitted Umrao Singh under section 345 of the Criminal Procedure Code.

At the time Mr. Sale convicted Ram Chandra, under section 352 of the Indian Penal Code, for an assault committed on *Musammat* Gomti in the same quarrel and sentenced him to 15 days' rigorous imprisonment. Ram Chandra has applied in revision and *Musammat* Gomti has filed an application to compromise the case against him.

Under section 438, Criminal Procedure Code, I report the case for the orders of the Hon'ble High Court with the recommendation that the compromise be accepted, that the non-appealable sentence passed upon Ram Chandra be reversed and that he be acquitted under section 345, Criminal Procedure Code. At the same time I order that the execution of Ram Chandra's sentence be suspended. He is on bail of Rs. 100 and he will remain on bail pending the order of the Hon'ble High Court.

JUDGMENT.—The learned Judge in making this reference appears to have overlooked the provisions of clause 7 of section 345 of the Code of Criminal Procedure. This forbids the composition of an offence being accepted, except as provided by section 345.

Section 345 specially allows a case in which an appeal is pending to be opened to composition with the leave of the Court before which the appeal is to be heard, but in it there is no mention of cases which come up in revision and similarly there is no provision made in section 439 of the Code as to applying the powers granted in section 345 to cases in revision. The recommendation of the Judge, therefore, cannot be accepted. The accused person must submit to arrest and complete the sentence imposed upon him when he was convicted.

Let the record be retured.

Record returned.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 850 OF 1914.

CRIMINAL REVISION PETITION No. 703 OF 1914.

March 5, 1915.

Present:—Mr. Justice Ayling.

MURUDAI VEERAN—ACCUSED No. 2—PETITIONER

versus

PICHAN AMBALAGARAN—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 45 (1) (*c*) 250 - *Complaint of theft before Village Magistrate—Report to Police officer—Charge - Compensation, right to.*

Where a complaint of theft was made to the Village Magistrate who communicated the information to the nearest Police station and the Police in due course charged the case:

Held, that the case must be regarded as instituted upon information given to a Police Officer within the meaning of section 250 of the Criminal Procedure Code, and the Magistrate was competent to pass an order for compensation.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, to revise the judgment of the Court of the Sub-Divisional first Class Magistrate of Karur Division, in Criminal Application No. 59 of 1914, preferred against that of the Court of the Stationary second Class Magistrate of Kulitalai, in Calendar Case No. 302 of 1914.

Mr. *R. Kuppusamy Aiyar*, for the Petitioner.

Mr. *P. R. Grant*, for the Government.

ORDER.—In this case the complainant, who was ordered to pay compensation, instituted proceedings by making a complaint of theft to the village Magistrate. The latter was bound under section 45 (*c*) of the Code of Criminal Procedure to communicate the information to the nearest Police station, and in fact he did so. The Police in due course charged the case. As pointed out in *Nachimuthu Chetty* v. *Muthusami Chetty* (1), the case must be regarded as instituted upon information given to a Police officer, and the Sub-Divisional Magistrate is wrong in holding that section 250 of the Code of Criminal Procedure is not applicable.

His order is set aside and he is directed to restore the appeal to file and dispose of it according to law.

Order set aside.

(1) 24 Ind. Cas. 167; (1914) M. W. N. 804; 27 M. L. J. 37; 15 Cr. L. J. 431.

FARID v. PIRU.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION NO. 153 OF 1914.

August 27, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

FARID *walad* IMAMBUX—APPLICANT

versus

PIRU *walad* KOURO AND OTHERS—OPPONENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 526—"Criminal case"—Transfer—Interpretation of Statutes—Change of language in the same Act—Presumption.

A proceeding under section 145 of the Criminal Procedure Code cannot properly be called a "criminal case" within the meaning of section 526, for the action which a Magistrate can take on such a proceeding, is of a purely preventive and provisional nature in a civil dispute and not of a punitive nature. [p. 106, col. 1.]

A change of language in the same Code or Act may be presumed to indicate a change of intention on the part of the Legislature. [p. 105, col. 2.]

Application for transfer of the case from the Court of Sub-Divisional Magistrate, Tando, to some other Court.

Mr. *T. G. Elphinston*, for the Applicants.

Mr. *Mathradas Ramchand*, for the Opponents.

Mr. *E. Raymond*, Public Prosecutor for the Crown.

JUDGMENT.

FAWCETT, J. C.—This is an application, under section 526 of the Criminal Procedure Code, for the transfer of certain proceedings now pending against the applicant and others in the Court of the Sub-Divisional Magistrate, Tando, under sections 145 and 107 of the Criminal Procedure Code. The connected application for revision of the order passed in those proceedings has been dealt with in our judgment in *Farid* v. *Piru* (1).

The Public Prosecutor has raised a preliminary objection that this Court has no power to transfer the case under section 526, as it is not a "criminal case" within the meaning of that section, and this point has accordingly been first argued before us.

We first deal with the question whether a proceeding initiated under section 145 of the Code constitutes a "criminal case" within the meaning of section 526. On this point there is a difference of opinion among the Indian High Courts. The Bombay and Calcutta High Courts have ruled that it is not a "criminal case." [See *In re Pandurang Govind* (2), *Lalit Mohan Moitra* v. *Surja Kanta Acharjee* (3), where Taylor, J., holds it is not a "criminal case" and Ghose, J., is doubtful; and *Lakhan Chandra Roy* v. *Yakub Mondal* (4), where the opinion expressed as regards section 526 (8) of the Code implies the ruling that a proceeding under section 145 is not a "criminal case" within the meaning of that section.] On the other hand the Madras and Allahabad High Coarts have held that it is a "criminal case." [See *Arumuga* v. *Tegundan* (5) and *Jaggu Ahir* v. *Murli Shukul* (6).] In accordance with the practice of this Court, we should be disposed to follow the Bombay ruling rather than those of the other High Courts. And in any case we think the arguments in favour of the Bombay view condsiderably outweigh those on the other side. As pointed out by Taylor, J., in *Lalit Mohan Moitra's* case(3), it is almost impossible to conceive that the Legislature should use the two phrases "case" and "criminal case" in exactly the same sense, especially when they occur in two such near and analogous sections as 526 and 528; and it is an ordinary rule of construction that a change of language in the same Code or Act may be presumed to indicate a change of intention on the part of the Legislature (*cf.* Maxwell on the Interpretation of Statutes, 3rd Edition, page 449). The argument in *Jaggu Ahir's* case(6) that there is no reason why the Legislature should deem it fit to limit the power of the High Court to transfer cases under section 145. is sufficiently answered by the provisions of section 435 (3) of the Code. The Legislature has seen fit to limit the power of revision in such cases, and there is consequently no logical difficulty in supposing that it also wanted to limit the power of transferring such cases under section 526. At any rate, as regards a

(1) 27 Ind. Cas. 907; 8 S. L. R. 207; 16 Cr. L. J. 235.

(2) 24 B. 527; 2 Bom. L. R. 84.

(3) 28 C. 709; 5 C. W. N. 749.

(4) 23 Ind. Cas. 727; 18 C. W. N. 393; 15 Cr. L. J. 350.

(5) 26 M. 188; 12 M. L. J. 391; 2 Weir 678.

(6) 15 Ind. Cas. 84; 34 A. 533; 13 Cr. L. J. 452; 10 A. L. J. 27.

proceeding under section 145, it cannot, in our opinion, be properly called a "criminal case," for the action which a Magistrate can take on such a proceeding is [as pointed out in *Pandurang Govind's* case (2)] of a purely preventive and provisional nature in a civil dispute, pending a formal adjudication of the rights of the parties to the dispute in a Civil Court, and is not of a punitive nature. It corresponds very closely to the action which a *mamlatdar* can take under Bombay Act IV of 1906, and the mere fact that a Magistrate is authorized to take action in such a case does not, in our opinion, constitute it a "criminal case" within the meaning of section 526.

If, as held by Ghose, J., in *Lalit Mohan's* case (3) and the Allahabad High Court in *Jaggu Ahir's* case (6), the expression "criminal case," as used in the Code, means every case over which a Criminal Court exercises jurisdiction, then it is difficult to see why the Legislature should deliberately use the expression "criminal case" instead of "case" in certain sections of the Code, especially having regard to the history of the distinction, which is pointed out by Taylor, J., in *Lalit Mohan's* case (3). It is not, however, necessary to construe the expression as restricted to cases arising out of and dealing with some crime already committed, as it is construed in the Bombay case. In this connection reference may be made to the interpretation put on the analogous expression "criminal cause or matter" in section 47 of the Judicature Act, 1873, by the English Courts. The cases regarding its construction are collected in Stroud's Judicial Dictionary, 2nd Edition, Volome 1, pages 437-439, and it will be seen that to constitute such a "criminal cause or matter," the general rule of construction adopted is either that the subject-matter of the proceeding is of a criminal nature or the proceeding is one in which a penalty by way of punishment is sought or can be enforced in case of disobedience. It seems clear at any rate that a proceeding under section 145 would not be held to constitute a "criminal cause or matter."

Accordingly we hold that we have no jurisdiction to entertain the application for transfer, so far as it relates to the Magistrate's proceedings under section 145 of the Code. It is unnecessary to determine whether the proceedings under section 107 constitute a "criminal case," as that part of the Magistrate's order has been quashed. As, however, the point has been referred to in argument, we may say that we are disposed to agree with the view taken by the Calcutta High Court in *Wazed Ali Khan* v. *Emperor* (7), that such proceedings are "criminal cases" within the meaning of section 526 rather than with the contrary view taken by the Punjab Chief Court in *Ahmad Baksh* v. *Emperor* (8).

CROUCH, A. J. C.—I concur.

Application rejected.

(7) 22 Ind. Cas. 747; 18 C. W. N. 274; 15 Cr. L. J. 171; 41 C. 719.

(8) 24 Ind. Cas. 971; 5 P. R. 1914 Cr.; 154 P. L. R 19.4; 15 Cr. L. J. 563.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 844 OF 1914.
CRIMINAL REVISION PETITION No. 697 OF 1914.
March 5, 1915.

Present:—Mr. Justice Ayling.

In re APPAVU PADAYACHI AND OTHERS —ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 256—Commencement of inquiry as in a warrant case—Offence disclosed not triable as such—Duty of Magistrate to afford accused opportunity for cross-examination of prosecution witnesses.

Where an inquiry commenced as in a warrant case and the accused curtailed their cross-examination of the prosecution witnesses under the impression that they could have a further opportunity of cross-examining them, but no offence triable as a warrant case having been disclosed, the Magistrate closed the case and convicted the accused:

Held, that it was the duty of the Magistrate to allow the accused an opportunity of completing their cross-examination before proceeding with the case. [p. 107, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Cuddalore, in Criminal Application No. 36 of 1914, preferred against that of the second Class Magistrate of Panrutti, in Calendar Case No. 331 of 1914.

Mr. *K. P. Shanmugam Pillai*, for the Petitioners.

Mr. *P. R. Grant*, for the Government.

LADHA SINGH v. EMPEROR.

ORDER.—In this case the only point taken by the petitioners is that they were prejudiced by the refusal of the 2nd Class Magistrate to summon P. W. No. 1 for purpose of further cross-examination. This refusal appears to have been inequitable. At the time when P. W. No. 1 was examined, the inquiry was being conducted as in a warrant case. The accused persons were entitled to assume that they would have a further opportunity of cross-examination after a charge was framed: and they might very reasonably curtail and limit their cross-examination under this impression. When it was found that no offence triable as a warrant case was disclosed, it was the duty of the Magistrate to allow them an opportunity of completing their cross-examination.

The order of the Sub-Divisional Magistrate is set aside and he is directed to re-hear the appeal and dispose of it after giving petitioners an opportunity of further cross-examining P. W. No. 1.

Revision allowed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 1591 OF 1914.

February 19, 1915.

Present:—Mr. Justice Scott-Smith.

LADHA SINGH—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 195, 476—Sanction without application, legality of—Order directing prosecution, when to be made—Complainant, whether can delegate his right.

An application is a necessary condition precedent to the grant to a private person of sanction to prosecute

Atma Ram v. *Emperor*, 23 P. R. 1901 Cr.; *Indar Bhan* v. *Emperor*, 30 P. R. 1905 Cr.; 105 P. L. R. 1905; 2 Cr. L. J. 687; *Elahi Bux* v. *Emperor*, 5 Ind. Cas. 721; 11 C. L. J. 11 ; 11 Cr. L. J. 212, referred to.

Where the facts constituting an offence are not brought to the notice of a Magistrate in the course of a judicial proceeding, he has no authority to act under section 476.

A person cannot delegate to another the right to file a complaint. A District Magistrate cannot, therefore, authorise the Public Prosecutor to file a complaint on his behalf.

In re Punam Chand Manek Lal, 25 Ind. Cas. 333; 38 B. 642 at p. 648; 16 Bom. L. R. 446; 15 Cr. L. J. 581, followed.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Rawalpindi Division, dated the 8th August 1914, affirming that of the District Magistrate, Rawalpindi, dated the 8th July 1914, sanctioning prosecution of the petitioner.

Bhagat *Govind Das*, for the Petitioner.

Kanwar *Dalip Singh* (for the Government Advocate), for the Respondent.

JUDGMENT.—At the last hearing Mr. Bevan-Petman took time to consider the ruling in *In re Punam Chand Manek Lal* (1), in which it is laid down that a person cannot delegate to another the right to file a complaint. Mr. Dalip Singh, who now appears for the Government Advocate, says the correctness of this ruling is not disputed by the said officers of the Local Government and he cannot support the order of the Deputy Commissioner and District Magistrate.

This was clearly a case where the Deputy Commissioner could not sanction the prosecution. Sanction is granted to a private person who applies for it, and an application is necessary condition precedent to the grant, *Atma Ram* v. *Emperor* (2), *Indar Bhan* v. *Emperor* (3) and *Elahi Bux* v. *Emperor* (4).

The Deputy Commissioner could not act under section 476, Criminal Procedure Code as the facts were not brought to his notice in the course of a judicial proceeding.

Finally, he could not delegate the filing of the complaints to the Public Prosecutor. He could himself have filed them.

I, therefore, allow the revision and set aside the orders of the Deputy Commissioner and District Magistrate dated 8th July 1914.

Revision allowed.

(1) 25 Ind. Cas. 333; 38 B. 642 at p. 648; 16 Bom. L. R. 446; 15 Cr. L. J. 581.

(2) 23 P. R. 1901 Cr.

(3) 30 P. R. 1905 Cr.; 105 P. L. R. 1905; 2 Cr. L. J. 687.

(4) 5 Ind. Cas. 721; 11 C. L. J. 111; 11 Cr. L. J. 212.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 640 OF 1914.

CRIMINAL REVISION PETITION No. 543 OF 1914.

February 19, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

DAPPILE CHENCHUGARI RANGA REDDI AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Prosecution for offence under s. 211, Indian Penal Code—Person giving information, whether institutes proceedings—Penal Code (Act XLV of 1860), s. 211.

The petitioner petitioned the Collector in his revenue capacity for a refund of the money which he alleged a Reddi had collected from him and misappropriated. The Collector directed the prosecution of the Reddi under section 409, Indian Penal Code. The Reddi was tried, acquitted and the Magistrate ordered the prosecution of the petitioner under section 476, Criminal Procedure Code, for an offence under section 211, Indian Penal Code:

Held, that as the petitioner did not institute or cause to be instituted criminal proceedings, he could not be prosecuted under section 211 of the Indian Penal Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Joint Magistrate of Nandgal directing the prosecution of the Petitioners (P. W. Nos. 2 and 3) in Calendar Case No. 32 of 1914.

FACTS.—One D. Ranga Reddi, the petitioner before the High Court, complained to the Collector of Kurnool that the acting Reddi of Giddalur village had collected from him Rs. 14 as assessment and without entering it into the accounts appropriated the same. The case was referred to the Tahsildar of Cumbam who, after an enquiry, submitted to the Deputy Collector a report recommending prosecution. The latter sanctioned the prosecution of the Reddi. He was prosecuted and tried but was acquitted, and D. Ranga Reddi who gave information was sent under section 476 of the Code of Criminal Procedure before a Magistrate to be tried for an offence under section 211 of the Indian Penal Code.

Mr. *Mir Sultan Mohidin*, for the Petitioners.

Mr. *C. Sidney Smith*, for the Government.

ORDER.—It is clear that the petitioners did not institute or cause to be instituted criminal proceedings against the acting Reddi. What first petitioner did was to petition the Collector in his revenue capacity for a refund of the money, which he alleged the Reddi had collected from him and misappropriated.

It was the Deputy Collector's order directing the prosecution of the Reddi which initiated the proceedings for an offence under section 409 of the Indian Penal Code. Without pronouncing any opinion whether the petitioners are liable to be prosecuted for giving false evidence before the Joint Magistrate, we find the order under section 476 of the Criminal Procedure Code directing their prosecution for an offence under section 211 of the Indian Penal Code cannot stand, and we accordingly set it aside.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No 141 OF 1914.

August 28, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crump, A. J. C.

JUMO *walad* WALI MAHOMED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 112, 118, 439 (5)—Order requiring sureties of a certain status, validity of—Revision.

Section 112 of the Criminal Procedure Code gives the Magistrate power to define the class of sureties. An order, therefore, requiring sureties to be landholders in the neighbourhood of the accused, either holding 100 acres of land or paying income-tax and able to control the accused, is perfectly legal. [p. 109, col. 1.]

Section 439 (5) of the Code precludes the High Court from entertaining an application for revision of an order under section 118 where the right of appeal has not been exercised. [p. 109, col. 2.]

Application for revision of the order of the Sub-Divisional Magistrate, Naushahro.

Mr. *Achalsing M. Advani*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—In this matter the Sub-Divisional Magistrate of Naushahro Feroze, by an order under section 118 of the Code

of Criminal Procedure dated 28th May 1914, called upon the applicant to execute a bond in the sum of Rs. 1,000 to be of good behaviour for a period of one year, with two sureties in the same amount. These sureties were by the same order required to be landholders in the neighbourhood of accused, either holding 100 acres of land or paying income-tax, and able to control the applicant. Against this order no appeal was made to the District Magistrate. On the order being read over and explained to the accused, he offered two sureties by name Muhimkhan and Allah Obhayo, but as on the 8th June these persons refused to stand as sureties, the applicant was sent to jail. Subsequently on the 1st July the same two persons and another by name Ahmed appeared before the Magistrate and expressed their willingness to become sureties for the accused. The Magistrate, however, refused to accept them. This refusal was based in the case of all three on personal grounds, which in the Magistrate's opinion showed they would not be able to control the applicant, and in the case of Allah Obhayo and Ahmed also on the ground that they did not own 100 acres of land.

We are now asked to interfere in exercise of the powers of re ision given by section 439 of the Code of Criminal Procedure. It is contended by Mr. Achalsing that the condition that the sureties should own 100 acres of land is oppressive and unreasonable, but before we can accede to that suggestion it is necessary to consider whether it is open to us in revision to alter the order made under section 118. It is not contended that the Magistrate had no power to define the class of sureties as he has done, that power is given by section 112 and as held in *Emperor* v. *Jan Mahomed* (1), an order of this kind is perfectly legal under that section. Such an order is, however, only a preliminary one, and when a Magistrate passes an order under section 118 requiring a person to give security under that section, the former order is necessarily superseded by the latter order. Any direction as to the class of sureties required, which may be contained in the order under section 118, is also, of course, as much a substantive part of that order as the order requiring security to be given; and the fact that it may merely repeat the conditions specified in the order under section 112 is immaterial. The first proviso to section 118 shows, if there were any doubt on the point, that the order under section 118 can include directions as to the nature of the security to be given, provided this is not different from that specified in the order under section 112. In this particular case the Sub-Divisional Magistrate expressly included directions as to the class of sureties to be furnished in his order under section 118, and by virtue of section 406 of the Code, an appeal lay against this order to the District Magistrate, who could have altered the order under section 423 (c). The petitioner has admittedly not approached the District Magistrate, and, in our opinion, we are consequently precluded by section 439 (5) from entertaining this application in so far as it seeks to impugn the propriety of the order made under section 118. It must, therefore, follow that the Magistrate's order as regards the second and third of the proposed sureties cannot be interfered with, as they admittedly do not satisfy the condition prescribed by the Magistrate in his order under section 118 that they should be landholders having 100 acres of land or paying income-tax. In so far as any question arises whether a Magistrate is justified in rejecting a proposed surety under section 122 as not fulfilling the conditions of his order under section 118, the order of rejection is unquestionably one which can be revised by this Court, but we cannot in purporting to revise the order under section 122, deal with the propriety of the order under section 118 as to the class of sureties to be furnished in any case which falls under section 439 (5).

Mr. Achalsing says that this point has not been raised before, and that the Court should in the circumstances interfere in this particular case. But the provisions of section 439 (5) are imperative, and even if they may have been overlooked in the past by the Court or Bar, that affords no good ground for our now disregarding the enactment in question.

No doubt this Court can interfere of its own motion in cases where a person affected

(1) 6 Ind. Cas. 887; 11 Cr. L. J. 417; 3 S. L. R. 239.

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is debarred from moving it under section 439 (5), but in this case the Court has not acted of its own motion in calling for the proceedings under section 435, but at the instance of the applicant, and it would be a pure quibble to say that, in spite of the provisions of section 439 (5) of the Code, the Court could do what applicant wants, of its own motion. This would be a mere evasion of the Statute which the Court cannot permit.

It is also in any case desirable that questions of this kind should be dealt with by the District Magistrate, whose local knowledge puts him in a better position than this Court to judge whether a condition of the kind objected to by applicant is (as contended) prohibitive and unreasonable or not. An appeal under section 406 can, of course, relate to any part of an order under section 118, and is not necessarily confined to the question whether or not the appellant should be bound over.

We, therefore, refuse to interfere with the order of the Magistrate rejecting the two proffered sureties, Allah Obhayo and Ahmed, under section 122.

As regards Muhimkhan, the Magistrate has rejected him merely on the ground that he would not be able to exercise any control over the applicant. The grounds for this view are that he is applicant's father-in-law, and though he knew applicant was a thief some time back and was warned by the *mukhtearkar* about the applicant's behaviour, he did nothing to control him in the past. It does not, however, follow that he will not exercise such control when he becomes a formal surety for applicant's good behaviour, and as he is the applicant's father-in-law and near neighbour, he is in a good position to exercise such control. We are of opinion, therefore, that the reasons given by the Magistrate for refusing to accept him as a surety are insufficient and quash this part of his order.

Revision allowed in part.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 453 OF 1914.
CRIMINAL REVISION PETITION 382 OF 1914.
January 21, 1915.

Present:—Mr. Justice Spencer.

In re JUTURI VENKATAPPA AND OTHERS —ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 523 (2) —Gambling on public highway—Public nuisance—Conviction—Currency notes not traced to any person—Ownerless property.

Where it is found that the accused caused annoyance and obstruction to the public by gambling on a throughfare, their conviction for committing a public nuisance is justified.

Where the currency notes found in the course of such gambling are not traced to any particular person as owner, the Magistrate is entitled to treat them as ownerless property and deal with them as such.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional first Class Magistrate of Cuddaph Division, in Calendar Case No. 9 of 1914.

Mr. *S. Ranganadha Aiyar*, for the Petitioners.

The *Acting Public Prosecutor*, for the Government.

ORDER.—The Magistrate has found on the facts that the accused caused annoyance and obstruction to the public by gambling on a thoroughfare and there was evidence that by playing across the cart track they obstructed carts and passers-by. On these findings the conviction of all the persons who were found in that group for committing a public nuisance was justified [See *High Court Proceedings*, 28*th January* 1878, *No.* 200 (1) and *Bethan Chetti, In re* (2)].

As regards the order under section 523 (2) of the Code of Criminal Procedure that the currency notes seized by the Police should be proclaimed, defence 1st witness stated that he entrusted the notes to his *gumashtah*, who was 1st accused, but he admitted that he had not entered the amount in his accounts. On his evidence and the evidence of other defence witnesses which the Magistrate considered to have been got up for the occassion, I do not find that the Magistrate was wrong in treating the property as property the owner of which was unknown.

(1) 1 Weir 239.
(2) 1 Weir 242.

It may be that no one has been able to prove a better title to the notes within six months from the date of the proclamation. But the final order is not before me, and I decline to interfere with the Magistrate's discretion in the matter at this stage.

The petition is dismissed.

Petition dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 152 OF 1914.

September 7, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

LURINDARAM *walad* CHUHERMAL—ACCUSED—APPLICANT

versus

THE KARACHI MUNICIPALITY—COMPLAINANT—OPPONENT.

Bombay District Municipal Act (III of 1901), s. 151—Essential ingredients of offence—Mere disobedience of notice, whether sufficient for conviction.

In order to render a person liable to conviction and punishment under section 151 of the Bombay District Municipal Act, it must be proved (*i*) that a notice has been given him under sub-section (1), and (*ii*) that he uses the place in question or permits it to be used in such a manner as to be a nuisance to the neighbourhood or dangerous to life, health or property. The mere fact that notice in due form was given regarding the place on a particular date cannot be conclusive evidence that there has been user of the place in such a manner as to be a nuisance after that date. [p. 112, col. 2.]

Application against an order of the Additional City Magistrate, Karachi.

Mr. *Achalsingh M. Advani*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor, for the Opponent.

JUDGMENT.

FAWCETT, J. C.—This is an application for revision of an interlocutory order passed by the Additional City Magistrate, Karachi, in a case instituted against the applicant under section 151 (2) of the Bombay District Municipal Act. In the trial, the complainant contended that it was sufficient for a conviction under that sub-section to prove that the Municipality had issued a written notice to the accused under sub-section (1), and that the accused had disobeyed it. Accused's Pleader on the other hand contended that it was essential for the prosecution to prove that the place in question was used in such a manner as to be a nuisance to the neighbourhood or dangerous to life, health or property, and that it was open to the defence to adduce evidence to the contrary. The Magistrate has passed an order upholding the contention of the Municipality, and has adjourned the further hearing of the case in order to enable accused to apply to this Court in revision.

The Public Prosecutor raised a preliminary objection to this Court's accepting such an application, and said it would be a bad precedent for this Court to give an opinion on a point of law arising in a trial before the trial was completed. If the point of law only rose on certain facts which were in dispute, it would, no doubt, be premature to allow it to be raised and decide it at this stage; but in the present case it is admitted by applicant's Pleader that a valid notice under sub-section (1) of section 151 was served on the accused and that he disobeyed it. Accordingly the question whether the accused can legally raise the plea in question as a defence to the charge brought against him is one which directly arises, is independent of any disputed facts, and should obviously be decided before evidence on the subject is actually taken by the Magistrate. We think, therefore, that this is an exceptional case of a kind in which this Court can properly interfere with an interlocutory order in exercise of its wide revisional powers, and that the determination at this stage of the point of law arising will be for the convenience of all parties concerned.

Sub-section (2) of section 151 runs as follows: "Whoever, after notice has been given under sub-section (1), uses any place or permits it to be used in such a manner as to be a nuisance to the neighbourhood or dangerous to life, health or property shall be punished," etc. *Prima facie* in order to render a person liable to con-

viction and punishment under that section, it must be proved (1), that a notice has been given him under sub-section (1), and (2) that he uses the place in question or permits it to be used, in the manner specified. There is no reason for construing it differently than if it appeared in the Penal Code. The fact that under sub-section (1) a notice cannot legally issue unless it is shown to the satisfaction of the Municipality that the use of the place is a nuisance or dangerous, is one which clearly cannot affect the construction of sub-section (2). If the opinion of the Municipality was intended to be conclusive and mere disobedience to the notice was intended to be punishable, the Legislature would have used some such words as "in contravention of the terms of such notice" instead of the words "in such manner as to be a nuisance to the neighbourhood or dangerous to life, health, or property." A comparison of this sub-section with sections 150 (3) and 155 clearly shows that there was no such intention on the part of the Legislature. In cases under section 151 (1), the Legislature no doubt thought it desirable that a person affected should be allowed an appeal to the Courts from the opinion of the Municipality, if prosecuted for disobedience.

The rulings in *Ahmedabad Municipality* v. *Maganlal Khushaldas* (1) and *Emperor* v. *Raja Bahadur Shivlal* (2) do not apply to this case. The former deals with sub-section (5) of section 96 of the Bombay District Municipal Act, under which mere disobedience to the provisions or orders referred to in that sub-section so long as such orders are not *ultra vires*, is punishable; and the latter deals with section 377 and 471 of the City of Bombay Municipal Act, 1888, under which the Commissioner's opinion is conclusive and mere failure to comply with his requisition is punishable.

Mr. Raymond argued that sub-section (2) of section 151 only referred to cases coming under clause (*ii*) of sub-section (1), but there is nothing in sub-section (2) to support this argument: on the contrary the words "after notice has been given under sub-section (1)" and its general wording leave no doubt whatever that it is intended to cover all cases in which a notice may be issued under sub-section (1).

Section 155 cannot, of course, be relied on in this case, *firstly*, because accused is being prosecuted not under that section, but under 151 (2), and *secondly*, because the disobedience or failure to comply with a direction in a notice issued under sub-section (1) of section 151 is an offence punishable under another section, *viz.*, section 151.

For the above reasons we set aside the order of the Magistrate refusing to enter into the question whether the place (whose further use has been prohibited by the Municipality) is proved to be used, or permitted to be used, by the accused in such a manner as to be a nuisance to the neighbourhood or dangerous to life, health, or property, and direct him to proceed with the trial in accordance with the law as laid down in this judgment.

CROUCH, A. J. C.—I concur. The view taken by the Magistrate is that the duty of the Court is merely to inflict punishment for an offence of which the Municipality have already found the accused guilty: the question whether or not he is guilty, the Magistrate has refused to try. It seems, therefore, a suitable case in which to exercise what I believe to be the indisputable power of this Court to interfere with an interlocutory order.

The offence with which section 151 (2) deals is the using of a place in a certain manner after notice has been given under section 151 (1). The mere fact that notice in due form was given regarding the user of the place on a particular date cannot be conclusive evidence that there has been user of the place in such a manner as to be a nuisance after that date. All the essential ingredients of the offence must be proved as in any other criminal trial, and the Magistrate must be satisfied by suitable evidence that accused has been guilty of causing nuisance after receipt of notice duly given under sub-section (2).

Revision allowed.

(1) 9 Bom. L. R. 156; 5 Cr. L. J. 171.

(2) 5 Ind. Cas. 860; 34 B. 346; 11 Cr. L. J. 270; 12 Bom. L. R. 126.

SUKH RAJ *v.* KANHAYA LAL.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 907 OF 1911.

May 13, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

SUKH RAJ—DEFENDANT—APPELLANT

versus

KANHAYA LAL AND OTHERS—PLAINTIFFS & SUNDAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884), *s.* 40—*Value of suit under Rs.* 1,000—*Further appeal, whether competent—Plaintiff, whether estopped from raising point of valuation—Punjab Courts Act I of* 1912), *applicability of—Further appeal, whether alterable for second appeal or revision.*

In a suit for declaration that a sale-deed executed in favour of the defendant shall not affect the plaintiff's reversionary rights after the death of the executant, and for an injunction restraining the executant from alienating the property, the plaintiffs put the following valuation on the suit for purposes of jurisdiction:

	Rs.	a.	p.
(1) Land at 30 times the revenue	130	5	0
(2) House	450	0	0
(3) Injunction	500	0	0
Total	1,080	5	0

But for Court-fee purposes they put a value of Rs. 130 only on the injunction. Both the lower Courts having decreed the claim, the defendants came up to the Chief Court in further appeal:

Held (1), that the value of injunction being only Rs. 130, the total value of the suit fell under Rs. 1,000 and, therefore, no further appeal lay under section 40 of the Punjab Courts Act 1884; [p. 113, col. 2.]

(2) that the plaintiffs were not estopped from contending that the value of the suit was really less than what they had put it at; [p. 113, col. 2.]

(3) that an appeal filed as a "further appeal" under the Punjab Courts Act of 1884 could not be altered after the coming into force of the new Act into a second appeal or a revision under section 70 *(1)* (*b*) of the old Act. [p. 114, col. 1.]

Second appeal from the decree of the Divisional Judge, Jhelum, dated the 6th May 1911.

Mr. *Nanak Chand*, for the Appellant.

Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—Mr. Gobind Das has raised a preliminary objection that no appeal lies, and upon a consideration of the point we find that the objection is well-founded. In their plaint the plaintiffs valued their suit thus:—

	Rs.	A.	P.
(1) The land at 30 times land revenue ...	130	5	0
(2) House	450	0	0
(3) Injunction	500	0	0
Total ...	1,080	5	0

This is a "further appeal" under the Punjab Courts Act as it stood before its recent amendment; and it is clear that a further appeal is competent if the above valuation is correct; but Mr. Gobind Das points out that it is not correct. On the injunction plaintiffs put, for Court-fee purposes, a value of Rs. 130 only; and we are bound by the Full Bench ruling *Barru* v. *Lachhman* (1) to hold that this must be the valuation also for jurisdiction. The total, therefore, falls below Rs. 1,000, which is the lowest limit of value for a land suit in which a further appeal lies, the Courts below having concurred in their conclusions and decrees.

Mr. Gobind Das also urges that the suit is not entirely a land suit, as the above detail of valuation shows and he refers us to *Fateh Singh* v. *Chetu* (2) as authority for holding that probably this is in reality an "unclassed suit," in connection with which the critical value is Rs. 2,500 in cases in which the lower Appellate Court has not varied or reversed the decree of the first Court, except as to costs. We are not at all sure that we consider that ruling good law; but we need not decide the point in view of our opinion that no further appeal lies in this case, even if it be taken as a land suit pure and simple.

Mr. Nanak Chand suggests that, as plaintiffs themselves assigned a value over Rs. 1,000, no doubt in order that, if occasion arose, they might have a second appeal, they should not be permitted to contend now that the value was really less. But we cannot find that plaintiffs are *estopped* from raising the point, which, after all, is one that goes to the root of the jurisdiction of this Court; and it is not easy to see how any conduct of parties can confer upon us a jurisdiction we do not possess.

Then Mr. Nanak Chand asks us to deal with the case as a "second appeal" under the new law of appeal, or as a revision under section 70 (1) (*b*) of the old law; but we can do neither. We cannot use the provisions of the new law in a case in which the decision of the lower Appellate Court was given before the new law came into

(1) 22 Ind. Cas. 503; 23 P. L. R. 1914; 111 P. R. 1913; 228 P. W. R. 1913.

(2) 100 P. L. R. 1904.

being; and it has been held more than once recently by Division Benches here that an appeal filed as a "further appeal" under the old law cannot be altered after the coming into force of the new law, into a revision under section 70 (1) (*b*) of the old law.

We have much sympathy with the appellant, but we can do nothing to help him. We dismiss his appeal; but, considering that the misleading valuation was made by respondents, we make no order as to costs.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL No. 62 OF 1913.

CIVIL SUIT No. 699 OF 1913.

March 31, 1914.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

R. D. SETHNA—DEFENDANT

versus

GRACE EDITH HEMMINGWAY—PLAINTIFF.

Transfer of Property Act (IV of 1882), s. 130—Deposit receipt, transfer of—Transferee becomes owner of the money mentioned therein—Resulting trust, whether can be implied—Trusts Act (II of 1882), s. 81.

A deposit receipt is not a negotiable instrument which passes either by delivery or by indorsement, but where the money mentioned in the receipt is immediately payable and the receipt is presented duly indorsed together with an order to pay a given individual, that individual becomes the owner of the money upon payment by the banker or his promise to hold it at the disposal of the payee. [p. 115, col. 2.]

Where, therefore, W who had a fixed deposit of Rs. 10,500 falling due on the 7th August 1912 sent on that date the receipt duly indorsed with a letter to the Bank asking them to hand over the amount to his nephew (the defendant) and the defendant drew the interest and Rs. 500 out of the principal and deposited the balance Rs. 10,000 in his own name, on a suit by the heirs of W on his death for a declaration that the amount of Rs 10,000 formed part of W's estate:

Held, (1) that the plaint was defective as it did not show that the plaintiff had obtained Letters of Administration and should on that account have been rejected on presentation; [p. 115, col. 1];

(2) that the defendant became the absolute owner of the money secured by the existing receipt [p. 116, col. 1];

(3) that there was no resulting trust in favour of the plaintiff. [p. 116, col. 1.]

Mr. *Binning* (with him Mr. *Shortt*), for the Defendant-Appellant.

Mr. *Inverarity* (with him Mr. *Strangman*, Advocate-General and Mr. *Raikes*), for the Plaintiff-Respondent.

JUDGMENT.—The undisputed facts are that one Mr. Wakeford, who was in receipt of a Government pension of Rs. 54 per mensem, had a deposit of Rs. 10,500 with the Hongkong and Shanghai Bank under a deposit receipt of the 7th of August 1911, which fell due on the 7th August 1912. On the 26th June 1912 he wrote to the Bank saying the receipt had been stolen and asking for a duplicate receipt. He visited the Bank soon after and was given a form for an indemnity to the Bank on the issue of a fresh receipt. He then told the Bank clerk, Sunderrao, that he wanted a duplicate and wanted to give the money to his nephew, the defendant Harrison, who had accompanied him to the Bank. The defendant came to the Bank again on the 7th August with the deposit receipt, which had been found duly endorsed and a letter from Wakeford, but upon being told he would have to be identified by Wakeford took away the deposit receipt and the letter. He returned the following day with the deposit receipt bearing Wakeford's endorsement, dated the 7th August, and also with a letter in the following terms:—

"*Bombay, 8th August* 1912.

THE AGENT,

Hongkong and Shanghai Banking Corporation.

SIR,

I hereby state that I have found my Bank receipt. Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew.

I also wish you to hand over the amount of Rs. 10,500 which is in fixed deposit to my nephew, Wilmot Charles Harrison, to his account.

Yours truly,

(*Sd.*) C. A. WAKEFORD.

This is my nephew's signature.

(*Sd.*) W. C. HARRISON.

(*Sd.*) C. A. WAKEFORD."

The defendant asked for a new deposit receipt for Rs. 10,000 and the Bank issued a receipt for that sum in the defendant's name and paid him the interest due on the former receipt and Rs. 500 as the balance of the principal.

Wakeford died on the 18th of October 1912 at the age of 84 unmarried and leaving him

surviving as his next of kin ten grand-nephews and nieces, *viz.*, two sons and two daughters of his predeceased niece, Jane Williams, and three sons and three duaghters of his predeceased nephew, Edmund Harrison. Two days before the due date for payment by the Bank of the sum of Rs. 10,000 secured by the deposit receipt in favour of the defendant, one of the daughters of Jane Williams filed this suit claiming a declaration that she as administratrix of Wakeford was entitled to the said sum of Rs. 10,000 as part of his estate.

The plaint was defective in that it did not show that the plaintiff had obtained Letters of Administration and it should on that account have been rejected on presentation. The plaintiff, however, obtained Letters of Administration on the 31st October 1913, a fortnight before the hearing, and the hearing was allowed to proceed. A decree was passed for the plaintiff declaring that the Rs. 10,000 in question formed part of the estate of the deceased and that the plaintiff was entitled to the same. This was not contrary to section 190 of the Succession Act as remarked by the learned Judge. The only tenable technical objection was to the institution of the suit before the plaintiff had an existing interest in the subject-matter. That point, however, if it had been taken and had resulted in the rejection of the suit at the hearing, would have only led to a waste of time and costs without benefiting the defendant, for a fresh suit would immediately have been brought by the administratrix. The course which the trial eventually took was determined by a ruling of the learned Judge that the endorsement of the receipt by the deceased was not evidence of a gift and that the onus was on the defendant to show how what was the only property of the deceased in August came to be given to him and that if he proved facts from which the Court could deduce that there was a good gift, the plaintiff would then have to prove circumstances showing the gift was invalid. On the evidence the learned Judge was satisfied that the deceased was anxious that the defendant should have the benefit of the money deposited with the Bank, but did not think that he intended that the defendant should be able to make away with the money in the donor's lifetime or draw the interest without making due provision for the donor's maintenance, but he held that there was no effective transfer, having regard to section 130 of the Transfer of Property Act, of the debt due by the Bank to the deceased and that, if there was, there would be a resulting trust for the legal representatives of the deceased under section 81 of the Indian Trusts Act.

We are unable to concur in the learned Judge's conclusion as to the effect of the transction of the 8th of August. It is established by a preponderance of English authorities that a deposit receipt is not a negotiable instrument which passes either by delivery or by endorsement, but where the money mentioned in the receipt is immediately payable and the receipt is presented duly indorsed together with an order to pay a given individual, that individual becomes the owner of the money upon payment by the banker or his promise to hold it at the disposal of the payee. The question is discussed by Buckley, J., in *In re Beaumont*; *Beaumont* v. *Ewbank* (1) where he says :—

"In all the cases, in order that the gift may be valid, it must, I think, be shown that the donor handed over either property, or the *indicia* of title to property, which belonged to him. His own cheque is not property; it is only a revocable order such that if the banker acts on it, the donee will have the money to which it relates. Even without actual payment of the cheque there may be a good gift—for instance, if there is an undertaking by the banker to the donee to hold the amount of the cheque for the latter, that may be enough. Unless there is that, or something equivalent to it, there is no delivery of property, but only a delivery of that which if acted on will procure the delivery of property."

An order on a banker to pay money which he holds to the credit of the customer, is not an assignment of a debt but an authority to deliver property, which if acted on is equivalent to delivery by the customer. Here the letter of the 8th of August is such an order and it has been acted on. It may be that if objection had been taken at the hearing, it would have been rejected for want of a stamp. That, however, is not an objection which can be effective in appeal now

(1) (1902) 1 Ch. 889 at p. 894; 71 L. J. Ch. 478; 86 L. T. 410; 50 W. R. 389.

that the letter is on the record (see section 36 of the Stamp Act.)

The defendant is, therefore, the owner of the money secured by the existing receipt and the plaintiff cannot succeed, unless she shows that he holds it in trust for the donor or his representatives. In our opinion the finding of the learned Judge as to the intention of the donor which is as favourable to the plaintiff as the evidence permits, negatives the idea of any resulting trust. Upon that finding this is a much stronger case in favour of the donee than *Standing* v. *Bowring* (2). The plaintiff in that case being 86 years of age and being possessed of consols to the amount of £ 6,000 transferred them into the names of herself and her godson. It was proved that she was aware when she did this that she would be able during her lifetime to receive the dividends and that if her godson survived her he would become entitled as survivor. Lindley, L. J., remarked at page 289:

"The plaintiff in her statement of claim and in the Court below rested her case on equitable grounds, and sought to establish a trust in her favour. But the only trust which was consistent with the evidence was a trust to pay her the income of the consols for the joint lives of herself and the defendant. This trust was not in controversy, but is not sufficient for the plaintiff's purpose. No trust will suffice short of an absolute trust for herslf. But it is impossible to impose such a trust on the defendant, when the evidence conclusively shows that she never intended to create any trust of the kind. Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied."

The gift in this case was an absolute gift to the donee with the expectation that he would look after the donor till the latter's death. In our opinion the evidence shows, though this is not essential to the defendant's success, that the defendant acted up to the donor's expectations. According to Exhibit 10 (a letter of the deceased to the plaintiff in June 1911) the donor paid his rent out of the interest he then received from the Bank and presumably paid his other expenses from his monthly pension of Rs. 54. In the month following the gift the defendant took the donor to live with him and thus became responsible for his lodging.

The learned Judge at one period of the case thought that the fact that an old man of debilitated health gave all his savings to the one among his nephews and nieces who had taken charge of him raised a presumption of undue influence. We are not prepared to assent to this, and the evidence shows that a coolness had arisen between the old man and the plaintiff, whom along with her sister he had at one time intended to benefit by Will. In our opinion the evidence establishes that the donor was perfectly sensible and competent at the time of the gift, and the charge that the defendant exercised undue influence fails. We reverse the decree of the lower Court and dismiss the suit with costs throughout.

Decree reversed; Suit dismissed.

(2) (1885) 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 19; 34 W. R. 204.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 68 OF 1913.

March 2, 1915.

Present:—Sir Charles Fox, Kt., Chief Judge and Mr. Justice Hartnoll.

OFFICIAL ASSIGNEE AS ASSIGNEE TO THE ESTATE OF *Hajee* MAHOMED HADY—DEFENDANT—APPELLANT

versus

Mirza ABDUL HUSSEIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, suit under—Will—Waqf—Private family matter—Administrator and trustee—Scheme under section 92, when to be settled—Accounts, direction for.

Where a Will makes provision for certain charity out of the income of the estate and also contemplates that one of the testator's descendants should always be the trustee for the time being of the property, a settlement of a scheme for a charitable trust, when possibly there may never be any property to which

the scheme can apply, is premature and the Court should pause before interfering under section 92 of the Civil Procedure Code in a matter which on the face of it is more of a private family matter than one of a public nature. A direction for accounts in a suit in which the administrator of the estate is not made party as such administrator must necessarily be fruitless. [p. 119, col. 1; p. 120, col. 2.]

Shahab-ud-din v. *Sohan Lal*, 1 68 P. L. R. 1908; 75 P. R. 1907; 139 P. W. R. 1907, *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri*, 22 C. 619; 22 I. A. 76, referred to.

Mr. *N. M. Cowasjee* (with him Mr. *A. T. Banerji*), for the Appellant.

Mr. *P. D. Patel*, for the 1st and 2nd Respondents.

Mr. *Rutledge*, for the 1st respondent and representatives of the 3rd Respondents.

Mr. *Broadbent*, for the 4th Respondent.

JUDGMENT.

Fox, C. J.—The suit was one under section 92 of the Civil Procedure Code. The three original plantiffs were respectively son-in-law, son and daughter of one Aga Yakoob Ally Saheb, and the original defendant was Hajee Mahomed Hady, another son of Yakoob Ally. He was sued in his personal capacity, and not as administrator of the estate of Yakoob Ally. The third plaintiff died after the suit was filed, and her legal representatives have been substituted for her as plaintiffs. One Hajee Syed Raza was added as a party "on behalf of himself and of the other heirs of Aga Syed Abdul Hoosein," a son-in-law of Aga Yakoob Ally Saheb and the executor of his Will. The Official Assignee as assignee of the estate of the original defendant, Hajee Mahomed Hady, who had been declared insolvent, was added as a party defendant at a later stage. The plaint set out that Aga Yakoob Ally Saheb died at Mecca in 1865, after having made a Will by which he bequeathed one-third of all his property moveable and immoveable, for public charitable purposes, and directed his executor first to invest the one-third in Government funds and when convenient, to buy immoveable property in such a way as to make it inalienable from the charitable trust. It was alleged that in pursuance of this direction the executor, Aga Sayed Abdul Hoosein, had purchased *inter alia* a piece of land on the outskirts of Rangoon. known as Suburban Allotment, second class, No. 9, Pazundaung, measuring 14 acres three annas and three pies. Aga Syed Abdul Hoosein had obtained probate of the Will in the High Court of Calcutta, and he acted as executor until 1879 when he died. By this Will, he appointed Hajee Mahomed Hady trustee of the charitable trust.

In 1884 Hajee Mahomed Hady obtained from the Court of the Judge of Moulmein Letters of Administration with the Will annexed to the unadministered estate of Aga Syed Yakoob Ally Saheb and subsequently sold several lots of immoveable property which Aga Syed Abdul Hoosein had bought as executor, but he then set apart the piece of land above described as property assigned to the charitable trust by the Will of his father. It was alleged that Hajee Mahomed Hady had acted as sole trustee of such trust property, but he had never furnished any accounts of his administration of it to the descendents of the founder. Other reasons were also given for the relief which was sought in the suit. The reliefs asked for were :—

1. That the defendant (that is, Hajee Mahomed Hady) might be ordered to furnish full accounts of the income and expenditure of the trust property, meaning the piece of land in Rangoon and the money derived therefrom.

2. Removal of Hajee Mahomed Hady from the office of trustee of the charitable trust.

3. The appointment of new trustees for the management of the trust and the vesting of the trust property in them.

4. Payment to the new trustees of such sums as might be found on taking of accounts to be due to the trust.

5. Appointment of a Receiver to receive the rents of the land.

6. Payment by Hajee Mahomed Hady of the costs of the suit.

Hajee Mahomed Hady in his written statement admitted uncontrovertible facts and that he had acted as sole trustee of the *waqf* created by his father's Will. He denied that the property alleged to be the subject of the charitable trust had been bought by Aga Syed Abdul Hoosein in pursuance of the directions in the Will about forming a charitable trust, and he denied that he had never set apart the Rangoon property in Pazundaung as property for that trust. He alleged that he held the property as administrator of the

OFFICIAL ASSIGNEE *v.* ABDUL HUSSEIN.

estate of his father, and that that estate was not yet fully administered in that besides the bequest for charity, his own share in the estate and three-fourths of a share of one of his sisters were still unsettled, this interest of his sister's being held by him as *waqf* under a dedication made by her husband, Aga Syed Abdool Hoosein.

Hajee Syed Raza in his written statement set out the devolution of the share of the lady referred to. He alleged that such share had never been separated or met by Hajee Mahomed Hady as administrator, and that it had to come out of the Pazundaung property, that is to say, his case was that that property had not been assigned to the charitable trust of Aga Syed Yakoob Ally but was still part of his estate. The Official Assignee's written statement followed the lines of Hajee Mahomed Hady's, and submitted that the Pazundaung property was his, or at any rate that no other beneficiary under the Will had any preferential right to the property.

The sole issue fixed in the case was as follows:

"Was the Pazundaung land wholly or in part *waqf* property under the Will of Yakoob Ally?"

In the learned Judge's view it was clear that the Pazundaung property had never been made *waqf*, and there was no separate charity fund, and no portion of the assets of the estate had been appropriated to either of the charitable trusts referred to in the case. He went on to deal with a point which was apparently raised by himself, and held that these trusts had obtained a charge on Hajee Mahomed Hady's interest in this property in consequence of Hady having handed over the title-deeds of it to the first plaintiff. He dealt with the position of the trusts and ultimately directed certain accounts to be taken.

The Official Assignee, who is concerned to get as much as possible for the creditors of Hajee Mahomed Hady, has appealed against the decree for accounts. Subsequent to it the Court sanctioned a scheme for the trust. The grounds of the Official Assignee's appeal are as follows:

1. That the learned Judge on the original side of this Court should have held that the suit was virtually one for a declaration that the second class Suburban Allotment No. 9 of Pazundaung was trust property, and that a suit of such nature would not lie under section 92 of the Civil Procedure Code.

2. That the said Judge should have held that this suit was not properly stamped under the provisions of the Stamp (Court Fees) Act.

3. That the different reliefs sought for in the suit or the suit itself had not been valued.

4. That having regard to the finding made by the said Judge that the Pazundaung property had never been made *waqf*, the said Judge should have dismissed the plaintiff's suit, and should have held that this suit under section 92 of the Civil Procedure Code could not lie.

5. That the learned Judge should have held that the one-third charity fund in Yakoob Ally's Will was at most the one-third nett value of the estate when Hajee Muhammad Hady obtained Letters of Administration *de bonis non* in 1884.

6. That the said Judge erred in not placing due and sufficient reliance on the statement of account filed by the said Hajee Muhammad Hady as such administrator in the District Court of Moulmein in 1891 in accordance with the provisions of the Probate and Administration Act.

7. That the said learned Judge erred in holding that the effect of the alleged handing over of title-deeds to Mirza Abdul Hussein, the first respondent, was to create a charge on Hajee Mohammad Hady's interest in the remaining assets of Yakoob Ally's estate in favour of Yakoob Ali and Aga Syed Abdul Hussein's charity.

8. That save and except the accounts directed by (*sic*) Hajee Mohammad Hady on account of charity, the said Judge erred in ordering the various other accounts and inquiries, to be taken as directed in his judgment and he should have come to the conclusion that an account of the trust fund of the said Yakoob Ally was not necessary inasmuch as in 1884 a sum of Rs. 1,64,600 was set apart by Hajee Muhammad Hady on account of Yakoob Ally's charity.

9. That the said Judge erred in adjudicating in this suit the alleged rights or the amount due to the charity of Aga Syed

Abdul Hoosain, and he erred in granting to the said charity the reliefs specified in his judgment.

Apart from the question of valuation and proper stamping of the plaint, it appears to me that the appellant is entitled to succeed on the 1st and 4th grounds, and that it is not necessary to deal with the other grounds except to say that the 7th ground must also prevail.

The 1st and 2nd plaintiffs filed a cross-objection that the learned Judge should have held that the whole of the Pazundaung property had been made *waqf*, but this is clearly unsustainable. It is quite plain on the evidence that neither the executor nor the subsequent administrator of Aga Syed Yakoob Ally's estate ever set apart the Pazundaung property as property appropriated solely to the charitable bequest in the Will. The suit was based on this having been done. It was not shown that it had been done, consequently the foundation of the suit disappeared. The title to the property has all along been and still is in the legal representative of Aga Syed Yakoob Ally, and he holds it for the unpaid heirs of the testator and for the charitable trust set out in the Will, if the bequest creating it is a valid and enforceable one. A direction for accounts in a suit in which the administrator of the estate is not made party as such administrator must necessarily be fruitless, and a settlement of a scheme for a charitable trust when possibly there may never be any property to which the scheme can apply is manifestly premature. The suit was, in my opinion, misconceived.

The first step to take, if the defendant Hady has not done what he should have done as administrator of the estate, is obviously to bring a suit against him as such administrator to have the estate properly administered. In such a suit the validity of the charitable bequest may be questioned, and if the decision in *Shahab-ud-Din* v. *Sohan Lal* (1) is followed, it may be held that such bequest is invalid and unenforceable. Its validity may also have to be considered in the light of the decision of their Lordships of the Privy Council in *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri* (2).

(1) 168 P. L. R. 1908; 75 P. R. 1907; 139 P. W. R. 1907.

(2) 22 C. 6:9; 22 I. A. 76.

It also appears to me extremely doubtful whether provisions in a Will such as those in Aga Syed Yakoob Ally's Will come within the purview of suits under section 92 of the Civil Procedure Code as trusts *for public purposes* of a charitable or religious nature.

The translation of the provisions of the Will dealing with the appliction of his estate to charity and religion is as follows:

"The 5th condition is that after payment of the two thousand rupees to my sister and before distribution of the legal shares of all, he should upon calculation set apart and keep one-third part of the estate, which is my own right (in the estate), and investing the same; in Company's papers he should hold the same afterwards, when convenient, he should buy lands, houses, bazars and so forth, either in the British territory or in Arabia, Persia, Khorasan or any other country whereever and whatever he may consider fit and advisable to buy and he should have the conveyance drawn and registry effected in such a way that the re-sale thereof be unlawful (difficult) and nobody (else) may be able to sell the same; he must not, however, purchase a ship or ships as I do not agree to his doing the same, and if at any time become aware that the country is bad (fasesl) and would be ruined, then it does not matter if he sell the same and with the consideration thereof purchase another property the income of which may be greater. The object of my urging this is that the one-third portion of mine which is my right is *hurram* to (not to be appropriated by) anybody though he is an heir (of mine) and whatever be the produce and income of the one-third portion of my property, out of that a house and *imambarah* will be purchased with a sum from eight to ten thousand rupees in one of the four holy places, namely, Najuf Ashruf, the sublime Karbula, the Ratunun and the holy place of Myrterdow, or he should lay the foundation of a *pucca* house for the residence of herself (the *wussy*) and all (my) heirs and whatever produce and income there be of the one-third of the estate he will divide the same into three parts, two-thirds of which must be added to the estate and again some desirable property will be purchased, and with another third he should defray the expenses of the said

imambarah, etc., during the days of Mohurrum and in all the seasons of the year and the holy days, by which is meant the performance of the Mohurrum festival (in commemoration) of the five venerable descendants of Ally and all the Imams who are guides to religion, and for giving food to the Syeds, *fakeers*, poor persons and others and that this laudable act should always be continued in perpetuity. If any one from amongst my children or their children be considered by him fit and worthy the *wussy* will employ him in the office of *mutuwally* after himself and they may be *mutsaddy* of these acts, and this practice will remain in force and continue from generation to generation to the end of the world. Every one of the *wussies* urge this matter on his derivative *wussy* that the *wussyship* may not go out of the hands of my descendants. If any one of my descendants at any time prove unfit or they become extinct then an *ameen* shall necessarily be appointed from amongst the persons who are not my descendants and thus the *wussyship* will devolve upon him, he also will apoint a *mutsaddy* for (the performance) of this act from amongst my descendants whom he may consider more trustworthy and make this *wussiat* that this practice may continue in this manner."

The 6th condition is this: "Whenever any of my descendants, be that a male or female, will arive at puberty (the *wussy*) will give him or her in marriage defraying the expenses thereof from his or her own legal share and will get ready (buy) for him or her a house, necessary articles and household furniture suitable to his or her rank and station (in life) and give him or her a small capital and the remainder of his or her legal share on his or her being twenty-one years of age agreeably to the injunction of maker of the law and the Imams who are the guides in religion and on whom be the blessing of God! but if he or she be unworthy, unfit and disqualified, the *wussy* will throw into (*i.e.* add to) the estate the remainder of his or her legal share in the inheritance and whatever may be the produce thereof the same shall be invariably given by the *wussy* for his or her subsistence in order that he or she may not be in distress, and whenever any of (my) descendants or descendants of descendants even without being a squanderer sustain a loss of a sudden, such as caused by fire, sinking under water, theft and so forth, then the *wussy* will certainly fix for or settle on him or her something out of the one-third part of my property in order that he or she may not be in distress and trouble."

It will be seen that the objects to which the income of property set apart under the bequest is to be devoted are left almost entirely to the discretion of the trustee for the time being of the property, and the Will contemplates that one of the testator's descendants should always be the trustee. Even if the provisions are valid and enforceable by the Court, it appears to me to be very questionable whether the Advocate-General or any two Mahomedans having obtained the Advocate-General's consent would be entitled to bring a suit under section 92 of the Civil Procedure Code to have a scheme settled for it, or to interfere in the other ways mentioned in the section. Even if the majority of the descendants of the creator of the *waqf* consented, as in this case, to a scheme being settled by the Court, it appears to me that the Court should pause before interfering in a matter which on the face of it is more of a private family matter than one of a public nature. It is not, however, necessary to come to a decision on these points.

I have already stated my reasons for thinking that the suit should be dismissed. It only remains to notice that it was argued that the suit lay, notwithstanding the finding that the Pazundaung property had not been dedicated under the Will, because one of the reliefs asked for was removal of the defendant Hady from the trusteeship.

A sufficient answer to this argument is that Hady was and is primarily administrator of the estate: as such he holds the property, and in such capacity he has to account for it. He could not be removed from such trusteeship in a suit to which he is not a party as such administrator.

I would dismiss the suit against all the parties and would award costs of the suit and of this appeal to the Official Assignee against

the plaintiffs, and would direct that the other parties bear their own costs of the suit and appeal.

The appointment of Receivers of the property will necessarily be revoked and cease on this decision, and the scheme settled will be set aside.

HARTNOLL, J.—I concur.

Appeal allowed.

BOMBAY HIGH COURT.
ORIGINAL SIDE CIVIL APPEAL NO. 27 OF 1914.
CIVIL SUIT NO. 572 OF 1914.
June 26, 1914.

Present:—Sir Dinshaw D. Davar, KT., Acting Chief Justice, and Mr. Justice Heaton.

CHAMPSEY BHIMJI & CO.,—DEFENDANTS—APPELLANTS

versus

THE JAMNA FLOUR MILLS COMPANY, LTD.,—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2—Mandatory injunction, whether can be granted on interlocutory application.

A Court has power to remedy an injury or wrong by a mandatory injunction on an interlocutory application. [p. 122, col. 2.]

FACTS appear from the following judgment of Macleod, J.—Plaintiffs are the lessees of certain premises for the unexpired period of a term of ninety-nine years from the 1st of April 1905 except the last eleven days thereof. The defendant lessors had covenanted to make and construct within one month from the date of the lease, and at their own expense keep and maintain, two *pacca* roads, each of the width of forty feet—the one leading from Mount Road to the premises leased to the plaintiffs and the other from the Rose Cottage Lane as shown in the plan annexed to the lease. The lessees were to have complete right of way and access thereon, for themselves and their agents and for carts, vehicles, etc., at all times and for all purposes.

The lessors in May last blocked up the road leading from the gate in the plaintiffs' premises to Rose Cottage Lane, as shown in the photographs exhibited in this motion. Plaintiffs now ask me to grant an injunction restraining the defendants from keeping any *debris* on the road and from raising the level thereof to a greater height than before, so as to prevent the plaintiffs from making use of it as before. It is quite clear from the affidavits in this case that the defendants have at present, in breach of their covenant prevented plaintiffs from having access to the road leading from the premises leased to the Rose Cottage Lane.

The defendants rely upon two grounds on which they object to the Court making any order. They *first* say that the plaintiffs have consented to the raising of the level road. They seem to rely upon a letter of the plaintiffs' secretary of the 19th March 1914. There is no justification in that letter for the defendants' contention. It runs thus:—

"We wish to draw your attention to the improvements being carried on in Rose Cottage Lane. We notice that this road will be raised considerably and will necessitate some alteration in the road leading from our Mill on to Rose Cottage Lane. The Mill-road is in a very bad state at present and we shall be obliged if you will arrange to repair it, and at the same time raise the level to that of Rose Cottage Lane.

"Unless this is done before the monsoon we are afraid we shall have great difficulty in getting loaded carts out of the mill compound."

There is no room for any doubt regarding the construction of this letter. No one in his senses could have thought that Mr. Ingham meant by that letter that the defendants might raise the level of their road throughout the length to the level of the Rose Cottage Lane, thereby entirely blocking the plaintiffs' means of access to that road unless the plaintiffs built a ramp on their own premises. That the defendants did not put this construction on that letter becomes quite clear when I turn to their letter of 2nd June, when they write therein, 'If you require any slope for your convenience and purposes you can do it inside the compound of the mill.' Defendants having blocked up the plaintiffs' means of egress by the southgate, calmly suggest that if the plaintiffs required any slope for their convenience inside the compound of their mill they might make it themselves. The evidence of defendants' witnesses that they

heard Mr. Ingham and other employees of the plaintiffs say that plaintiffs would make the slope inside the premises is an obvious fabrication. *Secondly*, the defendants contend that the Court has no power to make the order granting direct relief pending the hearing of the action. I do not think that so wide a limitation of the power of the Court exists. There must be an injunction restraining the defendants from further raising the level of the road, but I have no doubt that this Court has power to grant also an injunctson restraining the defendants from keeping the road at its present level so as to prevent the plaintiffs from making use of the road for taking their carts out through the south gate. Cases in which the Court will make what is in effect a mandatory order on an interlocutory application may be rare, but the Court has, in my opinion, power to make such an order before the suit is heard. It does not make much difference whether the order is made under Order XXXIX, rule 2, or under section 151. It cannot be that, when one party to a contract of lease has covenanted to allow certain means of ingress and egress, the Court should have nopower to interfere, before the action is heard, to prevent the first party from breaking his covenant. If the defendants'c ontention were correct, they might block up both the gates so as to confine the plaintiffs to their premises until the suit has been decided.

The injunction will go in this form:—The defendants until the hearing of this suit are restrained from obstructing the plaintiffs' right of way and access to the road leading from their south gate to the Rose Cottage Lane."

Mr. *Setalvad* (with him Mr. *Desai*), for the Defendants-Appellants.

Mr. *Jardine*, acting Advocate-General, for the Plaintiffs-Respondents.

JUDGMENT.

DAVAR, ACTING C. J.—In this appeal we do not think it necessary to trouble the learned Advocate-General to reply on behalf of the plaintiffs. The two grounds urged before us in support of the appeal are, *firstly*, that this Court has no power to make an order of a mandatory nature on an interlocutory application, and *secondly*, on the merits that this order should not have been made.

Having regard to the very clear wording of Order XXXIX, rule 2, and to the fact that this Court has always exercised the power of remedying an injury or wrong by a mandatory injunction on an interlocutory application, I have no doubt whatever that this Court has power to make a mandatory order on an interlocutory application. If the Court had no such power it would be in the power of a party to cause insufferable inconvenience and grave injury to another during the whole time that would elapse between the commission of the wrongful act and the hearing of the suit filed to remedy the wrong and redress the injury.

Then as to the merits, it is desirable to say as little as possible as the whole matter remains to be investigated before Mr. Justice Macleod on the 6th of July. It would be sufficient for us to say that an order on an application of this kind is purely within the discretion of the learned Judge who hears the application.

We have had read to us all the affidavits filed on this application and are not prepared to say that the discretion of the learned Judge was not in this instance exercised soundly and properly, and under the circumstances we see no reason whatever to interfere with the order made by the learned Judge.

As to expediting the suit, the learned Counsel for the respondents says that he agreed only on condition that an injunction was not granted. The regulation of the hearing of suits is entirely within the power of the Chamber Judge or the Judge to whom the suit is assigned for interlocutory applications, and the learned Judge in the Court below was entitled to make this order for an early hearing, quite independently of the parties' consent.

HEATON, J.—I only wish to add that whatever view may be taken of the general question of mandatory injunctions under Order XXXIX, rule 2, I think this injunction must be maintained. It is in form a restraining injunction and though in effect it may require the defendant to undo some part of that which he has already done, I do not think its effect is such as to pass outside the kind of relief which, I believe, is intended

to be given by rule 2 of Order XXXIX. I speak having regard to the particular facts of this particular case.

Appeal dismissed with costs, including costs of the application of the 23rd June 1914.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 354 OF 1913 WITH RULE NO. 796 OF 1913.

January 13, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

SURJAMULL AGARWALA—PLAINTIFF—APPELLANT

versus

RAM CHANDRA MISTRY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 52, scope of—Attachment—Application for formal attachment under O. XXI, r. 52—Previous attachment, effect on.

Order XXI, rule 52, is not restricted only to cases in which the property sought to be attached is in the custody of a Court other than that executing the decree but also provides for attachment where the property is in the custody of the same Court. [p. 125, col. 2.]

Where the property to be attached is in the custody of any Court, the attachment in the words of Order XXI, rule 52, shall be made by a notice to such Court that such property may be held subject to the further order of the Court. [p. 126, col. 1.]

Harsukh v. *Maghraj*, 2 A. 345, distinguished.

If there was an attachment, the mere fact that the respondent by way of abundant caution prayed for formal attachment in strict compliance with the terms of Order XXI, rule 52, would not take away the effect of the attachment already made. [p. 126, col. 2.]

Appeal from an order of the Sub-Judge of Pabna and Bogra, dated the 16th April 1913.

Babus *Provash Chandra Mitter* and *Susil Madhab Mullick*, for the Appellant.

Mr. *C. R. Das* and Babu *Hiralal Chakravarti*, for the Respondents.

JUDGMENT.—By an indenture of mortgage, dated the 24th January 1910 and made between Shyamlal Chatterjee of the one part and the respondents to this appeal, Ram Chandra Mistry and others (hereinafter called the mortgagees) of the other part, Shyamlal Chatterjee, in consideration of a previous advance of Rs. 5,178-11-9 made to him by the mortgagees and of further advances to be made to him by them upto Rs. 20,000 (including the said sum of Rs. 5,178-11-9), mortgaged by way of floating charge his beneficial interest in the trade or business of contractor of stone collections, petty contracts and all and every kind of contract works undertaken by him and carried on at Jainti and elsewhere under the Quarrying Division, Lower Ganges Bridge, or wherever the trade or business might be carried on thereafter either under the Quarrying Division, Lower Ganges Bridge, or under any one else who employed him, and also all books and other debts then due or thereafter to become due and owing to him on account of the said trade or business either from the Quarrying Division, Lower Ganges Bridge, or from any other source, including all cheques, cash, etc., that he might receive or become entitled to in connection with his said work or business of a contractor that were then existing or which might thereafter be secured by him and all contracts and agreements, benefits and advantages, that had been or might thereafter be entered into with him or which he might or could be entitled on account or in respect of the said trade or business and also all stock in trade, materials, goods, fixtures, etc., present or future, in connection with the contract business. The indenture contained a provision for the payment of interest on all sums advanced or to be advanced at the rate of Rs. 12 per cent. per annum with half-yearly rests and also a provision that Shyamlal Chatterjee would not without the mortgagees' consent in writing charge, hypothecate or mortgage the mortgaged premises.

The mortgage was presented for registration at Darjeeling on the 26th January 1910 and was registered there on the 2nd February 1910.

Subsquently by an indenture, dated the 22nd November 1910 and made between Shyamlal Chatterjee of the one part and Surjamull, the present appellant, of the other part, after reciting that Surjamull had already advanced money to Shyamlal Chatterjee to the extent of about rupees 8,000 and that Surajmull had agreed to make from time to time further advances not exceeding, with the sum already advanced,

Rs. 20,000 at any one time which Shyamlal Chatterjee agreed to re-pay with interest at the rate of Rs. 36 per cent. per annum, and that Shyamlal Chatterjee would execute a power of attorney in favour of Surajmull authorising him to receive all monies which should from time to time be payable to Shyamlal Chatterjee by or from the Eastern Bengal State Railway in respect of the work done by Shyamlal Chatterjee in terms of the contract already secured or to be secured in connection with the left or right bank of the Lower Ganges Bridge and would get the power of attorney registered with the Eastern Bengal State Railway authorities, Shyamlal Chatterjee covenanted with Surajmull to re-pay the sums already advanced with interest at the rate of Rs. 36 per cent. per annum and not to draw or receive from the Eastern Bengal State Railway authorities any money payable in respect of the said work until the advance and interest were re-paid and not to revoke the power of attorney.

Shyamlal Chatterjee executed power-of-attorney on the same day in favour of Surajmull, nominating Surajmull his attorney to apply for payment and to receive all sums of money due and payable to Shyamlal Chatterjee from the Eastern Bengal State Railway authorities in respect of any bill or bills of Shyamlal Chatterjee in connection with any work done or to be done by Shyamlal Chatterjee under any contract or contracts already secured or to be secured by him and to give proper receipt for the same. It does not appear that this power of attorney was ever registered with the Railway Company.

On the 9th March 1912, the mortgagees, under the indenture of the 24th January 1910, recovered judgment against the representatives of the estate of Shyamlal Chatterjee in the Court of the Subordinate Judge at Darjeeling for Rs. 34,388-15-9 and costs, and a declaration of lien was made in their favour over the property covered by the mortgage to the extent of Rs. 20,000. The appellant was made a party to the suit but was subsequently dismissed therefrom, the Judge agreeing with the contention put forward on his behalf that he was not a necessary party and stating that if the appellant had any claim to the property covered by the deed of hypothecation he could put it forward in the execution proceedings.

On the 15th May 1912, an order was made by the Subordinate Judge of Pabna in the respondents' suit directing the registration and attachment of the money due to the estate of Shyamlal Chatterjee from the Executive Engineer of the Left Bank Division, Paksey and Quarries Division, Lower Ganges Bridge, Paksey, for the work done at Jainti, and on the 28th May 1912, a letter was written by the Subordinate Judge of Pabna to the Examiner of Accounts, Lower Ganges Bridge, Paksey, stating that the sum of Rs. 4,000 and other money bills due to the heirs of Shyamlal Chatterjee for the works scheduled to the letter were attached by the Court at the instance of the respondents and requesting the Examiner to hold the moneys as per bills or otherwise under attachment until further order of the Court. The appellant on the 28th January 1911 instituted a suit for recovery of the moneys due under the indenture of the 22nd November 1910 and applied for attachment, the order for which was made absolute on the 5th April 1911, and on the 22nd May 1912 the appellant obtained a decree against the heirs of Shyamlal Chatterjee for Rs 12,771-5-3 and costs and on the 23rd May 1912, an order was made in the suit for the registration and attachment of the bills payable to Shyamlal Chatterjee's estate in the office of the Executive Engineer, Left Bank, and Quarry Division, Lower Ganges Bridge, Paksey, and on the 30th May 1912 and 1st June 1912, the Officiating Subordinate Judge of Pabna wrote two letters to the Executive Engineer, Quarry Division, Lower Ganges Bridge, Paksey, requesting that two sums of Rs. 4006-8-10 and Rs. 9,970-12-8 be sent to the Court for payment to the appellant. The Examiner of Accounts on the 12th-13th June 1912 sent Rs. 12,284-5-4 in payment of the amounts referred to in the letters of the 30th May 1912 to the Subordinate Judge of Pabna, but on the 20th June 1912 an order was made that the appellant was not to receive any payment of the money pending the disposal

S. N. DAR, B. A. LL. B.
Yuni High Court,
SRINAGAR (Kashmir)

of the respondents' application for rateable distribution.

The two execution cases eventually came on for hearing together before the Subordinate Judge of Pabna, the respondents asking that the question of title and priority in respect of the money in Court should be decided under Order XXI, rule 52, Civil Procedure Code, and that a declaration should be made in their favour that the appellant's right to the money in Court was subject to the charge created in favour of the respondents by the indenture of the 24th January 1910 and the decree of the 9th March 1912 of the Darjeeling Court, and in the alternative they asked for rateable distribution under section 73 of the Code of Civil Procedure. The appellant contended that Order XXI, rule 52, did not apply and that the executing Court could not decide the question of priority between rival decree-holders except under section 73 of the Code of Civil Procedure and that the respondents had no lien on the money and had abandoned their position as charge-holders. The Subordinate Judge decided against the appellant's contentions and found that the respondents had established their lien on the whole of the money in Court. The appellant now appeals agains this decision on the following grounds:—(1) That Order XXI, rule 52, is not applicable as it only applies when the money is in some other Court than that in which the order for attachment is made, the object of the rule being to prevent a conflict of jurisdiction between two Courts and not to attach property, and that the proper section to proceed under in a case like the present is section 73 of the Civil Procedure Code; (2) that even if the order is applicable, it is only applicable to a case in which the money is in the custody of the Court before the application for attachment is made and that it does not apply to cases like the present where the money did not come into Court until after the application for attachment was made, and when if in fact any attachment was made the money was not then in Court; (3) that there never was in fact any attachment by the respondents after the money came into Court and that the Court accordingly could not decide the question of priority; (4) that the decree of the respondents was not executed as a mortgage-decree and is in fact only a money decree, and we were referred to the case of *Harsukh* v. *Meghraj* (1). The decree was further attacked on the ground that it contained no direction for sale and that it is too vague to be enforced, as it does not specify the property to be included.

With regard to the first contention, in our opinion, Order XXI, rule 52, is clearly applicable to a case like the present and we see no reason to narrow the words of the rule so as to make it applicable only to a case in which the property sought to be attached is in the custody of a Court other than that executing the decree, and there is no other section in the Act providing for attachment where the property is in custody of the same Court. Order XXI, rule 46 excepts property deposited in or in the custody of any Court from the operation of the rule and section 73 relates to rateable distribution.

This really disposes of the appeal, but as the other contentions were argued in considerable detail before us and as we are asked to exercise our revisional jurisdiction under section 115 of the Code of Civil Procedure, we have considered them and embody our conclusions in this judgment.

With regard to the second and third grounds, the facts appear to be these. The respondent in his application, dated the 16th May 1912 for execution of his decree, prayed for attachment and sale of the properties of the judgment-debtor, and the Court ordered that the money due to the judgment-debtor from the Executive Engineer might be attached. There is on the record the draft of a letter from the Court to the Examiner of Accounts, informing him that the moneys and bills due to the judgment-debtor in his hands were attached by the Court, and requesting him to hold the moneys as per bills or otherwise, under attachment until further orders of the Court. It is said that there is nothing to show that the letter was actually sent. But in the respondent's application, dated the 15th June to the Court, he stated that *rubakar* of attachment had been sent. The Court ordered the petition to be put up in the presence of the Pleaders of both parties on the 17th June, and we do not find any exception taken to the said statement in the

(1) 2 A. 345 at p. 347.

petition, either by the Court or by the appellant, which indicates that the statement was correct. The said attachment, however, related to the monies in the hands of the Engineer. They had not then come into Court. The cheques arrived in Court on the 13th June 1912 in pursuance of the Court's order on the application of the appellant. On the 15th June the respondents presented two petitions to the Court, by one of which he complained that the appellant was trying to take out, in disobedience of the Court's order, the monies and bills and praying that they might be kept under attachment and that a *rubakar* might be sent soon, and by the other petition he prayed that the cheques which had arrived in Court that day and which the appellant was trying to take out, might be kept under attachment by an order under a *rubakar* of the Court and that the same might not be made over to the appellant. He also prayed for criminal prosecution of certain persons for disobedience of the Court's order passed in his execution case. The Court thereupon made the following order:—"On the application of the decree-holder for withholding the payment of money to Surajmull Agarwala, decree-holder, in Execution Case No. 84 of 1912. Let the prayer be allowed," and it appears from the order-sheet in Execution Case No. 84 of 1912 that the appellant was directed not to receive any payment of money deposited into the treasury unless and until the application of the respondent (erroneously described in the order as an application for rateable distribution) was disposed of. It is true the order-sheet merely mentioned the prayer for withholding the money, but we think the order virtually amounted to an attachment. There is no doubt that the respondent did apply for attachment of the money in the custody of the Court, and though there was not the formal order that the money be attached (that being the ground for the appellant's contention that there was no attachment), the Court ordered the money to be held subject to the orders of the Court. Now, where the property to be attached, is in the custody of any Court, the attachment, in the words of Order XXI, rule 52, shall be made by a notice to such Court that such property may be held subject to the further order of the Court, and this was what was done.

On the 4th January 1913, the Subordinate Judge directed the respondent to put in a petition within two weeks stating the section of the Code under which he could set up a miscellaneous case making the decree-holder in the other execution case as opposite party and try the matter in controversy between them in a regular way, as he was unable to find from the records in the two execution cases "a regular petition of claim to or objection to the payment of money brought under attachment," and that "till then the money under attachment will be held as it is." The respondent accordingly on the 11th January 1913 made an application praying that a formal order of attachment in strict literal compliance with the provisions of Order XXI, rule 52, might be made, but he asserted that the application for attachment of the money in Court which was made on the 15th June 1912, had been granted by the Court and that attachment was in effect made, but that in order to obviate any objections that thereafter might be raised, he applied for a formal order of attachment under Order XXI, rule 52.

On the 26th April the respondent applied for amendment of his application for execution of decree. These petitions were rejected on the 10th May 1913 and on the 16th May 1913, the Court decided the case in favour of the respondent. The appellant relies upon these petitions and the order rejecting them, and upon the fact that respondent's Counsel pressed for the said amendment and for the attachment of the amount in Court, as showing that no attachment was effected at all. It seems to us, however, that the Court in rejecting the petitions considered them to be unnecessary. In any case if there was an attachment, as we think there was, effected on the 17th June 1912, the mere fact that the respondent by way of abundant caution prayed for formal attachment in strict compliance with the terms of Order XXI, rule 52, would not take away the effect of the attachment already made. The order of the 4th January that "till then the money under attachment will be held as it is," shows that the Court also thought that the money was under attachment.

We are accordingly of opinion that there was also an attachment of the money after it came into the custody of the Court.

With regard to the fourth ground urged by

the appellant and the form of the decree, we do not see that there was any necessity to direct an account of what was due to the respondents in respect of their mortgage, as the amount due was found by the judgment and is stated in the decree and the property charged is sufficiently identified in the decree and in fact it was not seriously disputed before us that the money in Court was covered by the respondents' charge. With regard to the contention of the appellant that the decree is faulty in form as it contains no order for sale, of course the decree-holder is responsible for getting a decree in such a form that he can enforce it, but we see no difficulty here in the respondents' way on this account As they have a decree declaring a charge on certain sums of money and other things and as there is now in Court a sum of money which, as above stated, is clearly covered by their charge, we see no reason why once the priority of the charge is established (as in fact has been done) they should not receive payment of this sum. We know of no authority that debars us from so holding on the ground that the mortgage-decree in a case like the present must be in a particular form. With regard to the case of *Harsukh* v. *Meghraj* (1), it does not appear from the report what property was there charged, but the case of *Muluk Fugueer Bakhsh* v. *Manohur Das* (2), which was referred to and which is stated in the head-note to have been followed, was a case of a charge upon immoveable property, when different considerations apply; accordingly if the property charged in *Harsukh* v. *Meghraj* (1) was immoveable property, the decision is not applicable to the present case, but in any case the decree in that case did not as here contain a reference to the property covered by the deed of hypothecation, which is sufficient to distinguish it from the present case. The other cases quoted to us depend on the particular circumstances of the case and do not cover the present case.

There remains for consideration the question of priorities. In the present case neither party seems to have thought fit to perfect their charge by giving notice to the persons who were to make the payments to their mortgagor and accordingly apart from any question of notice the respondents' charge which is prior in date must prevail. The District Judge, moreover, has fixed the appellants with notice and although in our view this is not clearly established, it is difficult to believe in view of the rate of interest charged that the appellants did not know of the respondents' charge.

The appeal accordingly fails and must be dismissed with costs, 10 gold *mohurs*.

No order will be made upon the Rule which will be dismissed.

Appeal dismissed.

(2) (1870) 2 N. W. P. H. C. R. 29.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 147 OF 1912.

June 18, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

VENIDAS NARANDAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAI HARI—DEFENDANT—RESPONDENT.

Bhagdari and Narwadari Act (Bom. Act V of 1862), s. 3—Permanent tenant of lands in a Bhag—*Alienation by tenant of his share, whether permissible—Collector, whether can set aside alienation.*

Where rights are found to have existed before the Bhagdari and Narwadari Act, in persons not themselves *bhagdars* or *narwadars* but the *locus* of whose rights falls within what are called the *Bhags* or shares in the *bhagdari* and *narwadari* village, these rights are not any portion of such *Bhags* or shares of *bhagdari* or *narwadari* village etc., within the meaning of section 3 of the Bhagdari and Narwadari Act and the prohibitions against alienation contained therein do not apply. [p. 128, col. 2.]

Where, therefore, a permanent tenant of lands in a *bhag* before the passing of the Act, sold in 1907 his interest in the lands to the plaintiffs, but the sale was set aside by the Collector who put the defendant (the owner of the entire *bhag*) in possession in a suit to recover possession:

Held, (1) that the alienation by the permanent tenant was not prohibited by section 3 of the Act and was not null and void [p. 129, col. 1]; and

(2) that the Collector was wrong in removing the plaintiffs and putting the defendants in possession. [p. 129, col. 1.]

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 208 of 1910, confirming the decree passed by the Subordinate Judge of Umreth, in Civil Suit No. 484 of 1909.

Mr. *G. K. Parekh*, for the Appellants.

Mr. *G. N. Thakor*, for the Respondent.

VENIDAS NARANDAS v. BAI HARI.

JUDGMENT.

BEAMAN, J.—One Sakhidas, claiming to be a permanent tenant of lands in a *bhag*, sold his permanent tenancy right to the plaintiffs. The Collector, after the death of Sakhidas, intervened under section 3 of Bombay Act V of 1862, removed the plaintiffs, and placed the *bhagdar*, now defendant, in possession The plaintiffs then brought this suit and the Courts below decided against them.

On second appeal a Bench of this Court consisting of Scott, C. J., and Chandavarkar, J., remanded three issues to the lower Appellate Court. The first two are interesting, because they indicate clearly enough that at that time the learned Judges were disposed to think that if permanent tenants existed in these *bhagdari* and *narwadari* tenures, their rights of alienation could only be restricted by custom. It might be difficult to reconcile that opinion with another decision given by Scott, C. J., and Batchelor, J., in *Jijibhai* v. *Nagji* (1), but for the purposes of this judgment it will be sufficient, I think, to confine that case to its own facts, bearing in mind particularly the course of this litigation.

These three issues having been found upon by the lower Appellate Court, the first two virtually in favour of the present plaintiffs-appellants, the case came on a second time before Scott, C. J., and Batchelor, J. Those learned Judges again remanded two issues to the lower Appellate Court because in the then state of the record it did not appear that it had either been found on the evidence or admitted that the plaintiffs' vendor was a permanent tenant. The lower Appellate Court has found on the two issues so remanded that the plaintiffs' vendor was a permanent tenant, and that the permanent tenancy dated back to a time prior to the passing of the bhagdari Act of 1862. This is clearly a finding of fact, and the decision of the case must be based upon the vendor of the plaintiffs having been a permanent tenant of the land within a *bhag* before the enactment of 1862. Having regard to the policy of that Act expressed in the preamble, and to the general reason of its provisions in respect of alienations, we think that it is not necessary to give an absolutely literal and verbal interpretation to the very sweeping language of section 3. But even were that necessary, we should still with some confidence hold that on the facts found a permanent tenancy precedent to the passing of the Act of 1862 was a right in the permanent tenant not described in section 3 by the words "any portion of a *bhag* or share, etc." As we understand that section, its intention was to preserve a certain tenure, called the *bhagdari* or *narwadari* tenure, and the status of persons enjoying that tenure and the means devised by the legislature were clearly intended to prevent the dismemberment of lands belonging to such privileged classes under that tenure. But we think that it cannot be said that the mere geographical position of the lands held in permanent tenancy before the passing of that Act necessarily prevents alienations of such tenancies within either the verbal definition or the spirit of section 3. If the learned Judges who first remanded this case were right in contemplating at least the possibility of an existing permanent tenancy, should such be found, being alienable, unless restricted by custom, notwithstanding the provisions of section 3, then there would be no difficulty whatever in holding after the findings of fact on the second remand that the plaintiffs' vendor was such a permanent tenant before 1862, and that no custom has been proved restricting his right of alienation. The principle to which we seek to give effect, although it may be difficult to reconcile with the single decision I have referred to in *Jijibhai* v. *Nagji* (1), is at least intelligible, simple and capable of uniform application, and that is, that where rights are found to have existed before the Bhagdari Act, in persons not themselves *bhagdars* or *narwadars*, but the *locus* of whose rights fell within what are called the *Bhags* or shares in the *bhagdari* and *narwadari* village, those rights never were "any portion of such *bhags* or shares of *bhagdari* or *narwadari* village etc." within the meaning of section 3, and, therefore, it will follow naturally that the prohibitions against alienations contained in section 3 would have no applicability to the

(1) 3 Ind. Cas. 761; 11 Bom. L. R. 693.

class of cases we are describing. It appears to us that this is clearly such a case, and, therefore, that the alienation by the permanent tenant to the present plaintiffs was not prohibited under section 3, was not null and void, and, therefore, the Collector was wrong in removing the plaintiffs.

For these reasons we think that the plaintiffs' claim, including mesne profits, to be determined in execution, must be decreed with all costs.

HAYWARD, J.—I entirely concur. It appears to me that the permanent tenancy was a good alienation inasmuch as it took effect before the passing of the Bhagdari Act (Bom. Act V of 1862). The permanent tenancy so created thereupon ceased to be any portion of the *bhag*. It became independent property carved out of what was previously the *bhag*. The only rights left were the rights to receive rent from the permanent tenant. That was the only interest left in the *bhag*. No custom has been shown limiting in any way the right of alienation of a permanent tenant and there would ordinarily be nothing to prevent a permanent tenant giving full rights to his alienee, notwithstanding the fact that on failure of his own heirs there might, in default of alienation, have been a reversion to the *bhagdar*. The only property rendered inalienable was the right already referred to of receiving rent from the permanent tenant which remained vested in the *bhagdar*. That and that alone could properly be held to come within the definition of "portion of a *bhag*" and to have been rendered inalienable by the subsequent passing of the Bhagdari Act of 1862.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1499 OF 1913.

January 18, 1915.

Present:—Mr. Justice Piggott.

Musammat DULARI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

LAL BAHADUR SINGH—DEFENDANT—RESPONDENT.

Mortgage—Redemption not allowed before 59 years—No clog on equity of redemption.

Where a mortgage-deed ensured to the mortgagee possession for 59 years before the mortgagor was entitled to redeem:

Held, that the mortgage could not be redeemed before the expiration of that period. [p. 130, col. 1.]

Second appeal from the decision of the District Judge of Benares, dated the 18th August 1913.

Mr. *Harnandan Prasad*, for the Appellants.

Dr. *J. N. Sen*, for the Respondent.

JUDGMENT.—This was a suit for redemption of a usufructuary mortgage, dated March 14th, 1898. The suit was instituted on the 19th of July 1912. It has been dismissed by the District Judge, on the ground that it was premature as the terms of the deed provided for redemption only after the expiration of a period of 59 years. The first point taken in appeal is that the plaintiffs were entitled to redeem before the expiry of the term, because the defendant had himself broken an important stipulation in the contract by neglecting to pay the sum of Rs. 75 due to one Batore, who was a usufructuary mortgagee of a portion of the land in suit. This plea was not very clearly taken in the memorandum of appeal, but it was based in argument on the case of *Chhatku Rai* v. *Baldeo Shukul* (1). I so far accepted this contention as to remand two issues to the Court below in regard to the position of Batore and to the paying off of his prior mortgage. The findings returned dispose of the appellants' contention on this point, as it was found that Batore was in possession as mortgagee until he was redeemed by the defendant in accordance with the stipulation in the deed now in suit. The second plea raised is that the deed in suit does not in terms preclude redemption prior to the expiration of the period of 59 years. I have read the deed. It appears to me to be so drafted as to ensure to the mortgagee possession for 59 years before the mortgagor is entitled to redeem. The third plea taken is that it lay on the defendant to prove that the transaction was fair and *bona fide*. According to the pleadings in the Court of first instance it was alleged that the original mortgagor, *Musammat* Nanka, was induced to sign the deed in suit fraudulently in ignorance of the fact that the term of 59 years was entered within which the mortgage could not be redeemed. The District Judge

(1) 17 Ind. Cas. 340; 10 A. L. J. 330; 34 A. 659

has found that the executant of the deed was not a *pardanashin* lady and he refers to the fact that she appeared personally before the Sub-Registrar at the time when the deed was registered. In argument before me stress has been laid on the fact that the mortgagor was a tenant of the mortgagee. It was not the plaintiffs' case that the mortgagor did understand the stipulation in the deed which allowed the mortgagee possession for a period of 59 years, but that her assent to the same was induced by undue influence. This case, therefore, cannot be brought within the terms of section 16 of the Indian Contract Act, IX of 1872; nor should I be prepared to hold that the relations between tenants-at-fixed-rates and *zemindars* in the eastern districts of these provinces are presumably such that the latter are in a position to dominate the will of the former. Evidence was given in the case both by the mortgagor and by the mortgagee, and in view of the finding of the lower Appellate Court against the plea of fraud set up in the plaint, I do not think the plaintiff can claim to have the stipulation postponing redemption for a period of 59 years set aside, merely on the argument that it appears under the circumstances somewhat onerous. This appeal, therefore, fails and I dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 527 OF 1913.

June 29, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

NARANDAS VRIJBHUKHANDAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

BAI SARASWATI—PLAINTIFFS NOS. 1 AND 2—RESPONDENTS.

Will—Legatee not in existence at death of testator—Construction—Intention—Life-estate to daughter—Gift over to cousins failing male issue to daughter.

In construing Wills the Courts must look at and give effect to the intention of the testator. [p. 131, col. 2.]

Where a Will gave first a life-estate to the testator's widow and on her death a life-estate to his daughter and further provided that in the event of the daughter having a male child he was to take the whole estate of the testator on attaining the age of 18 and that the testator's cousins, who were appointed general executors of the Will and also trustees for the minor son of the testator's daughter, were to get the estate absolutely should the daughter die without male issue:

Held, that the dominant intention of the testator after providing a suitable life-estate for his widow was to give the whole of his property to his grandson and in the event of that being defeated, his intention was to retain the estate in his own family, and, therefore, the daughter could not get the estate absolutely. [p. 131, col. 2.]

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 560 of 1911, confirming the decree passed by the Additional Joint Subordinate Judge at Ahmedabad, in Civil Suit No. 414 of 1909.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *M. K. Mehta*, for Respondents Nos. 1 and 2.

JUDGMENT.—In this suit the plaintiff, Bai Saraswati, daughter of the testator, Mahasukhram, sued on behalf of herself and her minor son for the construction of a Will. It has been contended on behalf of the appellants, the cousins of the deceased testator, that the minor has not been properly represented in this litigation since his interests are manifestly in conflict with those of his natural mother, Saraswati. In the view we take, however, we think that it is impossible that the minor could be prejudiced. It has not been contended here, and we think that it could not be contended, that upon any construction of the Will the minor would obtain any portion of the estate, nor is he under the Hindu Law an heir to the deceased in the event of there being an intestacy. The minor, therefore, has clearly no real interest in this suit. The contest lies between Saraswati, who in the event of an intestacy would take the whole estate, and the cousins of the deceased Mahasukhram, who are the appellants here.

Both the lower Courts have found that upon a proper construction of the Will there is an intestacy, and that the daughter Saraswati is, therefore, entitled to the whole estate. We think the learned Judges below were in error. The Will is the work of an inexpert layman, and it would be unreasonable to look for too great technical accuracy in its composition. But reading it

as a whole we can feel no doubt as to the general scheme of the Will and what the real desire and intention of the testator were. Briefly the Will provides first a life estate for his widow, Parvati. She has since died. Next the Will provides that on the death of Parvati, his daughter Saraswati should have a life-estate of Rs. 150 and the rent of a house. In the event of his daughter Saraswati having male children or a male child, that male child (or possibly male children, if there should be more than one) is or are to take the whole estate of the testator on attaining the age of 18, and then bearing a good character. Presumably, if Saraswati should then have been surviving, the testator's intention was that her sons should provide for her, as no provision appears in the Will for the continuance of her maintenance after her male issue should have attained the age of eighteen years and at that time borne a good character. The appellants' cousins or, as they are called in this Will sometimes, brothers of the deceased testator, are the general executors of the Will and trustees of the life-estates provided in the Will, and also trustees for the minor male son or sons of Saraswati until they should attain the age of 18. Then follows a clause which has given rise to the main contest in this suit, and that is, that should Saraswati have no male issue then on her death, that is to say, on the termination of her life-estate, the whole of the testator's estate is to go to the appellants, his cousins, absolutely.

Now Saraswati bore no male child during the life-time of the testator. The intended bequest, therefore, to her male issue, should she have any, fails under the rule in the *Thgore* case: *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore* (1). After the death of the testator she has had male issue, and her son, the minor in this suit, still lives. It has, therefore, been contended, and that contention has prevailed in both the Courts below, that by reason of the apparent condition, namely, should Saraswati have no sons (that condition not having been fulfilled) the appellants cannot take after the death of Saraswati, and since the intended bequest to the son actually in existence cannot take effect either, there is an intestacy. We are entirely unable to accede to this contention. What we are to look at and, if we are able to ascertain, give effect to, is the intention of the testator. In doing so, we must be governed by general principles such as are to be found stated in cases like that of *Jones* v. *Westcomb* (2) and many others in the English Law Reports. Now here it is perfectly clear that the dominant intention of the testator, after providing a suitable life estate for his widow, was to give the whole of his property to his grandson. That intention has unhappily been defeated as no grandson was alive at the date of his death. Failing this it is equally clear that his dominant intention was to retain his estate in his own family, that is to say, in the hands of the appellants, his cousins. To the best of his ability he appears to us to have carefully guarded against the effect of there being an intestacy, namely, his estate passing absolutely into the hands of his daughter Saraswati.

Nor do we think that so literal and strict a construction ought to be put on the condition annexed to the appellants' taking the estate after the death of Saraswati. That this could not have been the testator's intention is perfectly clear from other clauses in the Will. Thus he expressly annexed a condition in the event of his grandson taking the estate that the boy shall attain the age of 18 and shall be of good character. Clearly then if the Will is to have any meaning he must have contemplated the possibility of his grandson, should any such have been in existence at his death, not attaining the age of 18 or not being of good character at that time, and in either event, although this is not actually expressed, it would be equally clear that he meant the appellants to take the estate after the death of Saraswati precisely as though no son had been born to her. In our opinion, therefore, it would clearly defeat the intention of the testator, were we to adopt the view that in the events which have happened there has been an intestacy and so give the whole estate to Saraswati. As between her and appellants it is clear beyond all possibility of

(1) 9 B. L. R. 377; 18 W. R. 359; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85.

(2) (1711) 1 Eq. Cas. Abr. 245; Prce. Ch. 316; Gilb. Eq. R. 74; 21 E. R. 1022.

argument that the testator preferred the appellants, and desired that they should take the whole estate after having provided a suitable maintenance for Saraswati during her life-time, nor can we find anything upon a reasonable construction of the Will as it stands, in the events which have happened, to preclude us from giving effect to that intention. In our opinion, therefore, the decree of the lower Appellate Court must be reversed, and it must now be declared that Saraswati is entitled to the life-estate reserved to her upon the condition stated in the Will, and that thereafter the appellants are entitled to take the whole estate. All costs to come out of the estate.

Appeal accepted.

ALLAHABAD HIGH COURT.
CIVIL REVISION PETITION No. 136 OF 1914.
January 8, 1915.
Present:—Mr. Justice Rafique.
CHHAJJU—DEFENDANT—APPLICANT
versus
AYUB AHMAD—PLAINTIFF—OPPOSITE PARTY.

Appeal—Appellate Court acting on report of Thumb Impression Bureau—Illegality—Evidence.

In a suit on a promissory note an Appellate Court, not making up its mind to believe the witnesses of either party, sent the document which was the subject-matter of dispute to the Thumb Impression Bureau and on the receipt of the report of the said bureau proceeded to decide the appeal:

Held, that the procedure adopted by the Court was unwarranted by law.

Civil revision against the decree of the District Judge of Meerut, dated the 16th May 1914.

Mr. *S. D. Sinha*, for the Applicant.

Mr. *M. L. Agarwala*, for the Opposite Party.

JUDGMENT.—This is an application in revision from the decree of the Additional Judge of Meerut. It appears that the opposite party sued in the Court of the Munsif of Muzaffarnagar on the basis of a pro-note and the applicant denied the execution of the said pro-note. Both parties gave evidence and the Munsif disbelieving the evidence of the plaintiff-opposite party dismissed his claim. On appeal the learned Additional Judge could not make up his mind as to which of the two sets of witnesses were to be believed. After hearing the argument in the appeal he sent the pro-note to the Thumb Impression Bureau at Allahabad and on receipt of the report of the said bureau he accepted the appeal. It is said on behalf of the defendant-applicant that the procedure adopted by the learned Judge was unwarranted by law. I think that the contention for the applicant is correct. The learned Judge, if he wanted to take additional evidence, should have done so according to law. The decree of the lower Appellate Court is set aside. The learned Judge will dispose of the appeal according to law. Costs of this application are allowed to the applicant.

Decree set aside.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 548 OF 1912.
June 30, 1914.
Present:—Mr. Justice Beaman and Mr. Justice Hayward.
Sayad MIR GAZI *Sayad* KUTBUDIN—PLAINTIFF—APPELLANT
versus
MIA ALI *Maulvi* ABDUL KADIR—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (2) (v)—Agreement by vendee to re-convey, whether compulsorily registrable.

An agreement by which a vendee undertakes to re-convey the property to his vendor when called upon to do so, is nothing more than an ordinary agreement to sell and is not compulsorily registrable. [p. 133, col. 1.]

Second appeal from the decision of the District Judge of Surat, in Appeal No. 27 of 1911, confirming the decree passed by the first Class Subordinate Judge at Surat, in Civil Suit No. 165 of 1910.

Mr. *Coyaji* (with him Mr. *P. B. Shingne*), for the Appellant.

Mr. *D. A. Khare* (with him Messrs. *M. P. Mehta* and *T. R. Desai*), for the Respondent.

JUDGMENT.—On the 9th of September 1903 the plaintiff and the defendant undoubtedly intended to mortgage the property now in suit. The defendant being a good *Mussalman* scrupled to take interest. It was accordingly agreed that the plaintiff should nominally sell the property out and out to the defendant and thereafter attorn to him

for an amount of rent which would represent reasonable interest. This conveyance was executed and duly registered. Contemporaneously the defendant executed an agreement to the plaintiff to re-convey the property for the same consideration, namely, Rs, 1,499 when called upon to do so. If we look at the true intention of the parties, we should have no doubt but that this was really, though in form a sale, a mortgage. Inasmuch, however, as the plaintiff very naturally did not register his part, that is to say, the agreement given to him by the defendant at the time, the Court below refused to treat the whole transaction together as a mortgage. So far defeated, the plaintiff fell back upon the alternative and claimed to have his agreement of the 9th of September 1903 specifically enforced against the defendant. The lower Appellate Court refused to give effect to the agreement to re-convey, on the ground that it was a document compulsorily registrable under section 17, clause (*b*), of the Registration Act. In our opinion, the learned Judge was wrong. Separated entirely from the conveyance of the defendant we can see in this document nothing more than an ordinary agreement to sell, and such agreements are expressly exempted from the operation of section 17, clauses (*a*) and (*b*), of Act III of 1877, by clause (*h*) as it stood in that section and now Exception (V). It has been strenuously contended, on behalf of the defendant-respondent here, that inasmuch as this agreement to re-convey contains words to the effect that on payment of the consideration the defendant is to give up the land and re-convey, there is a direct interest created by the instrument itself in the land. We think, however, having regard to its form as a whole that it is no more than an ordinary agreement to re-convey when called upon to do so, and we are the more disposed to adopt this view since there can be no doubt whatever but that the whole justice of the case is on the side of the plaintiff. We, therefore, think that the decree of the Court below must be reversed and that the plaintiff must now be decreed specific performance of the agreement of the 9th of September 1903, that is to say, that on the plaintiff paying to the defendant Rs. 1,499 within three months of the date of this decree, the defendant be ordered to re-convey the property in suit to the plaintiff and put him in possession thereof. The plaintiff must have all his costs after the remand. Up to remand the parties must bear their own costs.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL REFERENCE NO. 9 OF 1914.

January 15, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

Raja NARENDRA LAL KHAN—DECREE-HOLDER—PETITIONER

versus

NOBIN BEHARY BHATTACHARJYA—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 169 (c), Sch. III, Art. 2—Arrears of rent for period between institution of suit and confirmation of sale, landlord's claim to—Art. 2, applicability of.

If the amount claimed by the landlord is any part of the arrears between the institution of the suit and the date of the confirmation of the sale, he is clearly entitled to it under clause (*c*) of section 169 of the Bengal Tenancy Act.

The Legislature could not have meant to apply the limitation provisions of the Schedule III, Article 2, to the express provisions of clause (*c*) of section 169, because the limitation only provides for suits and not applications. [p. 134, col. 1.]

In the matter of Judicial Miscellaneous Case No. 123 of 1914 of the Court of the Munsif of Ghatal, District Midnapur.

Babu *Shiva Prosanna Bhattacharjya*, for Decree-holder-Petitioner.

JUDGMENT.—The provisions of clause (*c*) of section 169 of the Bengal Tenancy Act are quite clear. They are: "If there remains a balance after these sums have been paid, there shall be paid to the decree-holder therefrom any rent which may have fallen due to him in respect of the tenure or holding between the institution of the suit and the date of the confirmation of the sale." If the amount claimed by the landlord is any part of the arrears between the institution of the suit and the date of the confirmation of the sale he is clearly entitled to it. It is true that the tenant could under sub-section 2 dispute the decree-holder's right to receive any sum on account of rent under clause (*c*). But that must be upon the ground of payment or satisfaction in

any other way. The Legislature could not have meant to apply the limitation provisions of the Schedule III, Article 2, to the express provisions of clause (c) of the section, because the limitation only provides for suits and not applications of this kind.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 706 OF 1913.

July 2, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

SHRIDHAR BALKRISHNA VAIDYA—PLAINTIFF—APPELLANT

versus

BABAJI MULA AGARYA—DEFENDANT—RESPONDENT.

Khoti Settlement Act (Bom. Act I of 1880), ss. 9, 10—Khoti lands—Tenant resigning occupancy for consideration—Effect of resignation—Consent of khots *necessary for a valid transfer—Contemporaneous lease—Tenant, whether estopped from showing defect in* khot's *title—Evidence Act (I of 1872), s. 116.*

Where the defendant purported to resign his occupancy rights in a *khotki* to the plaintiff (one of the *khots*) for consideration and synchronously with this resignation a lease for a term of five years was executed, the defendant attorning to the plaintiff in respect of these lands, on a suit by the plaintiff to recover possession after the expiry of the term:

Held, (1) that the alleged resignation must be regarded, as a transfer which could only be legal under section 9 of the Act provided that the consent of the *khot* was obtained;

(2) that the transaction could not be regarded as a resignation under section 10 of the Act since it was accompanied with consideration;

(3) that as both parties were *in pari delicto*, the plaintiff was not entitled to estop the defendant from showing the illegality of the title so founded. [p. 135, col. 1.]

There is no estoppel against an Act of Legislature. [p. 134, col. 2.]

Second appeal from the decision of the first Class Subordinate Judge at Ratnagiri, in Appeal No. 401 of 1912, modifying the decree passed by the second Class Subordinate Judge at Chiplun, in Regular Civil Suit No. 249 of 1911.

Mr. *D. A. Khare* (with him Mr. *P. D. Bhide*), for the Appellant.

Mr. *V. B. Virkar*, for the Respondent.

JUDGMENT.—In this suit the defendant purported to resign his occupancy rights in a *khotki* to the plaintiff, who was one of the *khots* in the year 1905. Synchronously with this resignation a lease for a terms of five years was executed, and the defendant attorned to the plaintiff in respect of these lands. It is found as a fact that the proposed resignation was accompanied by consideration. After the expiration of the term the plaintiff has sued the defendant upon the lease, and the question of greatest difficulty which has arisen in the appeal is, whether the defendant is entitled to impugn the plaintiff's title

We pass over the nice point whether the estoppel mentioned in section 116 of the Evidence Act survives the term upon which the lands may have been demised. This difficulty would arise upon a construction of the words "during the continuance of the tenancy." We think it unnecessary to give any decision upon that point, because we entertain no doubt but that the defendant is not estopped from challenging the legality of the plaintiff's title. There is no estoppel against an Act of Parliament or in this country against an Act of Legislature. It is to be remembered that the transfer or resignation and the lease were made at the same time and formed parts of what is virtually one transaction. If the transfer is found to be tainted with any illegality as being in contravention of any provision of the Statute-law, the letting must go with it. We entertain no doubts in the state of the authorities but that this alleged resignation must be now regarded as a transfer. That has already been decided in more than one case in this Court, and must be regarded as settled law. Then if a transfer, it could only be legal under section 9 of the Khoti Act, provided that the conditions set forth in that section have been complied with. The essential condition which we have to consider is whether the consent of the *khot* was obtained, for it is not alleged that this transfer could be validated on the ground of any custom proved, authorizing a tenant so to alienate his occupancy rights without the consent of the *khot*. It is not seriously contended that the consent of the *khot* within the full meaning of that term has been obtained. One *khot*, the man in whose favour the void resignation was made, has of course consented. It is admitted that there are other *khots* whose consent would also be necessary, and it is not suggested that that consent has been obtained. In these

circumstances there could be no transfer under section 9. That section expressly makes occupancy rights of this kind non-transferable unless the conditions stated in the section have been complied with; nor, as we said, in the state of authorities could it be regarded as a resignation under section 10 since it was accompanied by consideration. Therefore, the foundation of the plaintiff's title in 1905 is shown to have been illegal. It was moreover a contract between the plaintiff and the defendant here, so that both parties may be said to have been in *pari delicto*, and the plaintiff is not entitled to estop the defendant from showing the illegality of the title so founded. We must, therefore, confirm the decree of the Court below and dismiss this appeal with all costs upon the appellant.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 192 AND 113 OF 1912.

November 10, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

IN F. A. NO. 192 OF 1912

S. R. M. A. R. RAMASWAMY CHETTY—PLAINTIFF—APPELLANT

versus

A. L. K. R. ALAGAPPA CHETTY AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN F. A. NO. 113 OF 1912

A. L. K. R. ALAGAPPA CHETTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

S. R. M. A. R. RAMASWAMY CHETTY—PLAINTIFF—RESPONDENT.

Principal and agent—Loans advanced by agent beyond authority—Ratification by principal—Suit for damages, whether maintainable.

Where the principal not only did not object to the propriety of his agent advancing certain loans and did not tell him that he would hold him responsible for any loss that he might sustain thereby, but even interfered with the collection of the debts, dictated his own terms and allowed with full knowledge of the circumstances the agent's successor to take the debts at a certain valuation, after which it was no longer open to the first agent to collect the debts himself:

Held, that the principal was precluded by his acquiescence from questioning the validity of these transactions and could not hold the agent liable for damages sustained. [p. 137, col. 2, p. 138, col. 1.]

Appeals from the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 24 of 1910.

Messrs. *S. Srinivasa Iyengar* and *S. Sundaraja Iyengar*, for the Plaintiff.

Mr. *C. S. Venkatachariar*, for the Defendant.

JUDGMENT.

IN APPEAL NO. 192 OF 1912.

The suit was brought by the plaintiff, a money-lender living in Kanadukathan in the Madura District, against the defendant, who was his agent at Thagimyo in Burma, to direct him to render accounts to the plaintiff and pay a certain sum of money, amounting to more than Rs. 50,000, which he is said to have misappropriated. The defence is that accounts have been rendered and no sums have been misappropriated. The Subordinate Judge passed a decree in favour of the plaintiff for a sum of Rs. 2,300-6-3 with interest. Both parties appealed.

It appears to be the practice among the Nattukottai Chetties, who carry on money-lending business at distant places, to appoint their agents for certain periods, generally for three years. A salary is fixed for the entire period, part of which is apparently paid at the commencement of or soon after the engagement and a certain amount before the termination of the agency, and the balance is paid after the settlement of accounts and payment by the agent of any sum that might still be due by him. The defendant was appointed agent for three years with a pay of Rs. 4,287-8-0 for that term. He received Rs. 2,860 of that salary soon after he opened an office at Thagimyo and he carried on the business for the stipulated period. [See Exhibit B, dated the 5th September 1904.] He was succeeded by Chinniah Pillai, P. W. No. 3, about June 1908. The parties do not agree as to the terms of the arrangement under which an agent vacates his office and delivers over charge to his successor. That there is such an arrangement is conceded by both parties. As it has a material bearing on the case we will refer to the evidence on that point.

According to the evidence of the plaintiff's witnesses Nos. 1, 2 and 3, it appears that the successor agrees to take the debts due to the business at a certain valuation from the outgoing agent. This no doubt must have been due to the fact that these Chetties lend their moneys at very high rates of interest and not always to persons whose solvency is beyond doubt, and they expect, therefore, to lose in various transactions, such loss being covered by the great profits made in other transactions. For this difference between the face value of these debts and the valuation at which the successor takes them, according to all these agents, who are the plaintiff's own witnesses, the outgoing agent is not liable to the principal, if he has not been guilty of any misconduct. According to the plaintiff the old agent is liable for that difference. His evidence is unsupported and is opposed to the evidence of his own witnesses, who themselves were agents and were never held liable by their principals for such differences when they handed over charge of their offices to their successors. It is also unreasonable. It also appears that, if the successor considers that some of these debts are bad, it is open to him to refuse to take them over and hold himself responsible for their collection. In this case the old agent continues responsible to his principal for their recovery. There is, therefore, nothing unreasonable in holding that if the new agent is willing, and this may be done with the consent of the principal to take over some or all of the debts advanced by his predecessor, the latter's responsibility ceases so far as such debts are concerned, and continues only with reference to the debts not handed over to the successor. The outstandings at the time the plaintiff's third witness took charge of the office from the defendant, amounted to a little more than Rs. 40,000. He valued them and took them over at a little more than Rs. 10,000 and among those debts are those items now in suit. The plaintiff is of course entitled to assume that the business was carried on in accordance with his instructions and that there was no misconduct on the part of the defendant. If, therefore, he shows that any loss was sustained by the defendant's default in these respects, he would be entitled to recover damages. Otherwise it appears to us that the plaintiff has no reason to complain. When the defendant delivered some of the accounts to the plaintiff at Madras after the termination of the agency, he promised to hold himself responsible for the losses that may have been sustained by the plaintiff in his having lent out money to persons contrary to instructions (Exhibit A). The only question we have to decide is whether the defendant has acted against instructions and if so, whether he is liable to pay any damages to the plaintiff. We have to see what the plaintiff's instructions were.

The plaintiff gave instructions to the defendant on the 28th of November 1904 (see Exhibit G) according to which the business was to be carried on. He wrote there that as Thagimyo was a small place and the persons there were only fit to be entrusted with small sums (as Rs. 100, 200, 300, 400 up to 500), the defendant was not to lend anybody sums like Rs. 1,000 or 2,000 and the dealings were to be carried on only up to a total of Rs. 50,000. He was also directed to advance loans only upon good security. In reply to this the defendant wrote (see Exhibit H3, dated 24th March 1905) that in accordance with the plaintiff's instructions he would recover the larger sums that had been already advanced and would lend out only small sums in future. He also suggested (see Exhibit H4 of the 12th May 1905) that larger sums might be lent on good security, to which the plaintiff replied (see Exhibits G1, and G2 of 21st February 1905 and 2nd May 1905), that that should not be done and that he should not lend more than Rs. 500 to any person. We will now proceed to consider how far these instructions have been violated and whether the defendant is liable to pay the plaintiff anything on account of such misconduct, if any.

Item No. 8. The plaintiff claims Rs. 12,807-9-10 on account of loss sustained in the transactions carried on by the defendant with Sinna Koppaiya. The defendant lent him Rs. 2,000 on a promissory note on the 21st November 1904, Rs. 3,000 on the 6th December 1904, Rs. 2,000 on the 3rd January 1905, and again Rs. 2,000 on the 1st February 1905. It will be observed that the first amount of Rs. 2,000 was advanced before the plaintiff gave his instructions on

the 28th of November (Exhibit G.) There is no evidence to prove whether Exhibt G reached the defendant before the date of the second advance on the 6th December 1904. It certainly must have reached him before the date of the third advance. No difference is made by the plaintiff between the advances. The defendant contends that final instructions were only given in May 1905 (Exhibit G2). But it is clear that pending the plaintiff's final orders the defendant should not have done anything against the instructions conveyed by Exhibit G, though it may well be that he was under the impression that the matter had not been finally settled at the time of Exhibit G. Apart from the fact that the plaintiff made no distinction between advances made before his instructions and after his instructions, there is clear evidence which shows that he is now precluded from questioning the validity of these transactions so far as the defendant is concerned. The various letters that passed between the parties place this matter beyond any reasonable doubt. We will only refer to a few of them. In reply to communications from the defendant the plaintiff asked him to settle the matter amicably for a smaller sum than the total amount advanced to Koppaiya and to see that the money was collected either by getting promissory notes from solvent persons or by receiving it in cash (Exhibit G12). In another letter he told the defendant that the best thing to be done under the circumstances was to settle the matter amicably and recover as much as possible and asked him to do so (Exhibit G15). The plaintiff sent his own agent from Rangoon for the collection of the money. It may be that if the plaintiff was only endeavouring to collect the amount advanced, he might not be estopped from recovering damages that he might have sustained from the defendant, *i.e.*, the difference between the amount recovered and the total money advanced. But in this case he took an active part in the settlement of the matter; he gave instructions as to how matters were to be settled. The amount to be recovered was settled between the parties; the defendant recovered a certain sum of money, took promissory notes from the debtor for the balance due under the settlement and those debts were finally taken over by his successor. We have very little doubt that if it had been the intention of the plaintiff to hold the defendant liable for damages sustained, he was bound to have given notice to the defendant of the same in the circumstances and he should not have allowed his agent to take over this debt.

We will not deal with Item No. 15. The plaintiff claims Rs. 12,057 on account of loss sustained in dealings with one Thakki Mowyechan. Thakki Mowyechan had entered into a contract with the *sircar* to build a bungalow at a cost of about Rs. 18,000. The defendant undertook to advance moneys to him, whenever they were needed up to Rs. 6,000. The cheque which he was to receive on account of his work from the Government officials was to be handed over to the defendant. Accordingly various sums were advanced from March 1905 up to the 25th August 1906. The plaintiff was informed of the nature of the contract (see Exhibit H5). He not only took no exception to it, but told the defendant that advances might be made if proper security was taken. Advances of various sums of money were being made on 10 or 15 occasions after July 1905. It is clear, therefore, that he ratified the defendant's conduct. It also appears that this was one of the debts taken over by the defendant's successor, and as it was taken with knowledge of the circumstances under which the debt was contracted, the plaintiff is now precluded from claiming any damages from the defendant on account of this transaction.

The other items are comparatively smaller sums. We think it unnecessary to go through them all. The nature of the evidence is the same. The plaintiff was informed of these debts. He did not raise any objection. The cases show that silence itself has been held to be acquiescence in commercial transactions. But in these cases the plaintiff not only did not object to the propriety of the first defendant advancing these loans and did not tell him that he would hold him responsible for any loss that he might sustain thereby but went further, he interfered with the collection of the debts, dictated his own terms and allowed with full knowledge of the circumstances the defendant's successor to take the debts at a certain valuation, after which it was no longer open to the defendant to attempt to collect the debts himself. In these circumstances we are of opinion that

he is precluded by his acquiescence from questioning the validity of these transactions and we must, therefore, confirm the decree of the lower Court in so far as it disallows the plaintiff's claim and dismiss the plaintiff's appeal with costs.

IN APPEAL NO. 113 OF 1912.

The defendant's appeal except as to costs is clearly untenable. We are of opinion that the plaintiff is only entitled to his costs on the amount decreed. With this modification we confirm the decree and dismiss the appeal. The parties will receive and pay proportionate costs in appeal.

Appeals dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1750 OF 1913.

December 1, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Richardson.

BADRI NARAIN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KODO SAH—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 75—Deed found to be forged—Burden of proof—Specific Relief Act (I of 1872), s. 39—Cause of action.

Where a lower Appellate Court clearly finds that a deed of sale registered under section 75 of the Registration Act, 1908, is forged, no question of the burden of proof arises. [p. 138, col. 2.]

Mohima Chunder Dhur v. Jugal Kishore Bhattacharji, 7 C. 736; 9 C. L. R. 471, distinguished.

Where a plaintiff has some interest in the land in suit, he has clearly a cause of action as is required by section 39 of the Specific Relief Act. [p. 138, col. 2.]

Appeal against the decree of the Subordinate Judge, Mozafferpore, dated the 20th March 1913, affirming that of the Munsif, Additional Court, at Sitamarhi, dated the 26th of July 1912.

Babu *Bankim Chandra Mukherjee*, for the Appellants.

Babus *Mahendranath Roy* and *Luchmi Narain Singh*, for the Respondent.

JUDGMENT.

COXE, J.—This appeal arises out of a suit for a declaration that a certain deed of sale, dated the 31st May 1910, is a forged document. The Courts below have held that it was a forged document and the defendants have appealed. The *first* argument on behalf of the appellants is that the Subordinate Judge on appeal has erred in law, in saying that the burden of proof lay heavily upon the defendants to prove by clear and satisfactory evidence that the plaintiff did really execute this *kobala*. Apparently registration of this *kobala* was directed under section 75 of the Registration Act, 1908, and it is argued that the effect of that order of registration was to throw the whole burden of proof in this case on the plaintiff. The learned Pleader for the appellants very frankly concedes that this argument is opposed to the decision in the case of *Mohima Chunder Dhur* v. *Jugal Kishore Bhattacharji* (1). But it seems to me that in this case the question of the burden of proof does not arise. The learned Subordinate Judge in appeal goes far beyond saying that the defendant has failed to prove that the bond is genuine.

He comes to the positive conclusion, on a consideration of the whole case, that the documents is forged. On that finding the question of the incidence of the burden of proof cannot arise.

Secondly, it is contended that the lower Appellate Court has misconstrued certain documents. The Judge has held on a consideration of the *kobala* in suit, together with another sale-deed that was effected by the plaintiff in favour of one Ram Narain Singh shortly after the alleged date of the *kobala* in suit, that some of the lands covered by this *kobala* in suit were not included in the sale to Ram Narain Singh. We have looked into this document and it appears to us that no question of construction of the document arises; the finding of the Court below is a finding of fact with which we cannot interfere in second appeal.

Thirdly, it is contended that no cause of action, such as is required by section 39 of the Specific Relief Act, has been shown. But clearly if the plaintiff has still some interest in the land, which is said to be covered by this *kobala*, he has clearly a cause of action.

Another small point has been taken, but it was never raised in the Courts below,

(1) 7 C. 736; 9 C. L. R. 471.

and we have not sufficient materials before us to deal with it.

The appeal is dismissed with costs.

RICHARDSON, J.—I entirely agree.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 574 OF 1912.

July 8, 1914.

Present: —Mr. Justice Beaman and Mr. Justice Heaton.

MANJUNATH SUBRAYABHAT—PLAINTIFF—APPELLANT

versus

SHANKAR MANJAYA APARTHA—DEFENDANT—RESPONDENT.

Vrittis—*Alienation, when permissible.*

The general rule is against the alienability of *vrittis*. They may only be alienated in special cases and under special conditions, provided that such alienations can be supported by local usage and custom.

Second appeal from the decision of the District Judge of Kanara, in Appeal No. 32 of 1911, reversing the decree passed by the Subordinate Judge at Honawar, in Civil Suit No. 272 of 1908.

Mr. *S. S. Patkar*, for the Appellant.

JUDGMENT.—The property in question in this suit is a *vritti*. The plaintiff claims to be the alienee of three-quarters of the cash allowance paid for the due performance of ceremonies and the worshipping of the idol. The first Court held that the alienation was good and decreed the plaintiff's claim. On appeal the learned Judge remanded certain issues inviting an inquiry into any local custom which would justify the alienation of such a peculiar right as this, to one who was not a member of the original family which enjoyed the priestly privilege. The findings on the remanded issues were all against the plaintiff. His suit was accordingly dismissed.

On appeal it has been strenuously contended that the learned Judge of first appeal adopted a wrong method. It is said that the general principle is that *vrittis* are alienable to suitable persons, unless a local custom to the contrary or some prohibition by the founder can be proved. This certainly does appear to be the effect of Melvill, J.'s decision in the case of *Mancharam* v. *Pranshankar* (1). On the other hand there is a much later decision by Ranade, J., in the case of *Rajaram* v. *Ganesh* (2), which, in our opinion, states both the underlying principle and method of dealing with cases like this more correctly. It is true that in that judgment the learned Judge refers with seeming approval to the case of *Mancharam* v. *Pranshankar* (1), but the principle he lays down is that the general rule is against the alienability of *vrittis*. *Vrittis* may be alienated in special cases and under special conditions provided, that such alienations can be supported by local usage and custom. That this was his ground is clear enough from the issues which he framed and remanded for trial. The learned Judge of first appeal appears to have followed exactly the course adopted by the learned Judges in *Rajaram* v. *Ganesh* (2), and having regard to the character of these *huks* and the desirability of preventing too free alienations of what in essence is a sacred and personal right, we are not prepared to say that the learned Judge of first appeal was wrong. We, therefore, think that his decree must now be confirmed and this appeal dismissed.

Appeal dismissed.

(1) 6 B. 298.
(2) 23 B. 131.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 270 OF 1913.

January 21, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Sir P. C. Banerji, KT., Judge.

JAGARNATH GIR—PLAINTIFF—APPELLANT

versus

TIRGUNA NAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Suit for declaration of title—Property in possession of Court of Wards for lawful claimant—Suit, whether maintainable.

Where the Court of Wards is in possession of a certain property on behalf of the person who might establish his title to it, a suit for declaration of title by a claimant as against several other claimants to the property is not barred by section 42 of the Specific Relief Act. [p. 140, col. 2.]

Goswami Ranchor Lalji v. *Sri Girdhariji*, 20 A. 120; A. W. N. (1897) 214, distinguished.

SITABAI RAGHUNATH KARMAKAR v. SHAMBHU SONU GAJANA.

First appeal from the decision of the District Judge of Benares, dated the 24th April 1913.

Mr. *Purushottam Das Tandon*, for the Appellant.

Mr. *Kalindi Prasad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed a declaration that he was entitled to certain *mutt* property as the *mahant* thereof in succession to the last *mahant*. It appears that the last *mahant*, one Narain Gir, was a minor and that the property was taken over by the Court of Wards. After his death the plaintiff made claim as did certain other persons who are the defendants to the present suit. The Court of Wards, which is in possession of the property, declined to hand over possession until some one should establish his title to the *mahantship*.

The lower Court without going into the merits has dismissed the plaintiff's suit upon two grounds, namely, that the Court of Wards was not made party to the suit and that the plaintiff did not claim possession.

It seems to us that the suit ought not to have been dismissed on either of these grounds. The Court of Wards made no claim to the property. If the Court of Wards wished to be made a party to the suit, it could apply to the Court to be made a party on its peril on the question of costs. If the Court below thought that the suit could not be disposed of without the Court of Wards being a party, it could, and in our opinion ought to, have exercised its jurisdiction in making the Court of Wards a party to the suit. We, however, think that it is highly probable in the present case that the Court of Wards will be perfectly satisfied with the decision of the Court in the present suit, and that it has no desire of any kind to be made a party to the proceedings.

On the second question we are of opinion that the possession of the Court of Wards is in trust for the person who shall establish his title to the *mahantship*. No one is entitled to get possession from the Court of Wards until such time as his title is established. Therefore the plaintiff was not entitled at the time he brought his suit to possession. We, therefore, think that section 42 of the Specific Relief Act does not apply to the circumstances of the present case. As we have already pointed out, the Court of Wards does not deny the plaintiff's title but admits that it holds the property for the person legally entitled. The learned District Judge has referred to the case of *Goswami Ranchor Lalji* v. *Sri Girdhariji* (1). In our opinion this case has no bearing on the present case. The Court in that case, we think, rightly held that the plaintiff's proper remedy was by way of a suit for possession against the parties who dispossessed him. The suit being a suit for possession the period within which it could be brought was 12 years. This was the only matter which was discussed in the case.

We accordingly allow the appeal, set aside the decree of the Court below, and remand the case to that Court with directions to re-admit the suit under its original number in the file and to proceed to hear and determine the same on its merits. Costs here and heretofore will be costs in the cause.

The Collector as representing the Court of Wards may be informed of our judgment.

Appeal allowed;
Suit remanded.

(1) 20 A. 120; A. W. N. (1897) 214.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 54 OF 1913.
July 7, 1914.
Present:—Mr. Justice Beaman and Mr. Justice Hayward.

SITABAI RAGHUNATH KARMAKAR—PLAINTIFF—APPELLANT
versus
SHAMBHU SONU GAJANA AND OTHERS—DEFENDANTS Nos. 1 TO 3 AND 6—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 108 (h)—Permanent tenant—Right to cut trees planted by himself.

A permanent tenant who has planted trees upon his lands is entitled to cut them down and use them. [p. 141, col. 1.]

Second appeal from the decision of the acting District Judge of Ratnagiri, in Appeal No. 584 of 1911, confirming the decree passed by

the first Class Subordinate Judge at Ratnagiri, in Civil Suit No. 113 of 1911.

Mr. *Jayakar* (with him Mr. *P. D. Bhide*), for the Appellant.

Mr. *Coyaji* (with him Mr. *B. V. Desai*), for Respondents Nos. 1 to 3 and 6.

JUDGMENT.—The only question argued before us is whether the defendants, who are found to be permanent tenants, have a right to cut trees upon the lands demised. The plaintiff is found to be the owner of the lands, but the tenants, upon the principle stated in section 83 of the Land Revenue Code, are found to be the permanent tenants, that is to say, the origin of their tenancy is lost in antiquity. The dispute between the plaintiff and the defendants now centres upon the right of the defendants to cut down trees, which *ex concessis* and by the admission of the plaintiff they have themselves planted. In these circumstances we entertain no doubt whatever but that the defendants have the right which they claim. The English Law of fixtures and the principle upon which it is based have no general applicability in this country. Therefore, before the passing of the Transfer of Property Act, which deals expressly with circumstances like these, we must be referred, in the absence of any special usage, to what we conceive to be principles of equity, justice and good conscience, and none of those in our judgment compel us to say that a permanent tenant who has planted trees upon his lands is precluded from cutting down and making use of them. It is unnecessary to discuss the numerous cases to which we have been referred, since the principle of our judgment is very simple, very clear, and has since found Legislative sanction in section 108, clause (*h*), of the Transfer of Property Act. It has been contended that that section does not apply to agricultural leases, and we are not supposing that it does, but we do think that the principle to which it gives expression are principles which, for the most part, were good law in respect of the facts covered by them before they found Legislative expression in the Transfer of Property Act, and among such would certainly be the principles upon which we found our decision here. We think, therefore, that the decree of the lower Appellate Court must be confirmed and this appeal dismissed with all costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 937 TO 949 AND 951 TO 957 OF 1912.

October 29, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

CHOCKALINGAM CHETTY—PLAINTIFF—APPELLANT

versus

PERIYA KARUPPAN CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 45—Landlord and tenant—Tenant paying rent to one out of several joint landlords, effect of.

Where a tenant pays off the *entire rent* due from him to one of two co-sharers, he can escape liability to the other, if he shows that his payment to that co-sharer was one made *bona fide*. [p. 142, col. 1.]

But if the payment by him was not made in good faith and was made to defeat the claim of the other co-sharer to his share of the rent, the latter's right to recover his share of rent is not affected. [p. 142, col. 1.]

A co-sharer who has been paid his share of the rent is not a necessary party to the suit by the other for his share. [p. 142, col. 1.]

Sheik Ibrahim Taragan v. *Rama Aiyar*, 10 Ind. Cas. 874; 21 M. L.J. 508; (1911) 2 M. W. N. 442; 35 M. 685, *Zia-ud-din* v. *Muhammad Umar*, 9 Ind. Cas. 275; 8 A. L. J. 54; 33 A. 308, followed.

Second appeals from the decrees of the District Court of Ramnad, in Appeal Suits Nos. 1 to 13 and 15 to 21 of 1911 respectively, preferred against those of the the Court of the Special Deputy Collector of Ramnad, in Summary Suits Nos. 1482 to 1484, 1486, 1487, 1489, 1492 to 1495, 1497 to 1499 and 1501 to 1507 of 1910, respectively.

Messrs *C. S. Venkatachariar* and *A. Srinivasa Aiyangar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—We must accept the finding of the District Judge that Karuppan Chetti was a joint landholder with the plaintiff in the plaint lands. We are not concerned with the plaintiff's right to sue for the whole rent (including Karuppan Chetti's share) in case no portion of the rent had been paid up, but with quite a different

question, whether plaintiff can sue for the whole or even his half share of the rent if the tenants had paid up the whole rent to the plaintiff's co-sharer, as is found in this case. The decision of that point depends on the answer to two questions: (*a*) whether the payment of the whole rent to the plaintiff's co-sharer was *bona fide* [see *Sheik Ibrahim Taragan* v. *Rama Aiyar* (1)], and (*b*) whether a tenant is or is not entitled to pay to a co-sharer of the landlord's rights the latter's share of the rent simply because the said co-sharer's name does not appear in the title-deeds under which the transfer of the *melvaram* right was effected in the plaintiff's name.

We agree with the Deputy Collector that the payment of the whole rent to Karuppan Chetty was not made in good faith and that the payment was made to defeat the plaintiff's claim to his half share of the rent. In such a case the plaintiff's right to recover his share cannot be affected. [See *Zia-ud-din* v. *Muhammad Umar* (2)].

As regards the other question, if Karuppan Chetty is legally entitled to one-half share in the rent, we do not see how the non-mention of his name in the title-deed could prevent the tenant (if the latter chooses) to pay half of the rent to Karuppan Chetty, or what the fact (that the tenant was not bound to pay any portion of the rent unless both the plaintiff and Karuppan Chetty institute a suit to recover) has to do with the tenant's right to pay the half share to Karuppan Chetty. The defendants having paid to Karuppan Chetty his share of the rent, there is no object in making Karuppan Chetty a party to this suit if the decree is to be passed only for the plaintiff's share of the rent. The defendants' plea of non-joinder has really no force unless "the rights and interests of the parties actually before" the Court (see the words of Order I, rule 9, of the Code of Civil Procedure) cannot be decided without the joinder of Karuppan Chetty.

In the result the appeal of the plaintiff (who has obtained a decree for his half share of the rent and who appeals in respect of the other half) and the memorandum of objections of the defendant in Second Appeal No. 941 of 1914 denying the plaintiff's right to a half share of the rent decreed to the plaintiff are both dismissed with costs. Second Appeals Nos. 938 to 949 and 951 to 957 of 1912 and the memorandum of objections in Second Appeal No. 954 of 1914 being withdrawn are dismissed with costs.

Appeals dismissed.

(1) 10 Ind. Cas. 874; 21 M. L. J. 508; 35 M. 685; (1911) 2 M. W. N. 442.

(2) 9 Ind. Cas. 275; 33 A. 308; 8 A. L. J. 54.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 2871 OF 1914.

March 3, 1915.

Present:—Mr. Justice Shadi Lal.

GANESHA SINGH AND OTHERS—OBJECTORS—APPELLANTS

versus

SHANKAR LAL, THE OFFICIAL LIQUIDATOR, GENERAL TRADING COMPANY, KAHUTA (AT RAWALPINDI)—RESPONDENT.

Companies Act (VI of 1882), ss. 169, 219—Appeal preferred to Divisional Court returned for want of jurisdiction—Extension of time—Liability of contributories—Duty of Court to decide objections—Transfer.

Where appeals against the order of the District Judge making the appellants liable as contributories was lodged in the Divisional Court within three weeks from the date of the order and having remained pending in that Court for a long time, were returned to the appellants for want of jurisdiction and were finally presented to the Chief Court:

Held, that as the appeals were lodged in the Divisional Court well within three weeks and the appellants had a *bona fide* belief that that Court was the proper tribunal to entertain them, this was a fit case for extending the period prescribed by section 169 of the Companies Act, 1882. [p. 143, col. 1.]

It is the duty of the Court to inquire into and decide the objections raised by the contributories to their liabilities as such. [p. 143, col. 1.]

Miscellaneous first appeal from the order of the District Judge, Rawalpindi, dated the 22nd of May 1913, making appellants liable as contributories and ordering the Liquidator to apply for attachment of appellants' property.

Mr. *Broadway* and Bhagat *Gobind Das* and Lala *Nihal Chand*, for the Appellants.

Mr. *Bhagat Ram Puri* for the Respondents.

JUDGMENT.—These five appeals, namely, Civil Appeals Nos. 2871 to 2875 of 1914, arise out of the liquidation of the General Trading Company, Kahuta, and will be disposed of by one judgment. The appeals were originally instituted in the Divisional Court, Rawalpindi, within three weeks from the date of the order appealed against and remained pending in that Court up to the 4th of December 1914, when they were returned to the appellants for want of jurisdiction and finally presented to this Court on the 9th December 1914. A preliminary objection has been taken by the learned Counsel for the respondent that as the notices were not served on the respondent within three weeks, the appeals are barred by the provisions of section 169 of Act VI of 1882. As observed above, the appeals were lodged in the Divisional Court well within three weeks and it appears that the appellants had a *bona fide* belief that that Court was the proper tribunal to entertain the appeals. In fact several appeals from orders passed in this liquidation had previously been presented to and heard by the Divisional Court, and in view of this fact and other circumstances I am of opinion that this is a fit case for extending the period prescribed by section 169. I, therefore, exercise my discretion under that section and overrule the preliminary objection.

On the merits, it is clear that the objections preferred by the appellants have not been properly adjudicated upon. It is true that the Company is not a limited liability Company and the contributories are, therefore, jointly and severally liable for the debts of the Company. Nevertheless it is necessary to determine, in the first instance, the amount representing the total liability of the Company and then collect sufficient funds to meet that liability. Further, it is the duty of the Court to inquire into and decide the objections raised by the contributories to their liabilities as such. If any of the above matters has already been decided, the Court should then consider how far the previous decision operates as a bar against the person who wants to re-agitate the same question.

I am satisfied that there has been no proper trial by the learned District Judge and I must, therefore, accept the appeal, set aside the order of the lower Court and remit the case for re-decision with reference to the above remarks. In the circumstances I direct the parties to bear their own costs in this Court.

Under section 219 of Act VI of 1882, I transfer the case of the winding up of the General Trading Company, Kahuta, from the Court of the District Judge, Rawalpindi, to that of the District Judge, Lahore, who is authorised to assign it to the Additional Judge.

Appeal accepted.

ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 252 OF 1914.

January 19, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

THE MUNICIPAL COMMITTEE OF AJMERE—DEFENDANT—APPLICANT

versus

KIFAYATULLAH—PLAINTIFF—OPPOSITE PARTY.

Ajmere Courts Regulation (I of 1877), ss. 17, 18—Ajmere-Merwara Municipal Regulation, ss. 85, 141—Notice—No direction issued by Municipal Committee within one month under section 85—Order of Committee beyond one month, validity of—Suit for damages—Civil Court, jurisdiction of.

A person gave the Municipal Committee of Ajmere notice in writing of his intention to re-erect a certain building within the limits of the Municipality. No step was taken by the Municipality within one month of the notice under section 85 (2) of the Ajmere-Merwara Municipal Regulation:

Held, that the Committee had no authority to take any action subsequently under that section. [p. 144, col. 2.]

Section 141 of the Ajmere-Merwara Municipal Regulation does not bar a suit for damages in the Civil Court by a person wronged by an illegal action of the Municipal Committee. [p. 144, col. 2.]

Reference made by the Commissioner of Ajmere-Merwara under section 18 of the Ajmere-Merwara Courts Regulation, I of 1877.

Mr. *Sarat Chandra Choudhri*, for the Applicant.

Mr. *Damodar Das*, for the Opposite Party.

JUDGMENT.—This is a reference by the Commissioner of Ajmere-Merwara under section 18 of the Ajmere Courts Regulation, I of 1877. The facts stated in the reference are that one Kifayatullah on July 23rd, 1907, gave the Municipal Committee of Ajmere notice in writing of his intention

to re-erect a certain building within the limits of the Ajmere Municipality and with his application submitted a certain plan. On October 2nd, 1907, the Municipal Committee issued a notice to Kifayatullah to the effect that he had contravened the provisions of section 85 of the Municipal Regulation by beginning to re-erect without permission, and required him to stop the work at once and submit an application for permission to build along with a plan. He was further told not to resume building until he received the orders of the Committee, for if the Committee found that the proposed building was objectionable it would have to be removed. On receipt of this notice Kifayatullah stopped the work. On March 10th, 1908, Kifayatullah brought a suit for recovery of Rs. 30 on account of damages, which he alleged he had suffered in consequence of the Municipal Committee having stopped the work and for a declaration that the notice was invalid. The Subordinate Judge gave the plaintiff a decree and his decree was affirmed on appeal by the Commissioner, but on an application made by the Municipal Committee under section 17 of the Ajmere Courts Regulation, the Commissioner has referred to this Court the question whether the suit was maintainable. The contention of the Municipal Committee appears to be that as it is invested by the Municipal Regulation with a wide discretion in matters of this kind, no suit can be maintained in a Civil Court with regard to them. Section 85 of the Municipal Regulation lays down that every person intending to erect or re-erect any building shall, if required to do so by rules made by the Committee in this behalf, give notice in writing of his intention to the Committee and shall, if required to do so, submit a plan showing the level at which the foundation and the lowest floor are proposed to be laid and a specification of the works intended to be constructed and the materials to be used, and shall obey all written directions consistent with the Regulation given by the Committee within one month after receiving such notice, either prohibiting the erection or re-erection or in respect of a number of other matters detailed in the section. An attempt was made in the Court of the Commissioner to show that the notice given by Kifayatullah did not comply with the section. The Commissioner declined to allow this point to be taken for the first time in appeal and we must assume that the notice given in this case complied with the requirements of the law. As we read section 85, if the Municipal Committee wishes to prohibit the erection or the re-erection of a building or to give directions with respect to any of the matters detailed in the section it must issue its directions within one month after receiving the notice. In the present case the Municipal Committee allowed more than one month to elapse before communicating with Kifayatullah, and when it did communicate with him, it did not issue a notice as it might have done under sub-section (2) of the section requiring the building to be altered or demolished, but it required him to stop the work and submit a fresh application. If Kifayatullah gave a notice which did not comply with the law, it should have been regarded as no notice at all and the Municipal Committee could have required him to alter or demolish the building; but as it must be taken that the notice given was in compliance with the law and as the Municipal Committee did not issue any directions within one month of the receipt of the notice, the Municipal Committee had no authority take any action under sub-section 2 of section 85. It was suggested that section 141 of the Act barred the jurisdiction of the Civil Court in cases of this kind. That section empowers the Commissioner or the District Magistrate to suspend the action taken by a Municipal Committee or to prohibit the doing of an act which is about to be done in pursuance of or under cover of the Regulation in certain cases. It seems to us doubtful whether section 141 was intended to apply to such cases as this. Even if it can be construed so as to cover such cases, we cannot treat it as barring the jurisdiction of a Civil Court to entertain a suit for damages at the instance of a person who has been wronged by an illegal action of the Committee. In our opinion the suit was maintainable and this is our answer to the reference. Let the papers be returned.

Reference answered

PUNJAB CHIEF COURT.
FULL BENCH.
ORIGINAL CRIMINAL CASE No. 8 OF 1908.
December 5, 1908.
Present:—Sir William Clark, KT., Chief Judge, Mr. Justice Ried and Mr. Justice Rattigan.
EMPEROR—PROSECUTOR
versus
L. C. E. SHULDHAM AND ANOTHER—ACCUSED.

Confession—Plea of guilty, when can be withdrawn—Incriminating statement made in Police custody and before Magistrate, admissibility of, against maker and accused jointly tried—Criminal Procedure Code (Act V of 1898), s. 364—Statement, recording of—Irregular procedure—Defect, how cured—Evidence Act (I of 1872), ss. 25, 26, 27, 30.

Where to a charge under section 376, Indian Penal Code, the accused made the following answer "I did not commit rape, I only held the lady's hands:"

Held, that the answer constituted a plea of guilty.

Where the accused at the time of making an incriminating statement is enfeebled by illness and is undefended, a withdrawal of the plea can be allowed if the accused wishes to withdraw it. [p. 151, col. 2]

No part of an incriminating statement whether amounting to a confession or not, written by an accused person himself while in Police custody is admissible either against him or against the person jointly tried with him unless it has led to the discovery of any fact within the terms of section 27 of the Evidence Act I of 1872. [p. 151, col. 2]

A deposition (not amounting to a confession) of a person recorded on solemn affirmation by a Magistrate is admissible against the deponent only but not against any other person jointly tried with him. [p. 151, col. 2.]

A statement made by an accused person before a Magistrate who subsequently commits him to the Court of Session must be recorded in the form prescribed by section 364, Criminal Procedure Code, 1898, but any defect therein can be cured by proving it by the evidence of the Magistrate who had recorded it. [p. 152, col. 1.]

A confession of an accused is not admissible under section 30 of the Evidence Act, against a co-accused if the former is convicted on his own plea of guilty. [p. 152, col. 1.],

Empress v. *Anunt Ram Singh*, 5 C. 954; 6 C. L. R. 297; 3 Shome L. R. 29 Cr. and *Empress* v. *Yakub Khan*, 5 A. 253; A. W. N. (1883) 25, referred to.

FACTS appear from the following Committal Order of the Magistrate, first Class Multan, dated the 21st October 1908:—

"Jane Anne Taylor, spinster, aged about 27 years and eight months, had been residing with her sister, Mrs. Shaw, wife of Mr. E. K. Shaw, Multan District Board Engineer, at Multan. In June last she went up to Mussourie, and was expected back in Multan on the 19th September to be married a few days after to Mr. Hebberd, P. W. D., to whom she had become engaged some six months before. On her way back from Mussourie Miss Taylor stayed with her brother Mr. J. H. Taylor, Permanent Way Inspector, North-Western Railway, at Ghaziabad, for some days. Her father, a Crimean veteran, was also living in the same house, while another brother, Mr. W. Taylor, Loco Foreman, North-Western Railway, was residing in another house in the same station. The two brothers came to the Railway Station at Ghaziabad on the night of the 8th of September to see their sister off by the 3-Up (Bombay mail) on her way to Multan. J. H. Taylor got his sister a 2nd class ticket. After this had been purchased, Miss Taylor had about Rs. 10 in cash with her to the certain knowledge of the brothers. This money was in a small purse (Exhibit P8) in which was kept the ticket also. Miss Taylor was wearing at that time her engagement ring, a gold ring set with five diamonds, a gold muff chain to which was attached an open-faced gold watch, and a gold safety pin. She was known to be possessed of other jewellery too such as bangles, bracelets, lockets, etc. When leaving Ghaziabad Miss Taylor had in her carriage a light brown (or yellow) steel trunk, a hat-box covered with Holland, her bedding rolled up in a hold-all with straps fastened, and a small basket with food in it sufficient for her journey; she was unlikely to spend money on the journey except for some light refreshments. The train left Ghaziabad about 1-30 o'clock A. M. on the 9th September, being about two hours late.

From Lahore Miss Taylor travelled by the 8-Down Karachi mail leaving Lahore at 20-15 o'clock on the 9th September. From want of accommodation in the 2nd class she was put into the lady's 1st class compartment. She was the only European lady travelling by that train. On arrival of the train next morning at Multan Cantonment Miss Taylor was discovered murdered, her throat cut, lying on the floor of her compartment. The photograph (Exhibit P6) depicts the state of the inside of the compartment at the time the murder was discovered

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It was taken shortly after under the orders of the District Magistrate. Inspector Shuldham of the North-Western Railway Police was at the Railway Station. He and the Station Master, Mr. Reuleus, between them appear to have decided to cut off the carriage containing Miss Taylor's compartment and then to let the train proceed on its journey. This was accordingly done. It was most unfortunate and very unsatisfactory that the train was not detained till at least a Magistrate had been communicated with; it was obviously the proper thing to have done, and, as after events have shown, it is not unlikely the murderers would have been discovered the very first day. The District Magistrate, Mr. Clarke, was at the Railway Station, immediately information of the murder reached him at his house that morning. He then asked me to hold an inquiry which I did, recording the statements of such persons as might be acquainted with any of the facts that very day, including that of the Officiating Civil Surgeon, who had intended going into the district by that train and was consequently at the Railway Station, and of C. E. Shuldham, son of Inspector Shuldham, he having come in by the latter. Suspicions early fell on C. E. Shuldham owing to his restless behaviour during the journey, his contradictory statements and a bad past record published by the Criminal Investigation Department in the *Gazette of India*. It was due mainly to this that Inspector Shuldham was on the 12th September removed from having any further hand in the investigation of this case. Mr. Rehill, Superintendent, Railway Police, had arrived on the evening of 11th September, so he, with the assistance of Mr. Williams, Superintendent Police, Multan, took charge of the investigation.

The murdered lady had been robbed of a good deal of jewellery. With a view to seeing if C. E. Shuldham had any of this it was decided that he should be searched, but it was considered advisable that this should be done in the train after Shuldham had been allowed to leave Multan a search here had been without result, but, as I noted at the time, "this was scarcely likely to be profitable" considering it had been conducted by the father. In the mean while it appears that the Police at Lahore received information from a Parsi gentleman, who had been a passenger in the 8-Down Karachi mail on the 9th-10th September from Raewind as far as Montgomery, which threw further suspicion on C. E. Shuldham. Accordingly on 13th September Sub-Inspector Abdul Aziz, who had been placed on special duty in this case, proceeded from Multan Cantonment by the 7-Up to Lahore to take the Parsi's statement. It happened that Mr. Clarke, Deputy Commissioner, Multan, was travelling by the same train on his way to Simla, as was also Mr. W. Taylor, brother of the deceased and curiously—a mere coincidence—C. E. Shuldham and his friend, W. Mullins, were also passengers in this train on their return journey, they had apparently avoided to some extent the vigilance of the Police. During the journey Shuldham's behaviour, it was noticed, was suspicious—he was seen frequently looking out of his carriage window in not quite an ordinary manner. A consultation was held by Mr. Clarke with Sub-Inspector Abdul Aziz after Mr. Taylor had spoken to the former, and the result was both Shuldham and Mullins were searched for—this has been made very clear—the jewellery and the jewellery only—there was no thought of looking for blood stains then. No jewellery was found. At Lahore the statement of the Parsi gentleman, who turned out to be Mr. Framjee, a respectable merchant of Lahore, was taken by Sub-Inspector Abdul Aziz. Mr. Framjee identified Shuldham as the Eurasian who had spoken to him at Raewind and had come into his carriage while the train was in motion. Mr. Framjee was taken to Mr. Clarke at the Lahore Railway Station and the latter heard his statement. This was, however, not considered sufficient to justify the Multan District Magistrate ordering the arrest of Shuldham and consequently neither he nor Mullins were detained—particularly as Shuldham was on bail to appear in a Magistrate's Court at Allahabad to answer a charge under section 171, Indian Penal Code; Mullins, however, had been directed to appear next morning with a view to his being questioned further; he did not turn up again and states now that he left at once for Pindi as Shuldham told him to clear out so that anything he might tell the Police might not spoil Shuldham's statement.

Later on some further evidence having

been obtained it was decided to arrest both Shuldham and Mullins. The latter was first arrested at Rawalpindi, and shortly after, not before there had been some search for him, Shuldham was arrested at Calcutta.

On 12th September Mullins made a confession implicating Shuldham very largely, both as regards rape and murder and also robbery. In this confession Mullins stated that Shuldham had told him after the murder that he had stolen some things belonging to the deceased and he had put these into his leather bag. Shuldham was brought down from Calcutta by two European Sergeants of the Calcutta Police; they arrived at Multan City Railway Station on the afternoon of 25th September and were met by the Punjab Police, and taken straight to the Cantonment Railway Police Station. Immediately on arrival at the Police Station, remembering what Mullins had said about the stolen articles having been placed in the leather bag, the latter was emptied of its contents—clothes, etc., and looked at carefully inside and out for blood marks by Sub-Inspector Abdul Aziz; the latter noticed these at once and shouted out, drawing the attention of all—and there were many present. The leather hand bag (Exhibit P14) had what appeared to be blood marks on the bottom portion of the inside as well as on the sides. One side was scratched a good deal and the lining had been removed, there were some marks outside too but not very distinct; the bag is practically a new one. When this important discovery had been made, Shuldham's clothes were very closely examined, and marks were detected on some, which appeared to be those of blood but seemed as if the clothes had been washed since having been stained.

Late on the night of 28th September Mr. Williams, Superintendent, Police, Multan, when visting Mullins in the lock-up, was informed by the latter that Shuldham had concealed something in the 3rd class compartment the two travelled by to Lahore on 13th September; Mullins gave details. As a result of this information the third class compartment was carefully searched at Lahore on 30th September. When a carpenter had removed the boards on the side of the carriage Miss Taylor's jewellery, every piece stolen, was discovered. It had apparently been dropped into the aperture into which the shutters of windows go down. The compartment in which this jewellery was found was the one Shuldham and Mullins travelled by on the 13th September.

I will now refer briefly to the evidence.

1. Raja Umrao Lal, Assisant Surgeon, will give evidence as to the cause of death, and also as to the state of the inside of Miss. Taylor's compartment immediately after the murder was discovered; he will also say that he wiped out the inside of the deceased's vagina with a clean piece of cloth (Exhibit P 20), which was afterwards sent to the Chemical Examiner; he saw that the lady's drawers or combinations (Exhibit P5) had 2 of the 4 buttons below the waist missing and it looked as if they had been recently torn off, the two below these again were undone.

2. Mrs. Shaw, sister of the deceased, will say the latter was expected at Multan on 10th September and when Mrs. Shaw went to the Railway Station to meet her she learnt of the murder, and later identified the body. She shortly after gave in a list of the missing jewellery (Exhibit P1). The jewllery found in the Railway carriage on the 30th September has been identified by Mrs. Shaw. A cash-box (Exhibit P7) found on the Railway line since the murder has also been identified by Mrs. Shaw as that of her sister.

3. Mr. E. K. Shaw, brother-in-law of the deceased, identified the body. He found no jewellery among Miss Taylor's things, except a safety-pin brooch which was attached to a blouse.

4. Mr. W. Taylor, brother of the deceased, will say he saw his sister start from Ghaziabad on the early morning of 7th September for Multan. He will say what money she had and what jewellery she was wearing. She was a second class passenger. The purse (Exhibit P8) was the one in which Miss Taylor carried her ticket and money. This witness also identifies the cash box (Exhibit P7) and the light brown or yellow steel trunk (Exhibit P9).

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Mr. Taylor will also give evidence as to the events of 13th September when he was on his way back to Ghaziabad and left Multan by the 7-Up mail; how and why suspicion fell on Shuldham; and as regards the search of Shuldham and Mullins in the presence of the District Magistrate—the search being only for jewellery.

5. Chela Ram, Trains Clerk, North-Western Railway, Multan, will give evidence from his "Numbers Taker Book" (Exhibit P10) as to the composition of the train—8-Down mail—in which Miss Taylor travelled.

6. Allah Yar, draftsman, North-Western Railway, prepared the sketch (Exhibit P11) of the train—8-Down mail.

7. Mr. Warren, Train Despatcher, North-Western Railway, Lahore, will say he put Miss Taylor into a first class compartment owing to want of room in the 2nd class, and informed Guard Chapman of this.

8. Guard Chapman was the Guard in charge of 8-Down mail in which Miss Taylor was a passenger. He saw the latter at Lahore, and spoke to her at Lahore Cantonment West, and again at Kahna Kacha where the breach on the line was. On arrival at Raewind Miss Taylor sent for him and he showed her how the lights in her compartment could be turned down; Miss Taylor put the light out in his presence. The witness saw Shuldham helping Major Sangster with his luggage in the compartment immediately in front of Miss. Taylor's. Afterwards he saw Shuldham in the intermediate compartment for Europeans, and Mullins in the third class of the Postal Van (see the sketch Exhibit P11). The train left Raewind at 23-55, and stopped next at Changa Manga, arriving there at 0-40. At Changa Manga witness saw Shuldham coming down the train from his intermediate compartment, searching carriages, and on being questioned told the guard he was looking for the iceman. Guard Chapman saw Shuldham get into the intermediate carriage again. Here Shuldham was in a "slatish coloured suit, otherwise a Holland suit." The train left Changa Manga 0-50 and arrived at Montgomery at 3-8. Here Guard Chapman made over to Guard Babington and told him Miss Taylor had asked to be called at Multan City. Exhibit P13 is Guard Chapman's "journal" showing "timings" of 8-Down mail. Exhibit P12 is a statement written out by this witness on 10th September for the Traffic Inspector. Guard Chapman was in the 7-Up mail on 13th September. He will give evidence as to Shuldham's behaviour then, and as to what followed.

Guard Babington was in charge of the train from Montgomery to Multan Cantonment. He did not wake Miss Taylor at Multan City, he says, because it was so late in the morning. After leaving Montgomery the train stopped next at Khanewal, arriving there at 6-29 and leaving at 6-39. Shuldham asked this witness to have a cup of tea and the latter accepted this offer; this was at Khanewal. The train arrived at Multan City at 7-17 and left at 7-20, and reached Multan Cantonment at 7-25. This witness also gives evidence as to the state of Miss Taylor's compartment at the time the murder was discovered.

10 Guard Thaddeus was Guard with 1-Up Calcutta mail of 9th September. He will say Shuldham was a passenger in this train; he saw Shuldham for the first time at Ambala Cantonment. Later he saw him at Rajpura in a second class compartment. At Ambala Shuldham told witness he had 'lost' his wife.

11. Ticket Collector Hope will say he saw Shuldham at Lahore on 9th September in the 2nd class waiting room and will give details of the conversation they had about Shuldham's wife, and that Shuldham said he would commit suicide. Also that Shuldham looked at a dagger at the Book-stall. The witness will show Shuldham had a second class ticket from Lahore to Raewind only. Mullins was with Shuldham and was given sweets by the latter, and Shuldham said he was going to make a man of Mullins. Both left by the 60-Down for Raewind. Exhibit P17 is the witness' "Checking Book." A second class ticket No. 075 of 8th September 1908, from Ghaziabad to Multan Cantonment, is entered in this checking book; the witness saw this ticket with a lady in a first class compartment (Exhibit P18) as the second class ticket in question. He will also describe the clothes Shuldham and Mullins were wearing.

Major Sangster, Cantonment Magistrate,

Karachi, will show how while on his journey from Jullundur to Karachi he met Shuldham and Mullins on the evening of 9th September at Raewind and what occurred there. He will say how he was the first to discover the murder at Multan Cantonment, he being a passenger in 8-Down mail occupying the first class compartment immediately in front of Miss Taylor's.

13. Umar Beg, Manager, Refreshment Room, Raewind, will state how he met Shuldham and Mullins at Raewind on 9th September and what occurred there. Neither Shuldham nor Mullins paid for the dinner the Manager gave them there. Both first put their luggage into a third class compartment of a Postal Van in the 8-Down mail; later Shuldham took his luggage out and told Mullins he was going to an intermediate compartment in front and went accordingly.

14. Mr. W. E. Shaw (no relative of the brother-in-law of deceased), Manager, Soldiers' Home, Peshawar, will say how he happened to be in a first class compartment in a carriage to the rear of the carriage in which was Miss Taylor's compartment; how Mullins and Shuldham entered into conversation with him and how Mullins came into his compartment (1st class). After the train had moved out of Raewind, these two played cards—even after the train had left Changa Manga. The witness will describe how, after the train had left Changa Manga, Shuldham looked in from the second class compartment immediately in front of Shaw's first class and told them to stop gambling, and shortly after Mullins went out. Shaw then went to sleep.

15. Mr. Framjee, a merchant of Lahore, will say how he travelled from Raewind to Montgomery in the 8-Down mail on 9th-10th September in a second class compartment. No one else was in the compartment when the train left Raewind, but some luggage of somebody was on the centre seat—*viz.*, a brown leather hand bag, a bundle of clothes, and a net bag with books in it. The witness will describe how after the train had left Changa Manga Shuldham came into his compartment and what he did there, how, on Shuldham telling him there were two Europeans playing cards in the next compartment, Mr. Framjee looked and saw that this was the case, and how Shuldham was no longer visible when Mr. Framjee drew in his head from the window, how an hour or half an hour before the train arrived at Montgomery Shuldham again walked in from the door, and changed his clothes, and then began talking about his wife, and the conversation the two had. Mr. Framjee getting out at Montgomery made room for another gentleman (Mr. Swain) who then came in. Mr. Framjee will also say how he had met Shuldham at Raewind in the Refreshment Room. Further Mr. Framjee will say how he stated what he had seen and heard to the Railway Officials when he was returning that day to Lahore, and the statement made by him to the Police later on at Lahore, and to Mr. Clarke, the District Magistrate, and how he identified Shuldham at Lahore.

16. Guard Cooke will say he saw Shuldham and Mullins at Raewind on 9th September, and that will describe the clothes worn by them there, and at Multan.

17. Mr. Swain, Stock Verifier, North-Western Railway, will say what occurred after he at Montgomery got into 8-Down mail on 10th September into the 2nd class compartment vacated by Mr. Framjee and will state how Mullins gave him a pair of glasses (Exhibit P).

18. Jhande Khan, Head Constable, Railway Police, Khanewal, will give evidence as to Shuldham asking him to get him two intermediate class tickets for Multan Cantonment and giving him Re. 1 to do so, and how by mistake in the hurry the Booking Clerk gave tickets for Multan City and how two others had to be obained at Multan City. The witness informed Inspector Shuldham, the father of the accused, about the tickets. This witness prepared the *surat hal* (Exhibit P21).

19. Chhabil Das, Assistant Booking Clerk, Khanewal, will corroborate Head Constable Jhande Khan *re* the tickets purchased at Khanewal.

20. Jahana, *khidmatgar*, Khanewal Refreshment Room, will show he brought tea for passengers by the 8-Down mail, and was paid by Shuldham for the tea supplied.

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21. Sultan Ahmad, Constable, Railway Police, Multan City, will confirm what Head Constable Jhande Khan has stated re the tickets from Multan City and will give full details.

22. Guard Sullivan will say he saw Shuldham and Mullins pass out of the Railway Station, and the former handed him two intermediate class tickets.

23. Atma Ram, *tum-tumwala*, drove Shuldham and Mullins hurriedly to Inspector Shuldham's house, being paid annas 3 by Shuldham. He saw a brown leather bag with the latter.

24. Mohamad Ismail, Constable, will say Shuldham and Mullins stayed with Inspector Shuldham from 10th to 13th September.

25. Khandai, *dhobi*, will say he washed Shuldham's clothes, and their state when given to him.

26. Mr. Clarke, Deputy Commissioner, Multan, will give evidence as to the photograph (Exhibit P16) and as to what occurred immediately after he had received a report of the murder. Also as to the events of 13th September when he ordered a search of Shuldham and Mullins in 7-Up going to Lahore; he will say the search was for jewellery and not blood-marks; and will also state what occurred at Lahore.

27. Sub-Inspector Abdul Aziz, North Western Railway Police, was placed on special duty in connection with this case on 10th September. He will give details of the event of 13th September and what followed at Lahore; of the search on 25th September on Shuldham's arrival from Calcutta, and on following days. He will give evidence as to the No. 771 having been discovered in Shuldham's pocket-book, Exhibit P36, on 9th October 1908.

28. Amir Chand, Goods Clerk, North-Western Railway, will say Exhibit P23 is a list of the clothes taken off Mullins, and of these Exhibit P24 is a shirt with marks like blood on it.

29. Moti Ram, Train Clerk, North-Western Railway, certifies to the correctness of Exhibit P26, the "Number Taker Book", containing the composition of 7-Up on 13th September, and that the sketch (Exhibit P-25) is correct.

30. Azmat Ullah, Draftsman, will say Exhibit P25 is a correct sketch of 7-Up on 13th September and he prepared it.

31. Sergeant White, Calcutta Police, will give evidence as to Shuldham's having been brought from Calcutta to Multan under arrest. Also as to the search in Multan on their arrival at Multan on 25th September. He will say Exhibit P14 is Shuldham's brown leather hand bag, and that Exhibit P27 is the list of Shuldham's property brought down from Calcutta, and Exhibit P-28 is the list given by the Commissioner of Police, Calcutta.

32. Sergeant Henderson, Calcutta Police, will corroborate Sergeant White.

33. Maula Dad, Clerk, District Traffic Superintendent's Office, Multan, will give evidence as regards the search of Shuldham on 26th September, and as to the coat, (Exhibit L).

34. Wassu Ram, Hospital Assistant, will give evidence as regards Shuldham's white trousers, (Exhibit M) having marks on them like blood-marks.

35. Hira Singh, Sub-Platelayer, Changa Manga, will give evidence as to the finding of the cash-box (Exhibit P2) on 20th September between the Stations of Satgharra and Wan Radha Ram (these are between Changa Manga and Montgomery) at mile 757 between telegraph posts Nos. 4 and 5. This box was found a little way inside the wire fencing. Also as to the finding of Exhibit P29 (card-board jewellery box broken) a little further on, and a little further still was found Exhibit P30 (a broach case). Exhibit P30 was found between the rails. There was a slight blood-mark on the cash-box.

36. Nihal Singh, *Mistri* of the Sub-Platelayer, will say that on 23rd September was found the 2nd class ticket (Exhibit P18), at mile 755, between telegraph posts Nos. 17 and 18.

37. Mr. Williams, Superintendent Police, Multan, will state how he obtained information from Mullins which resulted in search being made of the carriage in which the two accused travelled on 13th September.

38. Feroz Chand, Sub-Inspector Railway Police, will say how Exhibits P2, P29, P30 and P18, were found. Also as to the discovery of the jewellery (Exhibit P31, the list) on 30th September in a third class

compartment of carriage No. 771, with the jewellery being the piece of cloth, Exhibit P 32.

39. Mr. Curran, Assistant Carriage Examiner, will give evidence as to the finding of the jewellery on 30th September in carriage No. 771. He made a sketch of the carriage (Exhibit P33) and a list of the jewellery (Exhibit P34). Exhibit P31 is a list of the jewellery made by the Police, and this was signed by witness.

40. Feroz Din, carpenter, North-Western Railway, will also give evidence as to the finding of the jewellery and piece of cloth. He removed the boards of the carriage.

41. Colonel Coleman, Civil Surgeon, Multan, gives evidence as to six parcels sent him by the Police having been forwarded to the Chemical Examiner, Lahore, and the return of these with the latter's reports, No. 917, dated 18th September 1908, No. 984, dated 24th September 1908, No. 1003, dated 30th September 1908, and No. 1009, dated 3rd October 1908. He also says he forwarded to the Police the Chemical Examiner's report dated the 19th September 1908.

42. Narain Das, Head Clerk, Civil Surgeon's Office, gives evidence as to the phial referred to in the Chemical Examiner's report No. 974.

43. Ghulam Mohammed, Head Constable, gives evidence as to Exhibits P4 and P5 and P6 and P24 and P7 and P14, Y, L, T, M, and R, having been put up in parcels, sealed and sent to the Civil Surgeon.

44. Mauj Din, Constable, gives evidence as to his seat having been used and he took certain parcels to the Civil Surgeon.

45. Shahab-ud-Din, Constable, says he took one parcel to the Civil Surgeon.

46. Nur Mohammed, Constable, gives similar evidence.

The Chemical Examiner's reports show mammalian blood was detected on certain articles, and colouring matter of blood on some others, and semen on the piece of cloth with which the Assistant Civil Surgeon wiped out the deceased's vagina, as also on the combinations or drawers of the deceased wrongly described "shirt" in the Chemical Examiner's report.

Lastly, there is the confession of Mullins. With regard to this I should add that this does not appear to be a full confession; there appears little doubt Mullins took a greater share in this matter than he admits."

Mr. *Turner*, Government Advocate, with him Mr. *Grey*, for the Crown.

Messrs. *Ganpat Rai* and *Tek Chand*, for Shouldham.

Mr. *Lakshmi Narain*, for Mullins.

ORDER OF REFERENCE TO THE FULL BENCH.

REID, J.—(*December 4th*, 1908.)—Reference to Full Bench. Questions referred :—

1. Does the following answer to charge 4 constitute plea of guilty :—

"I did not commit rape, I only held the lady's hands?"

2. Is Exhibit P22 admissible against either or both prisoners ?

3. Is Exhibit P27 admissible against either or both prisoners ?

4. Is Exhibit P29 admissible against either or both prisoners ?

5. Is Exhibit P30 admissible against either or both prisoners ?

JUDGMENT OF THE FULL BENCH.

REID, J.—(*December 5th*, 1908.)—Our answer to the first question is that the words used constitute a plea of guilty, but, in our opinion, having regard to the fact that the prisoner was at the time enfeebled by illness and undefended, withdrawal of the plea should be allowed if the prisoner Mullins wishes to withdraw it. The document which is subject of the second question was admittedly written by Shuldham while in the custody of the Police in a Police cell, and not in presence of a Magistrate.

We are not satisfied that any part of the statement led to the discovery of any fact within the terms of section 27 of the Evidence Act, and we are unable to accept the argument of Counsel for the Crown that any part of the statement is admissible as an admission, though not admissible as a confession. The whole statement is incriminating.

Our answer to the second question is that no part of the document is admissible against either prisoner.

Our answer to the third question is that Exhibit P27, Shuldham's deposition on solemn affirmation recorded by a Magistrate on the 10th September 1908, is admissible against Shuldham and not admissible against

Mullins. When the statement was recorded Shuldham was not an accused person and the statement is not a confession within the terms of section 30 of the Evidence Act.

The fourth and fifth questions can be disposed of together, Exhibits P 29 and P 30 being admittedly on the same footing, *Empress* v. *Annutram Singh* (1), *Empress* v. *Yakub Khan* (2), cited by Counsel for Shuldham, do not help him These authorities merely lay down the rule that a statement made to a Magistrate who subsequently commits to the Court of Session must be recorded in the form prescribed by section 364 of the Code of Criminal Procedure. Exhibit P29 was admittedly recorded in the prescribed form and the Magistrate, examined as a witness, has supplied all that was wanting in the record of Exhibit P30.

Our answer to the 4th and 5th questions is that Exhibits P29 and P30 are admissible against Mullins on all the charges framed against him, and are admissible against Shuldham on the charges of rape and of abetment of rape, unless Mullins' plea of guilty of abetment of rape is accepted and acted on. If Mullins is convicted of abetment of rape on his own plea, Exhibits P29 and P30 are not admissible against Shuldham.

Reference disposed of.

CONCLUSION OF TRIAL.

REID, J.—(*December* 11*th*, 1908.)—Counsel for Shuldham concluded. Pleader for Mullins, allowed with consent of Crown, to reply to Government Advocate who will in turn reply to him if necessary.

Government Advocate addressed Court and Jury. Pleader for Mullins follows. Court summed up. Jury retired for 65 minutes and returned unanimous verdict of guilty against Shuldham on charges 1, 3, 5, and unanimous verdict of guilty against Mullins on third charge, verdict of guilty by 7 to 2 on first charge and by 6 to 3 on fifth charge. The Jury recommended the prisoner to mercy on the ground that he acted under the influence of Shuldham. Shuldham addressed Court in mitigation, sentenced to death on first conviction, sentences on other convictions deferred. Sentence on Mullins deferred. Court rose 6-25 P. M.

(1) 5 C. 954; 6 C. L. R. 297; 3 Shome L. R. 29 Cr.
(2) 5 A. 253; A. W. N (1883) 25.

REID, J.—(*December* 12*th*, 1908).—Sat at 11-A.M.—The foreman of the Jury, in reply to the Court, stated the Jury by a majority of 7 to 2 found Mullins guilty on the 2nd charge. I am unable to accept the verdict of the majority on the first and second charges, as there is, in my opinion, a reasonable doubt of Mullins having either conspired with Shuldham to commit the murder or anticipated that murder would be committed, or committed the murder himself, or in any way abetted its commission, but in view of the recommendation to mercy and of the sentences which I felt it to be my duty to pass, on the unanimous conviction under section 376, and on the conviction by the majority under section 394, which I accept, retrial on the first and second charges is, in my opinion, unnecessary, and the prisoner Mullins is, within the terms of section 308 of the Code of Criminal Procedure, acquitted on the charges of murder and abetment of murder.

On each of the convictions under section 376 and section 394 of the Penal Code he is sentenced to be kept in penal servitude for the term of his natural life. The sentence will run concurrently.

The Jurors are exempted from service on a Jury for the period of three years from this date.

Both accused convicted.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 42 OF 1915.

February 24, 1915.

Present:—Mr. Justice Twomey.

NGA SAN NYEIN—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), s. 235—Possession of instruments for counterfeiting coin—Accused's knowledge, if material—Criminal Procedure Code (Act V of 1898), s. 103 (2)—Search—Procedure.

For a conviction under section 235 of the Indian Penal Code, it is not only necessary that the accused should be in possession of the instruments or materials for counterfeiting coin but it should also be

proved that the possession was within the accused's knowledge. [p. 153, col. 1.]

In conducting searches the provisions of section 103 (2) of the Criminal Procedure Code should be strictly complied with. [p. 154, col. 1.]

Appeal from an order of the Special Power Magistrate of Prome, dated the 28th December 1914, passed in Criminal Regular Trial No. 186 of 1914.

JUDGMENT.—The appellant San Nyein, village headman of Gyogon village, has been sentenced to transportation for seven years under section 235, Indian Penal Code, the charge against him being that 40 counterfeit coins, 31 of 1913, 5 of 1880 and 4 of 1890, and a mould for making counterfeit rupees of 1913 were found at his house.

Police Inspector Maung Myaing stated that on receiving information that San Nyein was counterfeiting coin and had moulds in his possession he went to San Nyein's house on the morning of 12th November with a crowd of people from Letpadaw, a village about a mile from Gyogon. On searching the house a bundle containing a 1913 rupee-mould was found in an open *yedayauk* or water shoot placed for the purpose of catching water between the eaves of the kitchen annexed and the side wall of the main building. Besides the mould was found a roll of counterfeit rupees and a bamboo opium pipe. Another roll of false rupees was found in the thatch of the roof above the *yedayauk*. The *yedayauk* is 13 feet from the ground, see plan. The articles, therefore, could not have been put there by a man standing on the ground. But it is well within the reach of a man standing in the kitchen, for there is an open space between the conduit pipe and the kitchen roof all along the pipe.

There is no doubt that the articles were found as described. The only question is whether they were there with the appellant's knowledge. It is said that just before the search San Nyein's wife went up on to the house although the Inspector forbade her, and it is suggested that when she went up she may have taken the articles from inside the house and concealed them in the *yedayauk*. This, however, is very improbable for the Inspector had a crowd of people from Letpadaw with him, the house was surrounded and if San Nyein's wife had acted as the prosecution suggested, it could hardly have escaped notice. From the evidence it appears by no means impossible that the articles could have been planted surreptitiously from the kitchen at some time when the inmates of the house were in the main building.

The accused was one of the prime movers in bringing a charge of bribery against the Inspector Maung Myaing about two months before the search, and it was alleged that the Letpadaw headman, Tun Saing, was instrumental in getting the *douceur* for the Inspector. A departmental inquiry was held and the petition against the Inspector was dismissed. The Special Power Magistrate touches on this matter in his judgment, but he does not appear to have attached sufficient importance to it. There can be no doubt that it furnishes a motive for bringing a false charge against San Nyein. See the Prome District Office General Proceedings No. 341 of 1914.

The Special Power Magistrate was influenced a good deal by the evidence of the prosecution witness Maung Lun that the accused on the occasion of the search had shown him a counterfeit rupee, which he got from one Po Hlaing who was staying with him. This witness is not corroborated and his evidence is not intrinsically probable. Another witness Nga Maung spoke of three counterfeit 4-anna pieces given to him by San Nyein to buy opium. The Special Power Magistrate remarked that Nga Maung is not the sort of witness that can be readily believed. Nga Maung's statement is uncorroborated and even if it were true, there is nothing to show that the 4-anna bits which he says he received from Say Nyein were really counterfeit. I think that the evidence of Maung Lun and Maung Maung cannot be regarded as effective corroboration of the case against San Nyein.

If San Nyein were really a practical coiner, one would expect to find not merely a mould and some counterfeit coins but also the raw materials, lead, etc., and nothing of the kind was found.

San Nyein's lodger, Po Hlaing, was arrested under the prevention sections of the Code of Criminal Procedure some months

before the search of San Nyein's house. It is alleged that Po Hlaing was a coiner. It seems very improbable that San Nyein would keep a mould and counterfeit coins at his house after Po Hlaing's arrest. The attention of the Police having been directed to Po Hlaing, San Nyein would be more likely to get rid of any articles that might serve to connect him with his lodger's evil practices. Having regard to these considerations and to the recent enmity between the accused on the one hand and the Letpadaw headman and the Inspector on the other, I think it is not at all improbable that the mould, etc., were planted out of revenge and that San Nyein knew nothing about them.

The conviction and sentence are set aside and the appellant is acquitted.

The Inspector should be called to account for disregarding the provisions of section 103 (2), Code of Criminal Procedure, in not preparing a list of the articles found and taking the signatures of the witnesses of the search.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 398 OF 1914.

June 26, 1914.

Present:—Mr. Justice Scott-Smith.

SARDAR AHMAD—CONVICT—APPELLANT

versus

EMPEROR - PROSECUTOR—RESPONDENT.

Evidence—Unnatural offence—Uncorroborated testimony of complainant, whether sufficient—Prosecution, when not bound to produce all witnesses—Penal Code (Act XLV of 1860), s. 377.

In the case of unnatural offence under section 377, Indian Penal Code, conviction can safely be based on the uncorroborated testimony of the victim, if it is not otherwise doubtful.

The prosecution is not bound to produce witnesses who are not expected to speak the truth.

Appeal from an order of the District Magistrate, Gurdaspur, dated the 21st April 1914, convicting the appellant under section 377, Indian Penal Code, and sentencing him to five years' rigorous imprisonment.

Mirza *Jalal-ud-Din*, for the Appellant.

Lala *Madan Gopal*, for Mr. *Herbert* (Assistant Legal Remembrancer), for the Respondent.

JUDGMENT.—The appellant, Sardar Ahmad, a school-master in a boys' school at Dinanagar in the Gurdaspur District, has been convicted on three charges of attempting to commit an unnatural offence with Tara Chand, a boy of 13, one of the pupils in the school. The District Magistrate who tried the case has written a very careful and well-considered judgment, in which he has fully detailed all the facts of the case and the arguments urged by the defence, and it would be useless repetition for me to go over the same ground again. The points raised by Mr. Jalal-ud-Din in arguing the appeal have all been discussed by the learned District Magistrate. The main point urged is that it is very easy to make a charge of this kind and that it is unsafe to convict on the uncorroborated evidence of the boy Tara Chand. From the nature of the case there would be no corroboration of the actual commission of the offences.

Diwan Chand and Fazal Ilahi could, no doubt, have given very material evidence in support of Tara Chand had they chosen to do so, but they were not called as witnesses. According to Tara Chand they were abettors of Sardar Ahmad and they have been expelled from the school as a result of the inquiry consequent upon Tara Chand's complaint.

They certainly would not have supported his statement and the prosecution were not bound to produce witnesses who were not expected to speak the truth.

Rupa, P. W. No. 2, has given evidence about one visit of Tara Chand to appellant's house, and the boy Panna Lal, P. W. No. 3, supports Tara Chand in his statement that appellant beat him for refusing to come to his house. It was this beating which led to the boy complaining to his father, and the latter complained to the headmaster.

The defence of appellant, that the accusations are the outcome of a plot between Panna Lal and the fathers of the boys (including Tara Chand) who complained of their maltreatment by appellant, has been fully dealt with by the learned

Magistrate, and I agree with him in rejecting it absolutely.

The boys Abdullah and Ahmad Ali, who have gone back upon the original statements made by them to the head-master, have apparently been won over by appellant on account of being his co-religionists. Their evidence has been shown to be untrustworthy and has been rightly disbelieved. After a careful consideration of all the facts, I consider that the District Magistrate was justified in relying upon the statement of Tara Chand, even though it is practically uncorroborated. The sentence is, no doubt, heavy, but I am unable to consider it as in any way excessive.

The appeal is dismissed.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 971 OF 1914.

February 17, 1915.

Present:—Mr. Justice Parlett.

NGA SHWE YI *alias* NGA PO AND ANOTHER —APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 236, 237, 403—Penal Code (Act XLV of 1860), s. 457—Rangoon Police Act (IV of 1899), s. 31—Second trial for a graver offence when conviction on the same facts for lesser offence subsisting, whether legal.

When a man has been convicted of committing an act constituting an offence, and further evidence subsequently comes to light which shows that his act constituted a graver offence than that of which he was convicted, he cannot merely on that ground alone be put upon his trial for the graver offence. [p. 156, col. 1.]

Therefore, a person who is convicted under section 31 of the Rangoon Police Act for being in possession of an article supposed to be stolen cannot be again tried and convicted later on for the offence under section 457, Indian Penal Code, simply on the ground that the owner of the article is traced and some further evidence is available to constitute an offence under section 457 of the Indian Penal Code. [p. 156, col. 1.]

Appeal from an order of the Western Sub-Divisional Magistrate of Rangoon, dated the 25th November 1914, passed in Criminal Regular Trial No. 408 of 1914.

JUDGMENT.—At 3-30 A.M. on 6th November 1914 Mr. Yeoman's house was broken into and a sewing machine was stolen. He reported the matter to the Myetada Police Station at 9-30 A.M., handing over the key of the machine.

Meanwhile at 5-30 A.M. the appellant had been met by two Police Constables carrying a sewing machine. On being challenged he dropped the machine and tried to escape, but was arrested and taken with the machine to Latter Street Police Station. The officer in charge of the Station, without apparently any attempt to trace the owner of the machine, or even taking the elementary step of ascertaining whether the loss of any such article has been reported in another Police Station, forthwith sent the appellant up for trial under section 31 of the Rangoon Police Act, for being in possession of a thing which might reasonably be suspected to be stolen property and failing to account satisfactorily for his possession of the same, and he was summarily tried, convicted and sentenced under that section on 6th November, and his appeal was dismissed on 29th November.

The machine having been identified as that stolen from Mr. Yeoman's house on 6th November, the accused was on 16th November sent up for trial under section 457, Indian Penal Code, in respect of it, and has been convicted and sentenced thereunder. He appeals on the ground, among others, that his former conviction under section 31 of the Rangoon Police Act operated as a bar to the second prosecution under section 457, Indian Penal Code. In my opinion that plea is well taken. Section 403, Criminal Procedure Code, enacts that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted of such offence shall not, while such conviction remains in force, be liable to be tried again on the same facts for any other offence for which a different charge might have been made under section 236 or for which he might have been convicted under section 237. The Magistrate considered the point, but held that the facts in the two cases were different. In my opinion they were substantially the same, namely, accused's possession of the machine. In the first case the Court was only asked to draw the inference from his conduct that the machine might reasonably be suspected to be stolen, in the second case it was asked to draw the inference that the accused had broken into Mr. Yeoman's house and stolen it. It is

true that in the latter case a little additional evidence was tendered—namely, evidence of the house-breaking in the early hours of that morning, and of the identity of the machine, but I know of no authority for holding that when a man has been convicted of committing an act constituting an offence, and further evidence subsequently comes to light which shows that his act constituted a graver offence than that of which he was convicted, he may merely on that ground alone be put upon his trial for the graver offence. Clauses 2, 3, 4 and 5 of section 403 of the Criminal Procedure Code lay down under what circumstances alone a previous conviction is not a bar to a subsequent trial for the same matter, and the present case is, I consider, covered by none of those clauses. I do not think it can be held that clause 3 applied on the ground that the consequence of accused's act, namely the causing of wrongful loss to the owner of the machine, was unknown to the Magistrate at the first trial. The identity of the owner was unknown, but the finding of the Magistrate implied that wrongful loss had been caused to him.

I consider that appellant was not, under the circumstances, liable to be tried again under section 457, Indian Penal Code, and I reverse the conviction and sentence and acquit him of the charge under that section.

Accused acquitted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 665 AND 673 OF 1914.

CRIMINAL REVISION PETITION NO. 563 OF 1914 AND TAKEN UP NO. 36 OF 1914.

February 8, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

IN CR. R. CASE 665 OF 1914

MAHOMED KASIM—ACCUSED NO. 1—PETITIONER

IN CR. R. CASE NO. 673 OF 1914

DAVID CHETTY AND OTHERS—ACCUSED NO. 2 TO 9—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878), s. 3—Investiture of powers—Criminal Procedure Code (Act V of 1898), s. 39—Magistrate—'Specially empowered'—'Generally empowered'—Notification by Government empowering all second class Magistrates to try cases under Opium Act, if amounts to 'specially empowered'—Jurisdiction.

The word 'specially' in 'specially empowered' occurring in section 3 of the Opium Act, 1878, is used in speaking of individuals and in contrast with the word 'generally'. [p. 157, col. 1.]

When by a notification of the Government a class of officials is invested with powers to try certain offences, such officials are only 'generally empowered' and not 'specially empowered'. [p. 157, cols 1, 2.]

The language of section 39 of the Criminal Procedure Code explained. [p. 157, cols. 1, 2.]

Per *Seshagiri Aiyar, J.*—A notification empowering all second class Magistrates to try such offences under the Opium Act is *ultra vires* of the powers given by the Act, as its effect is to enlarge the definition of Magistrate as given therein. [p. 157, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sub-Divisional Frst Class Magistrate of Negapatam, in Criminal Appeal No. 83 of 1914, preferred against that of the Stationary Second Class Magistrate of Negapatam, in Calendar Case No. 405 of 1914, and case taken up in revision by the High Court as regards the 2nd to 9th accused in the said Calendar Case No. 405 of 1914.

FACTS.—The petitioner (1st accused) and others (accused Nos. 2 to 9), were convicted of an offence under the Opium Act and sentenced to various terms of imprisonment by the 2nd Class Magistrate of Negapatam, purporting to act under the authority of a notification, dated 12th October 1880, issued by the Government of Madras empowering all Second class Magistrates to take cognisance of offences under the Opium Act, 1878. The convictions were confirmed by the Sub-Divisional First Class Magistrate of Negapatam. The 1st accused then preferred this criminal revision petition to the High Court, which took up the case of accused Nos. 2 to 9 *suo motu*.

The Hon'ble Mr. *T. Richmond*, for the 1st Accused:—The second Class Magistrate had no jurisdiction to try the case. He was not specially empowered within the meaning of section 3 of the Opium Act. The notification in question amounts to a general investiture. (*cf.* also section 39, Criminal Procedure Code.) Special investiture must be by reference to the individual. The notification is *ultra vires* inasmuch as the effect of it is to enlarge

the term "Magistrate" as defined in the Act. The conviction is, therefore, illegal and ought to be set aside.

The *Public Prosecutor*, in support of convictions :—The power to try offences under special and local laws is itself a special power and persons invested with such powers must be deemed as "specially empowered." The word "specially" in the Opium Act and the Code of Criminal Procedure has reference only to the extra special powers given by the Government.

ORDER.

SPENCER, J.—The question has been raised whether the Second Class Magistrate who tried this case acted without jurisdiction in trying a case under the Opium Act.

In section 3 of the Act a Magistrate has been defined as a Presidency Magistrate, a Magistrate of the First Class or (when specially empowered by the Local Government to try cases under this Act) a Second Class Magistrate. Now it is conceded that this particular Second Class Magistrate has not been empowered by name or by office by any notification issued by the Local Government under the Opium Act. The only notification is that published in the Fort St. George Gazette, Part I, dated 12th October 1880, whereby the Governor-in-Council empowered all Magistrates of the Second Class to try cases under the Opium Act of 1878.

The question, therefore, is whether this investment of powers was an act of "specially empowering" Magistrates of the Second Class; for if it was not so, it appears that the Local Government were not acting within their powers.

Section 39 of the Criminal Procedure Code throws light on what is meant by specially empowering persons.

It declares that the Local Government may empower classes of officials generally by their official titles or persons specially by name or in virtue of their office. When, therefore, a class of officials is invested with powers to try certain offences, it would appear that they are "generally" empowered. The word "generally" is in contrast to the word "specially," which is used in speaking of individuals.

It is urged by the Public Prosecutor that the power to try offences under special or local enactments is itself a special power and that persons so invested with powers may be described as specially empowered ; but this is not the sense in which I understand the Imperial Government to have used the word in framing the section. It follows that the trial was without jurisdiction. We set it aside and order the 1st accused, to be re-tried by such First Class Magistrate as the District Magistrate may direct. We see no reason to direct a re-trial of the other accused, as they have already undergone their sentences and have been sufficiently punished, assuming that they are guilty.

SESHAGIRI AIYAR, J.—I agree.

I think Mr. Richmond is right in his contention that the notification of the Government of Madras, dated the 12th October 1880, cannot confer upon all Second Class Magistrates in the Presidency the power to try opium cases. The definition section in the Opium Act gives a discretion to the Local Government to "specially empower Second Class Magistrates" with jurisdiction. The general authorisation quoted to us is *ultra vires* of the powers given by the Act. Under the notification in question the Government have exercised powers by which they have enlarged the definition of "Magistrate" so far as their Presidency is concerned. I do not think this is permissible. The analogy of section 39 of the Criminal Procedure Code is against the contention of the Public Prosecutor, which I shall presently notice. That section speaks of a "special authorisation" and of a "general authorisation." I cannot accept the argument of the learned Public Prosecutor that the word "specially" in the Opium Act and in the Code of Criminal Procedure has reference to the extra or special powers conferred by the Government. Whether the authority is given by name to an individual or to a class, in either case the added power will be "special power". The word "special" in section 39 is inserted to contrast it with the word "general" following later on. I do not think the word *special* is used in the sense suggested by Mr. Grant. Moreover, the notification of 1880 cannot have the effect

of enlarging the powers of all Second Class Magistrates appointed since the date of its publication.

I agree that the Second Class Magistrate had no power to try this case. I also agree that there should be a re-trial. It is not necessary to order the re-trial of the other accused.

Conviction set aside;
Re-trial of one accused ordered.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 565 OF 1914.
February 2, 1915.
Present:—Mr. Stuart, A. J. C.

JAGAN NATH—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Joint trial—Property stolen at one and same theft and separately received by several accused—Irregularity, incurable—Criminal Procedure Code (Act V of 1898), s. 537—Conviction, setting aside of.

A joint trial of persons separately receiving property stolen at one and the same theft, is bad, and this defect is not an irregularity which can be cured under section 537, Criminal Procedure Code, and a conviction marred by this defect cannot stand. [p. 159, col. 1.]

Emperor v. *Jethalal Harlochand*, 29 B. 449; 7 Bom. L. R. 527; 2 Cr. L. J. 480 and *Abdul Majid* v. *Emperor*, 33 C. 1256; 3 C. L. J. 412; 3 Cr. L. J. 391; 10 C. W. N. 912, referred to.

Appeal against the order of the Assistant Sessions Judge, Lucknow, dated the 19th November 1914.

Mr. *R. F. Bahadurji*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.—In this case four persons, Sheo Prasad, Jagan Nath, Chhedi Ahir, and *Musammat* Radha, were tried together by the learned Assistant Sessions Judge of Lucknow and a Jury on separate charges under section 411, Indian Penal Code. The charges were based on the following allegations.

On the 16th of August 1914 a burglary had been committed on the premises of a certain Munshi Parbhu Dayal. Property which was alleged to have been stolen during the commission of that burglary was found in the house of Sheo Prasad. Other property alleged to have been stolen during the commission of the burglary was found in the house of Jagan Nath. It was further asserted that certain property stolen during the commission of the burglary had been tracted to the possession of Radha and that certain other property which was alleged to have been stolen during the commission of the burglary was found in the possession of Chhedi.

It was not part of the case for the prosecution that any of these four persons had actually taken part in the commission of the burglary, and the case for the prosecution appears to have been compatible with a theory that the burglars had disposed of one portion of the stolen property to Sheo Prasad, another to Chhedi, a third to Jagan Nath, and a fourth to Radha, such disposals being separate and unconnected with each other. The case for the prosecution could be accepted in entirety and at the same time it could be found that each of these four persons were ignorant of the disposal of the stolen property made to the others. In these circumstances I do no consider that the prosecution alleged that these four persons had committed different offences in the same transaction. The result of the trial was that Jagan Nath and Sheo Prasad were convicted, and that Chhedi and Radha were acquitted. On behalf of Jagan Nath, Counsel has appeared to appeal against the conviction on the ground that there had been no legal trial owing to these four persons having been tried jointly. Sheo Prasad has also appealed through the jail, raising no legal points and putting forward nothing of weight and since filing his appeal (I am informed by the jail authorities) he has escaped from prison where he was serving not only the sentence under this conviction but sentences under other convictions. The defect in the trial of Jagan Nath is, however, also apparent in the trial of Sheo Prasad, and this defect is not an irregularity which can be cured under section 537 of Act V of 1898. The point raised is not a new one. It has already been considered in *Emperor* v.

Jethalal Harlochand (1) and *Abdul Majid* v. *Emperor* (2) and in other cases and there is a consensus of opinion that a conviction marred by this defect cannot stand. I have, therefore, no option but to set aside the convictions and sentences, both in the case of Jagan Nath and in the case of Sheo Prasad. I order accordingly. I should not have considered anything raised by Sheo Prasad in his petition of appeal had it referred to the merits of the case, as his alleged action in escaping from jail would deprive him of any right to be heard, but this is not a case of an appeal against a conviction but of an illegal conviction. There is, of course, nothing in the proceedings so far which will prevent the Crown taking such other action against Jagan Nath and Sheo Prasad as it may see fit to take. Jagan Nath will be set at liberty, unless he is detained on some other charge.

Appeal allowed.

(1) 29 B. 449; 7 Bom. L. R. 527; 2 Cr. L. J. 480.
(2) 33 C. 1256; 3 C. L. J. 412; 3 Cr. L. J. 391; 10 C. W. N. 912.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 732 OF 1914.
CRIMINAL REVISION PETITION No. 615 OF 1914.
February 1, 1915.
Present:—Mr. Justice Spencer.
In re APPANDA NATHA NAINAR AND OTHERS—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), ss. 341, 447—*Conviction for two charges—Acquittal on one—Sentence unaltered, effect of—Enhancement of sentence—Criminal trespass, offence of, when complete—Charge under s.* 447, *essentials for.*

When a Subordinate Magistrate convicts an accused of two charges and the Magistrate on appeal reverses the conviction on one and confirms that on the other, without at the same time reducing the sentence, it is in effect an enhancement of the sentence and the conviction should, on that ground, be set aside.

Ramzan Kunjra v. *Ramkhelawan Chowbe*, 24 C. 16, referred to.

A charge of criminal trespass will not stand unless the Court finds that that trespass was committed with intent to commit a criminal offence, etc. Mere entry upon the land by an accused with a view to remove crops planted by him does not amount to an offence under section 447.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Cheyyar Division, in Criminal Application No. 37 of 1914, preferred against that of the Second Class Magistrate of Cheyyar, in Calendar Case No. 152 of 1914.

Mr. *A. Ramachandra Aiyar*, for the Petitioners.

The *Public Prosecutor*, for the Government.

ORDER.—The Appellate Court acquitted the accused of the offence of wrongful restraint and confirmed the conviction for Criminal trespass.

In doing so the Court left the substantive sentence of fine unaltered. This amounted to an enhancement of the sentence. Vide *Ramzan Kunjra* v. *Ramkhelawan Chowbe* (1). Moreover the conviction for wrongful restraint having gone it should have been found whether the accused entered upon land in the possession of another with the intention of committing some other offence or with the intention of intimidating, insulting or annoying any person in possession.

The facts that the crop which complainant attempted to cut had admittedly been grown by the 2nd accused and that 1st accused, who claimed that he held under an independent title and that he had leased the land to 2nd accused for cultivation, was not a party to the decree obtained by the complainant against the 2nd accused, rendered it all the more necessary for the prosecution to establish that the accused entered on land with a criminal intention.

The Appellate Court's finding is only that the appellants committed criminal trespass by going to the land in question intending to prevent the respondent from harvesting the crops by force. This is not enough. Force is not necessarily criminal force

I must set aside the conviction and direct the fines to be refunded.

Conviction set aside.

(1) 24 C. 316.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 610 OF 1914.
CRIMINAL REVISION PETITION No. 516 OF 1914.

January 4, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

SAWMINATHA MUDALIAR—ACCUSED—PETITIONER

versus

GOPALAKRISHNA NAIDU—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 144 (5)—Time expired order, setting aside of.

An order, which on the date on which it is sought to be revised by the High Court ceased to be in force by efflux of time under section 144 (5) of the Code of Criminal Procedure, should not be interfered with in revision under section 435 of the Code of Criminal Procedure.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Tanjore, in Miscellaneous Petition No. 7 of 1914, (Civil Miscellaneous Petition No. 616 of 1914, on the file of the Court of the Sub-Divisional Magistrate of Negapatam.)

Mr. *T. V. Gopalasamy Mudliar*, for the Petitioner.

Mr. *T. V. Muthukrishna Aiyar*, for the Respondent.

The Acting *Public Prosecutor*, for the Government.

ORDER.—The Magistrate's order, dated 31st July 1914, which is appealed against could not, under the provisions of section 144 (5), Criminal Procedure Code, remain in force more than two months. As there is at this date no valid order in existence, we do not think it necessary to adjudicate on the questions upon which the parties were at issue.

The petition is dismissed.

Petition dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 522 OF 1914.
CASE REFERRED No. 53 OF 1914.

September 24, 1914.

Present:—Mr. Justice Hannay.

In re CHINNASWAMY—ACCUSED No. 3.

Criminal Procedure Code (Act V of 1898), ss. 118, 120, 123—Security, failure to give—Imprisonment, whether can run concurrently with sentence accused already undergoing.

Section 120 (1) read with section 123 (1) of the Code of Criminal Procedure, makes it illegal for a Magistrate to pass a sentence of imprisonment to run concurrently with some other sentence the accused is already undergoing.

Case referred, for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Chingleput, in his letter dated the 19th June 1914.

The *Public Prosecutor*, for the Government.

ORDER.—The order of the Joint Magistrate in Miscellaneous Case No. 8 of 1914, that the period of one year's rigorous imprisonment imposed on the accused under section 118 of the Criminal Procedure Code is to run concurrently with the sentence which the accused was at that time actually undergoing in another case, is illegal with reference to the terms of section 120 (1) of the Criminal Procedure Code read with section 123 (1). Under section 120 (1) the period for which security is required can only commence on expiry of the sentence which the accused is already undergoing, and under section 123 (1) the accused may be detained in prison after the expiry of the sentence he is now undergoing if he has not by that time furnished security as ordered. The order of the Joint Magistrate will be modified accordingly, so as to make the period for which security is required and the period of imprisonment awarded in the event of security not being furnished to commence from the expiration of the previous sentence.

Order modified.

SUNDAR DEI *v.* BALDEO BAKHSH SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 139 AND 140 OF 1912.

December 7, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

Musammat SUNDAR DEI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Thakur BALDEO BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage, anomalous—Post diem *interest*—*Construction of document.*

Where a mortgage-deed provided that the mortgage was made for three years bearing interest at 2 per cent. per mensem payable every six months and in default mortgagees were entitled to charge compound interest and to make realization by a suit or in any other way that they might wish, that the mortgagor would redeem at the expiration or before the close of the fixed period by paying off the total amount due thereon and in the event of the mortgage not being redeemed within the fixed period the mortgagor undertook to place the mortgagees in possession for a period of four years, and during possession the profits were to be taken in lieu of interest, the mortgagor reserving the right to redeem at any period during these four years by paying up the amount due and that if the mortgage was not redeemed on or before expiration of the said four years, complete proprietary title should pass to the mortgagees:

Held, that the document was an anomalous mortgage, being a combination of a simple mortgage, a usufructuary mortgage and a mortgage by conditional sale. [p. 166, col. 2.]

Held, further, that the terms of the deed evidenced an intention that interest would not run after expiration of the four years and, therefore, interest could not be allowed after that date. [p. 168, col. 2.]

Mathura Das v. *Raja Narindar Bahadur*, 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88 and *Bindesri Naik* v. *Ganga Saran Sahu*, 20 A. 171; 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273, distinguished.

Appeal against the decree of the Subordinate Judge, Tahsil Biswan, dated the 1st July 1912.

Mr. *A. P. Sen* and Babu *Tinkauri Mohan Ghosh*, for the Appellants.

Mr. *J. Jackson*, Babu *Ran Bahadur*, Messrs. *N. N. Goshal*, *Sami Ullah Beg* and *Syed Muzaffar Husain*, for the Respondents.

JUDGMENT.—Thakur Baldeo Bakhsh Singh, *talukdar* of Bihar in the Sitapur District, executed on 21st August 1876 a registered deed of mortgage for a consideration of Rs. 3,981 in favour of Bansidhar, Badri Nath and Manohar Lal. The mortgage affected his proprietary rights in the three villages of Bhitia, Jalipur and Parbatpur. On 30th August 1878, Baldeo Bakhsh Singh transferred by a registered deed of sale to Sadanand for a consideration of Rs. 15,000 the whole of his proprietary rights in Parbatpur with the exception of 301 *bighas* 16 *biswas*. On 26th February 1879, Baldeo Bakhsh Singh transferred by a registered deed of sale the whole of his properietary rights in Bhitia to Abbas Ali Khan for Rs. 6,369. On 5th March 1879, Baldeo Bakhsh Singh transferred the whole of his proprietary rights in Jalipur by a registered deed of sale to Abbas Ali Khan for a consideration of Rs. 2,150. On 23rd September 1884, the sons and one grandson of Sadanand transferred by a registered deed of sale all the rights which he had obtained under the deed of 30th August 1878 to the Rani of Katesar for a consideration of Rs. 14,000. Thus the Rani of Katesar became entitled to the proprietary rights in Parbatpur with the exception of 301 *bighas* 16 *biswas*, and Abbas Ali Khan became entitled to the proprietary rights in Bhitia and Jalipur. On 4th August 1910, Manohar Lal and fifteen other persons filed a suit in the Court of the Subordinate Judge of Biswan on the foot of the deed of 21st August 1876, in which it was asserted that the amount due on the said mortgage was on the date of the institution Rs. 51,03,980-7-3. The plaintiffs withdrew their claim with regard to Rs. 20,03,980-7-3 and claimed Rs. 31,00,000. They asked that, if the amount of Rs. 31,00,000 were not paid, the three villages affected by the mortgage should be foreclosed. The question was raised whether the plaintiffs as originally arrayed included all the representatives of the original mortgagees. The persons originally made defendants were Thakur Baldeo Bakhsh Singh, the mortgagor, the Deputy Commissioner of Sitapur as Manager of the Court of Wards for the estate of Rani Pirthipal Kuar of Katesar (the Court of Wards having assumed management of that estate) and Abbas Ali Khan. But in an amended plaint Ram Chand, Ram Partab, Jagdish, Balbhaddar and Satrohan, the sons of Panni Lal, the son of Sundar Lal, brother of Badrinath, original mortgagee, were joined as defendants Nos. 4 to 8, and Manni Lal, son of Sundar Lal, brother of Badrinath, was joined as defendant No. 9. The plaintiffs asserted that defendants Nos. 4 to 9, although related to one of the mortgagees, had ceased

to have any interest in the mortgagees' rights, but their names were inserted on the allegation that this course was necessary to prevent misunderstanding. Further Sewak Ram, Parbhu Dayal and Audesh Nandan were joined as defendants Nos. 10 to 12 in the amended plaint. Audesh Nandan is said to be the proprietor of a portion of the 301 *bighas* 16 *biswas* excluded in the sale-deed of 30th August 1878, and Sewak Ram and Parbhu Dayal are stated to be the proprietors of the remainder of that area. Defendants Nos. 10 and 11 raised in their written statement the point that Bhola, son of Dubar Lal, brother of Bansidhar, mortgagee, and Thakur Prasad, Kundan Lal and Kunj Behari, son of Chandi Lal, son of Ram Charan, brother of Bansidhar, should also have been made parties to the suit. The family history of the mortgagees, in so far as its description is necessary for the comprehension of this portion of the pleadings, may be stated here.

Of the three original mortgagees Manohar Lal was a party to the case. There remain Badri Nath and Bansidhar. Badrinath was one of five brothers, Raghubar Dayal, Sundar Lal, Chhote Lal, Ajudhia Prasad and himself. Of these brothers Sundar Lal is dead. Badri Nath died without issue. Ajudhia Prasad is plaintiff No. 8, Chhote Lal is plaintiff No. 9 and Raghubar Dayal is plaintiff No. 10. Ram Sarup, Mandhata, Ram Kishan, Paras Ram and Ramjee, the sons of Raghubar Dayal, are plaintiffs Nos. 11 to 15. The plaintiffs asserted that the Sundar Lal branch had lost all interest in the mortgagees' rights. But nevertheless they subsequently joined the surviving members of the Sundar Lal branch as defendants, that is to say, Ram Chand, Ram Partab, Jagdish, Balbhaddar and Satrohan, the sons of Panni Lal and the grandsons of Sundar Lal, defendants Nos. 4 to 8, and Manni Lal, the son of Sundar Lal, defendant No. 9. Bansidhar was one of four brothers, Ram Charan, Dubar Lal, Mulchand and himself. He died without issue and is represented directly by his widow, *Musammat* Sundar Dei, plaintiff No. 2. The Mulchand branch is represented by the surviving members, Mata Din, the son of Mulchand, and Kalka Prasad, Prem Nath, Gajadhar Prasad, Mohan Lal and Gobind Prasad, the sons of Jugal Kishore and grandsons of Mulchand, plaintiffs Nos. 3 to 7. The allegation of the plaintiffs was that the Ram Charan branch and the Dubar Lal branch had lost all share in the mortgagees' rights. The defendants Nos. 10 and 11 raised the point that the Ram Charan and Dubar Lal branches had not lost their interests in the mortgage and should have been joined as parties. They were not joined as parties, though we find that on 8th May 1912 an application was made by the plaintiffs to join them as defendants, subject to the reservation that they still maintained that they had no interest in the property in dispute. That application was refused. The above remarks sufficiently explain the position as to successorship to the rights of the mortgagees.

It is to be noted that defendants Nos. 10 to 12 were subsequently struck off the list of parties, and that the plaintiffs withdrew all claims against such property covered by the mortgage as had come into their possession. The question of non-joinder was raised generally in the pleadings of defendant No. 2 in a manner which requires the Court to decide the point. The remaining pleadings of the principal defendants are based on the following facts:—

Thakur Baldeo Bakhsh Singh, the original mortgagor, admitted the deed and asserted that everything with regard to it had already been paid off. He further asserted that the suit was bad as the deed did not give the mortgagees a right to foreclose, owing to the fact that they had not enforced the previous right to obtain possession. He asserted that the plaintiffs had no claim to *post diem* interest. Defendant No. 2 put the plaintiffs to the proof of mortgage and denied their right under the terms of the deed to obtain payment or to foreclose in view of the fact that they had not obtained possession according to the conditions alleged to be stated in the deed. It was further asserted that if the deed be genuine everything due under it had already been paid off. Defendant No. 3 mainly asserted that he had with the consent of the mortgagees paid off all that was due with respect to the villages of Bhitia and Jalipur and that the mortgagees had agreed to exempt those villages from the operation of the mortgage.

The learned Subordinate Judge framed the following issues:—

Preliminary issue.—Whether the suit is barred by limitation?

1. Whether the mortgage-deed, Exhibit 1, is genuine and for consideration?

2. Whether the plaintiff is entitled to compound interest?

3. (*a*) Whether the suit is bad for non-joinder of the persons named in paragraph 20 of the written statement of the Court of Wards and paragraph 12 of the written statement of defendants Nos. 10 and 11 as parties to the suit within the period of limitation?

(*b*) If so, what is the legal effect?

4. Is the plaintiff entitled to interest from the date from which he was entitled to take possession of the mortgaged property under the terms of the mortgage-deed, Exhibit 1?

5. Whether the suit is barred by adverse possession for more than 12 years of the property in suit?

6. Whether the mortgage in suit has been paid off?

7. How does the plaintiff's not having given notice of his claim to the Court of Wards at the time the Katesar estate was taken under the Court of Wards affect the suit?

8. Will the receipt of Rs. 3,243 by the mortgagees from Abbas Ali amount to release of *Mauza* Bhitia Jalipur from liability under the mortgage in suit?

It was found on the preliminary issue that the suit was not barred by limitation, and on the first issue that the mortgage-deed was genuine and for consideration. It was found on the second and fourth issues that the mortgagees were entitled to compound interest for the whole period, on the third issue that Manni Lal, defendant No. 9, and Ram Chand, Ram Partab, Jagdish, Balbhaddar and Satrohan, in other words the Sundar Lal branch, had no interest in the property in suit, but that the Dubar Lal and Ram Charan branches of the Bansidhar family had an interest. These branches were not parties to the suit. It was decided that the suit was not, however, bad for non-joinder. On the fifth issue it was decided that the suit was not barred by adverse possession, and on the sixth issue that the mortgage in suit had not been paid off in so far as the Rani of Katesar was concerned. On the seventh issue it was decided that the absence of notice to the Court of Wards could not affect the suit. On the eighth issue it was decided that the receipt of Rs. 3,243 by the mortgagees from Abbas Ali Khan effected the release of Bhitia and Jalipur from liability under the provisions of the deed of mortgage. Upon these findings it was decided that in default of payment of Rs. 31,01,345-10-10 on the first January 1913, five-sixths of the village of Parbatpur excluding 301 *bighas* 16 *biswas* should be decreed to the plaintiffs as absolutely foreclosed. The learned Subordinate Judge arrived at this share on the finding that the omission to join the Dubar Lal and Ram Charan branches of Bansidhar's family deprived the plaintiffs of the right to foreclose more than five-sixths of the property.

Two appeals have been filed against this decision. Appeal No. 139 has been filed by the plaintiffs and Appeal No. 140 has been filed by the Deputy Commissioner of Sitapur on behalf of the Katesar estate. These appeals have been heard and will be decided together.

The grounds taken on behalf of the Katesar estate are that the suit should be dismissed for non-joinder, that the evidence on the record justifies the conclusion that the whole amount due on the deed of mortgage has been paid off, that the Katesar estate had a good title by adverse possession, that the suit was barred by limitation and that in no circumstances could *post diem* interest be allowed.

The grounds of appeal taken by the plaintiffs are that the payment of Rs. 3,243 had not released Bhitia and Jalipur from the consequences of the mortgage, and that the payment could not in law release a portion of the mortgaged property in absence of the execution of an effective subsequent deed exempting those properties from the operation of the original deed of mortgage, that the branches of Dubar Lal and Ram Charan were proved on the evidence to have lost all right and title to benefits under the mortgage, and that the whole of the village of Parbatpur excluding the area of 301 *bighas* 16 *biswas* should have been declared liable to foreclosure.

SUNDAR DEI *v.* BALDEO BAKHSH SINGH.

We first decide the appeal of the Katesar estate. The learned Counsel, who represented the estate, did not argue at length on the second and ninth grounds to the effect that the whole of the money due on mortgage had been paid off, and it is not necessary for us to enlarge on the suggestion that the whole of the money has been paid off. It is sufficient to say that the payment of anything, with the exception of Rs. 3,243 which were paid on behalf of Abbas Ali Khan, is not established upon the evidence on the record. The learned Subordinate Judge has discussed the evidence as to payment in that portion of his judgment which commences, "It was only defendant No. 3 who raised a specific plea of payment," down to the words, "I entirely disbelieve it." He has advanced cogent reasons for disbelieving the evidence produced on this point. We agree with his conclusions and accept the arguments which he has adduced in support of those conclusions as sufficient. It is not possible to arrive at a reasonable conclusion of payment upon the presumption that the money must have been paid because the plaintiffs neglected to enforce their remedy for 34 years. It is necessary, in order to establish this question of payment, to have something more solid than a presumption, and the omission on the part of the contesting defendants to adduce anything more than the unsatisfactory evidence upon the point which is on the record, tells strongly against them in this connection. We, therefore, decide this point against the appellant.

Before considering the arguments raised by the learned Counsel for the Katesar estate upon the remaining points, it is necessary first to consider carefully the terms and nature of the deed of mortgage. It is now admitted between the parties that this deed of mortgage was executed for good consideration and duly registered. The following is a translation of the deed which is accepted as accurate by all Counsel appearing in the appeals:

"I, Thakur Baldeo Bakhsh Singh, son of Thakur Umrao Singh, caste Thakur Gaur, am resident and *talukdar* of Rihar, *Pargana* Tambaur, Tahsil Biswan, District Sitapur.

"Whereas *Mauza* Bhitia Jalipur, Hadbast No. 89, and *Mauza* Parbatpur, Hadbast No. 140, in *Pargana* Tambaur, Tahsil Biswan, are ancestral landed property and I have been keeping them from before in my proprietary possession without anybody else's share therein and without anybody's obstruction; now in perfect health and proper senses without anybody's undue influence or compulsion I have mortgaged, for my own necessity, all the three entire villages named above bounded as follows according to Hadbast, including all land under cultivation or not or lying fallow, *jalkar*, *bankar*, *abadi*, inhabited or otherwise, tanks, groves, *deh*, river, rivulet, *sir*, *dhara*, *parjote*, *dasaundh*, and *haq chaharum*, trees bearing fruits or not or of spontaneous growth, and all rights and interests which have arisen from the villages named above or which may accrue in future, without the exception of any interest or part, to Lala Bansidhar, Badrinath and Mahohar Lal, Khatris, money-lenders and residents of town Laharpur proper in Tahsil and District Sitapur for three years for Rs. 3,981 in coin of the present Government, half of which amounts to Rs. 1,990-8-0, bearing interest at Rs. 2 per cent. per month; and having realized the mortgage-money in cash in one instalment from the said mortgagees brought the same in my own use. The agreement is that I will continue to pay up the interest at every six months and if the interest or any part thereof is not paid at any sixth month or till the end of the year, then at that sixth month or at the end of the year the mortgagees will be entitled to add that interest to the principal and to make their realizations with interest thereon at the above rate by a suit or in any other way they like. I will redeem the mortgaged villages at the expiration of the fixed period, or within the period mentioned in this bond, after paying off the principal together with the balance of the interest. In case of the breach of the promise, *i. e.*, if I am not able to redeem the mortgaged villages after paying the principal and interest at the expiration of the fixed period or within it, then after three years I will put the mortgagees in possession for four years more just like myself, having effected mutation in Court in the name of the mortgagees instead of mine; and if I do not apply for mutation, then the mortgagees will have the right to apply to Court themselves and to effect the mutation and the mortgagor will

be liable for the costs of the same. And during the time of possession of the mortgagees, I, the mortgagor, will have no right to the profits nor will the mortgagees have any right to interest, and from date of possession the mortgagees are liable for Government revenue. If I cannot redeem the property within these four years, *i. e.*, till the expiration of seven years from date of execution of this mortgage-deed or within that period, then this mortgage-deed will be considered a perfect sale-deed. I will not be competent to transfer the property anywhere else by mortgage, sale or gift till redemption, and if I do so, it will be considered invalid as against this mortgage-deed and the mortgagees will be entitled also to hypothecate, sell or make gift of this mortgage-deed anywhere within the period according to their own necessity, and the mortgagor will be bound by the terms of this document, considering that *mahajan* to be in the place of mortgagees, and I will have the right to redeem the property from that *mahajan* after paying him the principal and the balance of the interest due according to the above-montioned terms, *i. e.*, within the period of seven years, and he will have no objection to my redeeming the property; and after the expiration of the said fixed period, enforcement will be made according to the above-mentioned terms. Therefore, this perfect mortgage-deed with promise of payment and with the condition that it will be a perfect sale-deed after seven years, is executed of my own free will, without anybody's undue influence or compulsion so that it may come of use when required.

Boundaries of mortgaged villages.

(1) BHITIA, (2) JALIPUR.

East.- Supoli in possession of mortgagor and Gudausa, Katesar Estate.

West.—Puranpur, Katesar Estate.

North.—Parbatpur.

South.—Gudausa, Katesar Estate.

(3) PARBATPUR.

East.—Makhu Bihar, Rihar Estate.

West.—Ahrauri, Rihar Estate.

North.—Chandi, Rihar Estate.

South.— Bhitia Jalipur.

Dated the 21st August 1876 corresponding to *Bhadon, Sudi*, Sambat 1933 and 1284 *Easli*, Monday.

Written by Raghubar Dayal, resident of Laharpur.

(Sd.) Baldeo Bakhsh Singh.

Witnesses:-

1. Din Dayal.
2. .....

Registered on 22nd August 1876 in the office of Sub-Registrar, Sitapur."

The contents of this deed may be conveniently abstracted as follows:—The mortgagor commences by stating that he has mortgaged the three villages of Bhitia, Jalipur and Parbatpur to Bansidhar, Badrinath and Manohar Lal, for three years for Rs. 3,981 bearing interest at Rs. 2 per cent. a month, and that he agrees to pay the interest at every six months and if the interest or any part thereof is not paid at any sixth month or till the end of the year, the mortgagees will then be entitled to charge compound interest, and *to make realizations by a suit* or in any other way that they may wish. Reading together the words that the mortgagor has mortgaged the villages with the clause that they may make their realizations by a suit, we decide that this portion of the deed creates in favour of the mortgagees a simple mortgage. Our interpretation is borne out by the fact that in a case which was decided by their Lordships of the Privy Council it was held that, when a deed recited a liability to pay the principal and interest by way of simple mortgage, with a subsequent covenant to give possession of the mortgaged property in lieu of interest, and contained no covenant allowing sale, a suit for sale lay [*Lingam Krishna Bhupati Deva* v. *Maharaja Manya Sultan Bahadur of Vizianagram* (1)]. Then follows a clause to the effect that the mortgagor will redeem the mortgaged villages at the expiration of the fixed period or before the close of *the fixed period* by paying off the total amount due thereon. The words "fixed period" here clearly mean "within three years from the date of the execution." After that, follows a condition, that in event of the mortgage not being redeemed within the fixed period (that is to say, within three years from the date of its execution) the mortgagee undertakes to place the mortgagees in possession of the three villages for a period

(1) 10 Ind. Cas. 272; 8 A. L. J. 594; 15 C. W. N. 441; 9 M. L. T. 445; 13 Bom. L. R. 447; 13 C. L. J. 584; (1911) 1 M. W. N. 429; 21 M. L. J. 1147.

of four years, and once the mortgagees obtained possession of those villages the profits of the villages in question shall be taken by the mortgagees in lieu of interest, and that the mortgagor shall have no title to claim any excess of profits over interest nor shall the mortgagees have title to claim the difference between the interest and the profits, if the latter sum be less than the former. The mortgagor reserves to himself the right to redeem the mortgage at any period from the 22nd August 1879 up to the 21st August 1883 by paying up the amount due. These latter conditions create a usufructuary mortgage, the usufructuary mortgage being a mortgage which was to take effect upon 22nd August 1879 in event of the simple mortgage not having been redeemed before that date, and the amount due being the amount due on 22nd August 1879. On payment of the amount due at any period up to the 21st of August 1883 the mortgagor has a right to redeem the mortgage. Then follows a third clause that if the mortgage be not redeemed on or before the 22nd August 1883, complete proprietary title in the property mortgaged shall pass to the mortgagees. This clause creates a conditional sale in event of non-redemption on or before that date. There is nothing stated as to any intention to pay interest after the 22nd August 1883 when, under the terms of the deed in event of non-redemption, the mortgagees were given the right to claim proprietary possession by virtue of a conditional sale. The present Transfer of Property Act was passed in 1882 some six years after the execution of this deed. At the time that the deed was executed, every mortgagor had a right to a period of grace in which he could exercise his title to redeem even after the expiration of the period when such a deed created a right of foreclosure. Under the existing law at the time of its execution it was necessary for a mortgagee to obtain possession by foreclosure through a Civil Court, and the mortgagor was given a period of grace by the Court within which to redeem; it must be presumed that both parties knew the law on the subject, and it is clear that they made no provision as to the rate of interest to be charged nor had the mortgagor covenanted to pay interest from the period when the clause as to conditional sale became operative up to the period when the mortgagees actually obtained foreclosure. The deed is not only silent on this point. In a subsequent clause we find that words were used indicating a direct intention not to pay interest after the 22nd August 1883. The mortgagor covenants that the mortgagees shall have a right to transfer their rights as mortgagees, and stipulates that he will have the right to redeem the property from such transferee, after paying him the principal and the balance of the interest due according to the above-mentioned terms, that is, within the period of seven years. The addition of the words "within the period of seven years" clearly indicates an intention not to pay interest after the expiration of such period. Further we find that he stipulates that after the expiration of the said fixed period, that is to say, after the 22nd August 1883, enforcement will be made according to the above-mentioned terms. We can only understand these words to mean that after the 22nd August 1883, the sole right that shall remain with the mortgagees will be to obtain foreclosure by executing the clause with regard to conditional sale.

We have now to consider how the terms of this mortgage are to be enforced with regard to the provisions of Act IV of 1882 and the present Code of Civil Procedure. It has been argued on behalf of the plaintiffs that this mortgage is a combination of a usufructuary mortgage and a mortgage by conditional sale and as such is not an anomalous mortgage. We cannot accede to this contention. As we have shown, this document, which is of a very peculiar character, combines three mortgages. At the beginning it was a simple mortgage and it was open to the mortgagees at any period after the first six months, in case of default, to sue the mortgagor for the amounts then due and to have a charge declared on the mortgaged property for realization of the amount due to them. Thus it was a simple mortgage. Later on, the mortgagees are given the right to take possession of the property after the manner of usufructuary mortgage, and finally they are given the power in event of certain conditions arising to take the document as one of conditional sale and to obtain foreclosure accordingly. Thus the three kinds of mortgages—simple mortgage, usufructuary mortgage and mortgage by conditional sale—are all present in the same document. Therefore, the docu-

ment is an anomalous mortgage, and under the provisions of section 98 of Act IV of 1882 effect must be given to its provisions according to its terms and apart from the especial procedure enjoined by Act IV of 1882 in other places and by the Code of Civil Procedure.

Pertinent principles with regard to interpretation have been enunciated by their Lordships of the Privy Council in the cases of *Mathura Das* v. *Raja Narindar Bahadur* (2) and *Bindesri Naik* v. *Ganga Saran Sahu* (3). In both cases their Lordships explained the necessity of considering the terms of a document as a whole, and gathering the intentions of the parties from the meaning to be applied to the words in view of the considerations that would ordinarily guide reasonable men of their class in making a covenant for the re-payment of money on the security of landed property. At page 49 of the former ruling the words occur: "The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a Jury or a Court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction." This pronouncement as to the principles that should guide a Court in considering the terms of such a document is of the very highest authority, and it is necessary for us not to overlook the possibility of the deed evidencing the intention of the parties to permit the enforcement of the rate of interest provided not only between the period of 22nd August 1879 and the 21st August 1883, but even beyond that period. It is argued on behalf of the plaintiffs that the mortgagees should not be considered to deprive themselves of the remedy of enforcing the payment of interest at the stipulated rate after the 21st August 1883, because they had reserved to themselves the remedy of foreclosure for obtaining satisfaction on account of the amount due to them as against the mortgagor. The present document is of a nature different to either of the documents considered by their Lordships of the Privy Council in the case above-mentioned. The first of those documents was a simple mortgage. The second was a mortgage by conditional sale. In neither case was the document an anomalous mortgage, and in both cases there were indications of an intention that the interest was to run till the dates of payment. In the present case the mortgage is an anomalous mortgage, and there are no indications of an intention that interest will run after 21st August 1883. On the contrary the document evidences an intention that interest will not run after the 21st August 1883. There are distinct indications that the mortgagor with the permission of the mortgagees stated it to be his intention of paying no interest after the 22nd August 1883. *Post diem* interest is not allowed as a matter of course. In the case of *Gudri Koer* v. *Bhubaneswari Coomar Singh*, (4) a claim to *post diem* interest was refused. That case was decided before the decision of their Lordships in *Mathura Das* v. *Raja Narindar Bahadur* (2). But in the cases that were decided subsequent to that decision, *Moti Singh* v. *Ramohari Singh* (5) and *Balwant Singh* v. *Gayan Singh* (6): claims to *post diem* interest were also refused. In a case decided in this Court, *Narayan Prasad* v. *Diwan* (7), Mr. Chamier lays down a principle which appears to us to apply exactly. He says at page 126: "Where the mortgagor promises to pay a certain sum with interest at a certain date, there is room for the contention that the mortgaor did not intend to promise to pay interest except for the

(2) 19 A. 39; 23 I. A. 138; 1 C. W. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88.

(3) 20 A. 171; 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273.

(4) 19 C. 19.

(5) 24 C. 699; 1 C. W. N. 437.

(6) 21 Ind. Cas. 253; 35 A. 534; 11 A. L. J. 829.

(7) 6 Ind. Cas. 996; 13 O. C. 125.

periods fixed," and we find that there is the authority of their Lordships of the Privy Council in the case of *Chajmal Das* v. *Brij Bhukan Lal* (8) for the proposition that *post diem* interest cannot be assumed to be payable in each and every case, for in that case *post diem* interest was not allowed according to the terms of the bond though interest was allowed by way of damages. At page 517 of that ruling occur the following words: "Their Lordships are not prepared to dissent from the construction placed by the High Court on the bond in respect of there being no covenant by Banke Lal to pay interest after the fixed period of two years from the date of the bond, although it is difficult to suppose that this was the intention of the parties to the bond. But even on that construction the plaintiff would be entitled, on default being made in the payment, to recover interest technically as damages, and the rate would *prima facie* be the same as that provided by the bond during the two years, although there is no rule of law making that rate necessarily the measure of the damages."

The cases cited in support of the opposite conclusion are *Phul Chand* v. *H. H. Sandilands* (9), *Ram Din* v. *Ram Prasad* (10) and *Rahas Behari Lal* v. *Bachchu Singh* (11). With regard to the cases of this Court it is sufficient to say that in the case of *Phul Chand* v. *H. H. Sandilands* (9), the mortgage was made to secure the re-payment of a principal sum with interest at a fixed rate. The mortgagee agreed to put the plaintiff in possession to secure the interest. He did not do so. The deed was a deed of simple mortgage with a covenant that certain land would be assigned in order that the mortgagee might recover his interest from the profits. In the case of *Ram Din* v. *Ram Prasad* (10), the rate of interest was fixed year after year without any final period being fixed. The mortgagee agreed to take possession of the property in lieu of interest. Possession was not given and the rate of interest allowed by the deed was charged in full. Both these cases are clearly distinguishable from the present, and in the case of *Rahas Behari Lal* v. *Bachchu Singh* (11), the suit was on a mortgage by conditional sale, the terms of which were construed by the Bench which decided the case to convey the meaning that the mortgagor agreed to pay interest after the date fixed for redemption. It is true that a Bench of the Madras High Court in *Ghantayya* v. *Papayya* (12) dissented from the view taken by the majority of the Judges in a Full Bench decision in *Moti Singh* v. *Ramohari Singh* (5). But in that case the words of the document did not preclude the intention of the mortgagor to pay interest after the date fixed, there being a promise to pay interest generally. We, therefore, find that in no circumstances can interest be allowed after the 22nd August 1883, according to the terms of the deed. In order to avoid foreclosure, it is necessary for the mortgagors to pay amounts calculated at the following rates. They must pay the amount of principal Rs. 3,981, together with interest at 24 per cent. per annum compoundable with six-monthly rests from 22nd August 1876 to 21st August 1879. When the sum due on the 21st August 1879 has been calculated after making deductions for payments made, interest will be calculated on that sum from 22nd August 1879 to 21st August 1883 at 24 per cent. per annum compoundable with six-monthly rests, and that amount will also be added. The reason for charging interest at this rate from 22nd August 1879 to 21st August 1883 to the property is that the mortgagor agreed to hand over the profits of the property for the four years in question in lieu of interest, that is to say, in lieu of interest at the rate agreed for the first three years We do not know what the profits for that period would have amounted to. Had they exceeded the amount of interest at 24 per cent. per annum on the total amount due on the 22nd August 1879, it might have been to the advantage of the mortgagor (in spite of the existence of the clause allowing compound interest to be charged) to refrain from delivering possession. Had they been less than that amount

(8) 17 A. 511; 22 I. A. 199; 6 Sar. P. C. J. 624.
(9) 19 O. C. 29.
(10) 11 O. C. 323.
(11) 23 Ind. Cas. 871; 1 O. L. J. 50.
(12) 23 M. 534.

it might have been to the advantage of the mortgagees to refrain from demanding possession. We are not in a position to discover what these profits were. But, inasmuch as possession was not delivered, the legal position of the parties is clear. The clause allowing profits to be set off in lieu of interest became inoperative, and they reverted to the original contract to pay interest at 24 per cent. per annum compoundable with six-monthly rests. Thus interest at 24 per cent. compoundable with six-monthly rests will be chargeable to 21st August 1883, but in accordance with our previous finding with regard to *post diem* interest we decide that after the date when under the terms of the deed the mortgagees obtained a right to foreclose, that is to say, the 21st August 1883, *post diem* interest cannot be allowed, and we further consider that interest by way of damages cannot be awarded. In the first place no interest is claimed by way of damages, and, even if we were ready to overlook this point, the action of the mortgagees in delaying their suit for such a large number of years precludes them from all claim to preferential consideration with regard to a remedy that they have not explicitly sought. Thus we find that the amount due upon the deed is Rs. 11,401-3, that is to say, the amount of principal, Rs. 3,981 with interest at 24 per cent. compoundable with six-monthly rests from the 22nd August 1876 to 21st August 1883 after crediting Rs. 3,243, admittedly paid.

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In the result the appeal of the Court of Wards is in the main successful and the appeal of the plaintiffs is to some degrees successful. It will be more convenient to state our decree as a whole. Its effect will be that the plaintiffs are entitled to foreclosure only over the village of Parbatpur excluding 301 *bighas* 16 *biswas*, unless the Rani of Katesar whose property is under the management of the Court of Wards pays Rs. 11,401-3 to them within six months from the date of this decree. In event of her paying the sum the plaintiffs shall transfer the property to her free from all encumbrances created by the plaintiffs or other persons claiming under them or those under whom they claim, and shall put her into possession of the property delivering up all documents in their possession or power relating to the same. No power to redeem was given to Abbas Ali Khan by the decree of the learned Subordinate Judge, and as he has not appealed upon this point, no power to redeem is declared in his favour.

With regard to the question of costs the plaintiffs fixed the amount payable for foreclosure at 39 lakhs of rupees. We have found that the amount payable to avoid foreclosure is Rs. 11,401-3. The stamp paid was on the principal sum secured and the amount that we have awarded is in excess of the principal sum secured. The Rani denied the plaintiffs' claim *in toto*. We, therefore, decide that the Rani pay to the plaintiffs the Court-fees paid by them in both Courts, the costs of witnesses, etc., and the Pleader's fee on Rs. 11,401-3, and bear her own costs in both Courts. The costs of Abbas Ali Khan in appeal will be borne by the plaintiffs. Costs except as hereinbefore provided to be borne by the parties.

Appeals partly allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 375 OF 1911.
December 2, 1914.
Present:—Mr. Fawcett, A. J. C.
AYOOB ISMAIL—PLAINTIFF
versus
NUR MAHOMED SILEMAN—DEFENDANT.

Easements Act (V of 1882), s. 23—Altering mode and place of enjoyment—Right to discharge rain water by sloping eaves—Raising height of eaves, when justified—Trespass—Projections over another's land, when amount to trespass—Remedy in case of trespass—Specific Relief Act (I of 1877), s. 55—Injunction, grant of.

Where the sloping eaves of the roof of a dominant tenement projected over a servient tenement to a certain extent, and the dominant tenement acquired an easement to discharge rain water by those eaves on the servient tenement, and where the dominant owner in constructing an upper storey raised the height of the eaves and further projected the flat roof

AYOOB ISMAIL v. NUR MAHOMED SILEMAN.

planks and balcony or verandah roof of the first floor beyond the extent of the original projection:

Held, (1) that the dominant owner had a right to raise the height of the eaves so long as he did not throw an increased burden upon the servient tenement; [p. 170, col. 2.]

Mulia Bhana v. *Sundar Dana*, 21 Ind. Cas. 352; 15 Bom. L. R. 876; 38 B. 1 at pp. 6, 7, followed.

(2) that the projections beyond their original extent amounted to an actual trespass on the principle of the maxim "*Cujus est solum, ejus est usque ad cœlum*; [p. 170, col. 2.]

Rathinavelu v. *Kolandavelu*, 29 M. 511; 16 M. L. J. 281, followed.

Corbett v. *Hill*, (1870) 9 Eq. 671; 39 L. J. Ch. 547; 22 L. T. 263, *Ranchod Shamji* v. *Abdulabhai*, 28 B. 428; 6 Bom. L. R. 356 and *Chhotalal Hirachand* v. *Manilal Gagalbhai*, 20 Ind. Cas. 246; 15 Bom. L. R. 551; 37 B. 491, referred to.

(3) that under the circumstances of the case injunction and not damages was the proper remedy. [p. 171, col. 2.]

Messrs. *Nadirshah* and *Kikla*, for the Plaintiff.

Mr. *Parsram Tolaram*, for the Defendant.

JUDGMENT.—Plaintiff sues for an injunction ordering the defendant to remove certain projections which the defendant has built over the plaintiff's land.

There is no dispute that there are such projections. The defence set up by defendant is that the sloping roof of his old building projected over plaintiff's land for about 45 years, and that in constructing an upper storey he " has projected the flat roof planks and verandah roof of the first floor to the same extent as his (former) sloping roof."

The evidence of Mr. Measham Lea and the sketch, Exhibit 5, shows, however, that defendant has done more than this. It is not merely that the new roof projects over plaintiff's land, but a whole portion of the new building, *viz.*, a balcony or verandah, now projects over plaintiff's land ; and this projection is some 3 inches more than the old sloping eaves. Moreover the roof to this projection itself projects about 9 inches further over the land.

Plaintiff's Pleader does not dispute that defendant has an easement to discharge eaves droppings on the plaintiff's land by means of the old projecting roof ; but he contends that defendant has no right to shift the position of the original projection. This contention is, however, clearly wrong. Defendant has, under section 23 of the Indian Easements Act, a right to raise the height of the eaves so long as he does not throw an increased burden upon the servient tenement [cf. *Mulia Bhana* v. *Sundar Dana* (1).]

If the defendant, therefore, had confined himself to merely projecting the new roof to the same extent as the old one, although at an increased height, the plaintiff would have had no cause of action. This would not in any way impose any additional burden on the servient heritage.

But what the defendant has done is a clear interference with plaintiff's rights as owner of the land over which the projection has been built. It, interferes, for instance, with plaintiff's right to build up to and above the projecting eaves, so long as he arranges for the carrying off of the rain-water dropping from the eaves [cf. *Corbett* v. *Hill* (2) and the cases following that decision, including those of *Ranchod Shamji* v. *Abdulabhai* (3), *Chhotalal Hirachand* v. *Manilal Gagalbhai* (4)].

Plantiff cannot, if defendant's building remains, build on the space occupied by the projecting balcony up to its roof, as he otherwise would have been able to do. The building of this projection is not a mere alteration of the mode of enjoying defendant's easement—which was one merely of projecting his *roof of eaves*, and discharge of rain-water therefrom on plaintiff's land—but an actual trespass (except in regard to the new projecting roof) which infringes the principle of ownership, *cujus est solum, ejus est usque ad cœlum* [cf. *Rathinavelu* v. *Kolandavelu* (5).]

Plaintiff also contends that, as defendant has made his new building so that the rain-water of the front half to the west now falls on the road instead of on to plaintiff's land, he has abandoned his easement, so far as regards the corresponding portion of the old roof. This contention is directly supported by illustration (*e*) to section 38 of the Indian Easements Act, and is, I think, correct. No relief has, however, been asked for in regard to

(1) 21 Ind. Cas. 352; 38 B. 1 at pp. 6, 7; 15 Bom. L. R. 876.

(2) (1870) 9 Eq. 671; 39 L. J. Ch. 547; 22 L. T. 263.

(3) 28 B. 428; 6 Bom. L. R. 356.

(4) 20 Ind. Cas. 246; 15 Bom. L. R. 551; 37 B. [illegible].

(5) 29 M. 511; 16 M. L. J. 281.

the pieces of wood still projecting in this part of the old roof, and as they at present do no harm, they can remain subject to plaintiff's right of removal as declared above.

I accordingly answer these issues as follows:

1. Defendant has encroached on plaintiff's land by projecting a balcony or verandah over the plaintiff's land.

2. and 3. Defendant has no right to any projection by twelve years' adverse possession, but has a right to project sloping eaves—as an easement acquired by prescription to the extent of 1 foot and $7\frac{1}{2}$ inches either in their old position or in a higher one, except in regard to the western portion where defendant has impliedly released the easement.

The case of *Chhotalal Hirachand* v. *Manilal Gagalbhai* (4) shows that the prescriptive acquisition of the right in question is governed by section 15 of the Indian Easements Act and not by section 28 of the Limitation Act. As to the extent of the right of projection, I take Mr. Measham Lea's measurment as more reliable than any other evidence in the case.

The only remaining question is whether plaintiff should be allowed an injunction under section 55 of the Specific Relief Act. Defendant's Pleader urges that there have been laches disentitling the plaintiff to an injunction, but I do not think this is the case. Plaintiff gave a notice to defendant on 14th October 1911, while the building was under construction, for defendant himself says that it was not completed till $1\frac{1}{2}$ or $1\frac{3}{4}$ months after that. The suit was brought on 22nd November 1911, and the affidavit of plaintiff dated 20th idem, accompanying the application for a temporary injunction, asserted (without subsequent contradiction) that the defendant was still constructing the projection. I do not believe defendant's statement that the building was complete before the issue of the injunction, which is unsupported by any statement to that effect during the pendency of the injunction proceedings. There has not, so far as I can see, been any unreasonable delay on the part of plaintiff, who would have to wait for some time to see the nature of the projection in question.

It is true that the utility of the dominant tenement is not at present substantially diminished, but it interferes with the right to build on the plot and thereby substantially diminishes its value. Also the amount laid out by the defendant on this projection cannot have been very much, while the encroachment was one of rather an impudent kind. Following, therefore, the general principles which are summarized at pages 632 and 633 of Peacock's Law of Easements in British India, I grant plaintiff an injunction ordering the defendant to remove the whole of the projection complained of (*viz.* all the portion above the projecting line, which I have marked A B in the sectional sketch, Exhibit 5, and which is there shown as measuring 1 foot $10\frac{1}{2}$ inches), except such portion of the tiled roof as projects not further than 1 foot and $7\frac{1}{2}$ inches over the plaintiff's land.

As plaintiff has substantially succeeded, the defendant must bear his costs of the suit.

Suit decreed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 155 OF 1912.

July 28, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

RAJ RAGHUBAR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BIKRAMAJIT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption out of Court—Accounts, adjustment of—Suit for surplus profits, maintainability of.

Where redemption takes place privately or out of Court, it is at the option of the parties to adjust the accounts and settle their differences amicably or to allow redemption to be effected on payment of the principal money secured by the mortgage under protest, leaving the other matters in difference between them to be adjusted thereafter through Court. [p. 172, col. 2.]

Where redemption had taken place out of Court and there was nothing to indicate that any adjustment of accounts had been made or that the payment had been accepted in full satisfaction of all liabilities arising out of the mortgage:

RAJ RAGHUBAR SINGH *v.* BIKRAMAJIT SINGH.

Held, that a suit for surplus profits was maintainable. (p. 173, col. 1.)

Appeal against the decree of the Subordinate Judge, Tahsil Biswan, dated 7th August 1912.

Babu *Basudev Lal* and Babu *Nagendra Nath Ghoshal*, for the Appellants.

Babu *Mohan Lal* and Babu *Sita Ram*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the mortgagors for the recovery of surplus profits of the mortgaged property. The mortgage was redeemed without the intervention of a Court on the 29th August 1909. The mortgage-deed provided for the payment of interest at 7 annas per cent. per mensem and directed that the mortgagee was to realize the rents of the mortgaged property, then estimated to amount to Rs. 11,000 per annum, deduct the interest due to him annually from the same, and pay the balance to the mortgagors at the time of the revenue demand year after year. The Government revenue was to be paid by the mortgagors. The allegation of the plaintiffs was that the mortgagee did not pay the full amount of the surplus profits due to the mortgagors, that in *Sawan* 1318 *Fasli* the plaintiffs, who held the equity of redemption, asked the defendants-respondents, who were the representatives-in-interest of the mortgagee, to adjust the accounts and to take the balance of the mortgage-money due to them after crediting such surplus profits received from the mortgaged property as had not been paid to them, but that the defendants refused to allow redemption, unless the entire sum secured by the mortgage was paid to them, and that they had consequently to pay the sum of Rs. 80,000, being the amount secured by the mortgage, to them to obtain redemption. The defence was that the defendants had paid the surplus profits due to the plaintiffs from time to time, and that Rs. 626-10-6 were due to the defendants on account of the mortgage. It was further pleaded that the plaintiffs were estopped from claiming surplus profits by their voluntary payment of Rs. 80,000 to the defendants in full satisfaction of the amount due under the mortgage.

The plaintiffs offered to produce evidence to prove the circumstances under which the principal money secured by the mortgage was tendered to obtain redemption, but the Court below refused to take their evidence and came to the conclusion that the conduct of the plaintiffs in tendering the principal money secured by the mortgage, without deducting the surplus profits now claimed by them, was sufficient to estop them from filing a suit for surplus profits thereafter. Order XXXIV, rule 7, of the Code of Civil Procedure contemplates the taking of accounts in a suit filed for redemption of a mortgage. But where redemption takes place privately or out of Court, it is at the option of the parties to adjust the accounts and settle their differences amicably or to allow redemption to be effected on payment of the principal money secured by the mortgage under protest, leaving the other matters in difference between them to be adjusted thereafter through Court. The receipt granted by the mortgagee in this case merely acknowledged the receipt of Rs. 80,000 on account of the mortgage effected by Rai Debi Bakhsh Singh and Raj Mangal Singh in favour of Mirtanjey Bakhsh Singh on the 1st July 1902, and recited that the original mortgage-deed was returned and the mortgaged property released from the mortgage. There is no reference in that receipt to any adjustment of accounts or to the payment of the said money in full satisfaction of all liabilities arising out of the mortgage. Article 105 of the first Schedule of the Indian Limitation Act provides a limitation of three years for suits by a mortgagor, after the mortgage is satisfied, to recover surplus collections received by the mortgagee, from the date when the mortgagor re-enters on the mortgaged property. That article was explained by Aikman, J., in *Ram Din* v. *Bhup Singh* (1), to apply to cases where a mortgagor got possession over the mortgaged property by redemption effected otherwise than by means of a suit. In *Mohammad Faiyaz Ali Khan* v. *Kallu Singh* (2), Stanley, C. J., and Banerji, J., held that a suit for surplus mesne profits could follow a suit for redemption, if Order II, rule 2, of the Code of Civil Procedure did not bar the claim. In *Salik*

(1) 30 A. 225; 5 A. L. J. 192; A. W. N. (1908) 96.
(2) 8 Ind. Cas. 689; 7 A. L. J. 1201; 33 A. 244.

Ram v. *Ashik Husain* (3), dealing with a tender of the mortgage-money, accompanied by the reservation of a right to sue for the items due by the mortgagees to the mortgagors under the mortgage, Spankie, A. J. C., observed: "All that the plaintiffs did was to reserve their rights to dispute that the whole amounts deposited were due to the mortgagees. The deposits were made in good faith, with the intention that the mortgagees should, if they were willing to do so, take the amount. 'A man,' says Bowen, L. J., in *Greenwood v. Sutcliffe* (4), 'has a right to tender money reserving all his rights, and such a tender is good, provided he does not seek to impose conditions.' In the same case Lindley, L. J., said: 'What is the object of a tender? It is not necessarily to put an end to all controversy. It may have that effect, and very often has, but its main object is to throw the risk of further controversy upon the other party.'" The mortgage-deed in this case provided that the mortgage-money shall be payable at the residence of the mortgagee, and if the story of the plaintiffs be true, no inference can be drawn that the payment was made unreservedly in full discharge of all mutual rights and liabilities.

Section 115 of the Indian Evidence Act cannot apply unless there is evidence to show that a person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. The evidence which the plaintiffs wanted to adduce in the case ought, therefore, to have been gone into and the case decided on the merits.

We allow the appeal and remand the case to the Court below with a direction to reinstate the suit under its original number and to dispose of it in accordance with law. The costs will abide the result.

Appeal allowed; Case remanded.

(3) 4 O. C. 355.
(4) (1892) 1 Ch. 1; 61 L. J. Ch. 59; 65 L. T. 797; 40 W. R. 214.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 385 OF 1911.

February 1, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe

JOY MONGALA DEBI MISRANI—PLAINTIFF—APPELLANT

versus

A. J. SHILLINGFORD—DEFENDANT—RESPONDENT.

Putni Regulation (VIII of 1819), *s.* 11—Putni *tenure, sale of—Purchaser of* putni *tenure, rights of—Encumbrance, adverse possession when—Avoidance of encumbrance—"Defaulting proprietor" in s.* 11, *meaning of*—Res judicata—*Bengal Tenancy Act (VIII of* 1885), *s.* 10—*Admission, admissibility of*

Where a decree-holder purchaser causes a number of plots to be described in the sale proclamation as *milik* of his judgment-debtor and after the sale they are described as such in the sale-certificate, it is in the nature of an admission and as such cannot be used as evidence on behalf of the purchaser or his successor-in-interest. [p. 177, col. 1.]

Ramani Pershad Narain Singh v. *Mahanth Adaiya Gossain*, 31 C. 380, followed.

A *putni* can only be sold for rent under Regulation VIII of 1819 and the fact that the sale-certificate was given on a printed form for certificate-sales will not convert the *putni* sale into a certificate-sale. [p. 178, col. 2.]

A purchaser of a *putni* tenure at a sale under Regulation VIII of 1819 is not privy in estate to the defaulting proprietor and he does not derive his title from him as under section 11 of the Regulation he acquires the property free of all incumbrances. A claim by such purchaser, therefore, is not barred by *res judicata* by reason of the failure of suit by the previous *putnidar* and he is entitled to avoid all incumbrances upon the property. [p. 179, col. 2.]

Satish Chandra Sinha v. *Munjanali Debi*, 15 Ind. Cas. 869; 17 C. W. N. 340, *Khantomonee Dasi* v. *Bejoy Chand Mahatab Bahadur*, 19 C. 787; *Karmi Khan* v. *Brojo Nath Das*, 22 C. 244 and *Gobinda Nath Shaha* v. *Surja Kanta, Lahiri*, 26 C. 460, referred to.

An encroachment by a trespasser and adverse possession against the defaulting *putnidar* is an incumbrance within the meaning of section 11 of Regulation VIII of 1819. [p. 179, col. 1.]

Nuffer Chandra Pal Chowdhry v. *Rajendra Lal Goswami*, 25 C. 167, referred to.

The expression "defaulting proprietor" in section 11 of Regulation VIII of 1819 means the proprietor of the tenure in default, and these words are not intended to be restricted to the particular proprietor for whose default the *putni* is brought to sale. [p. 179, col. 2.]

Gopendro Chunder Mitter v. *Mokaddam Hossain*, 21 C. 702 at pp. 714, 719, referred to.

Appeal from a decision of the Subordinate Judge of Purnea, dated the 30th June 1911.

Mr. *Jacob*, Counsel, and Babu *Lal Mohan Ganguly*, for the Appellant,

JOY MONGALA DEBI v. SHILLINGFORD.

Babus *Nagendra Nath Mozumdar* and *D. N. Bagchi*, for the Respondent.

JUDGMENT.

SHARFUDDIN, J.—This is an appeal against the judgment and decree passed by the Subordinate Judge of Purnea on the 30th June 1911. The appeal is on behalf of the plaintiff. The plaintiff claimed the lands in suit as her *milik lakheraj* lands, which have been recorded in the Record of Rights as the *mal* lands appertaining to the *putni talook of Mouza* Sowria. The plaintiff is the widow of Ghanasyam Misser and claims the lands in suit as having been purchased by her husband on the 7th June 1904 and 2nd July 1907 in execution of his own decree passed against Chatrapat Singh. She says that her husband was put in possession of the lands in suit by Court and that he was in peaceful possession of the same till the preparation of the Record of Rights, in which the lands in suit were entered as belonging to the *putni* tenure of the defendant 1st party, whereupon her husband instituted two suits for the correction of the entries in the record, which were withdrawn by him with liberty to institute a fresh suit. That he having died, the plaintiff has brought the present suit. Her case is that in *Mouza* Sowria Raja Rajendra Narain Roy had 977 *bighas* of *lakheraj milik* lands which were sold in execution of a decree obtained by Rai Lachmipat and purchased by him on the 6th December 1872. That after the above sale *Musammat* Saraswati Misrani and others, widows and heiresses of Sobh Nath Misser who was a relative of Raja Rajendra Narain, instituted two suits (No. 78 of 1873 and No. 11 of 1874) against Rai Lachmipat and others for setting aside that sale, on the allegation that the lands were *mal* lands of *Mouza* Sowria, but these suits were dismissed and the lands were declared to be the *milik* land of Raja Rajendra Narain. This judgment was upheld by the High Court on appeal. It is important to note here that Mr. Shillingford, defendant 1st party, was no party to any of these suits. The plaintiffs of those suits were said to have been the *putnidars* of the *mal* lands of *Mouza* Sowria. The defendant 1st party was at first a *dar-putnidar*, but subsequently he became the *putnidar* by purchase at a public auction-sale. That Ghanasyam Misser, late husband of the plaintiff, obtained a decree against Chatrapat Singh, son of Lachmipat, and others, heirs and representatives of Lachmipat, and put up to sale the whole of the said *miliks* and sold and purchased the property in execution of his decree on the 7th June 1904 and the 2nd July 1906, and after obtaining possession through Court remained in possession until the preparation of the Record of Rights. The Settlement Officer, however, under his orders dated the 4th July 1907 (Exhibit 4/6) ordered the lands in suit to be entered as *mal* lands appertaining to the Sowria *putni* of the defendant first party. The second party defendants are the landlords and the third party defendants are the tenants.

Plaintiff prays that the lands in suit be declared to be her *milik lakheraj* lands and that if the Court finds that these lands are the *mal* lands of the *putni* Sowria, her suit should be decreed on the ground of adverse possession for more than 12 years before the suits.

The suit is really contested by the defendant first party and the defendants second party support him. His defence is that Raja Rajendra Narain was never a *milikdar*, he was a tenant of some *mal* lands in Sowria and the lands in suit were never the *milik* lands of the Raja, nor were they purchased by Lachmipat. That the heirs of Sobh Nath never instituted any suit with regard to the lands in suit, and if so, those suits should be held to be collusive and fraudulent. That Chatrapat was never in possession of these lands. That adverse possession is an incumbrance and Mr. Shillingford, the purchaser of the *putni talook*, under the Putni Regulation VIII of 1819, purchased the *putni* free of all incumbrances created by the proprietor of the defaulting *putni*.

The Subordinate Judge has dismissed the suit and hence the present appeal by the plaintiff.

In the present suit three important questions are involved: (1) whether the lands in suit claimed as *milik* were the *milik* lands of Raja Rajendra; (2) whether these lands were purchased by Lachmipat as the *milik* lands of the Raja and whether after purchase Lachmipat and after him his son, Chatrapat, were in possession; (3) if these are not the

milik lands, does the adverse possession of Lachmipat and Chatrapat and the plaintiff's husband's possession create and establish any right and title in favour of the plaintiff?

Let us now see if the Raja ever had any *milik* land. Exhibit C is the *thak* map and Exhibit D is the *khasra* of 1846. A translation of the *khasra* is in the printed paper-book. The original is in *Hindustani*. In this *khasra* a number of plots are mentioned, the holders' names and areas of each plot are also given. The last column gives a description of the plots. There are only two kinds of lands mentioned in the last column. They are either *milik* or *mal* lands. There are, however, many plots without any description. The question is whether the plots with no description are *mal* or *milik* lands. Raja Rajendra's name appears against a number of plots without any description. It has been contended that these lands are *milik* lands. The method adopted in the preparation of this *khasra* appears to us to have been this. It appears that out of 165 plots only two, namely, Nos. 4 and 80 are mentioned as *milik* and the succeeding plots, Nos. 5 and 81 are, recorded as *mal*. No. 4 is *parti* land and No. 80 is described as the holding of one Kabutar. It seems that the writer of this *khasra* at the beginning of each page gave the description of the land till he came to a plot which was *milik*. The first item in the first page is *mal* land and the 4th is *milik*. The rest on this page is not described as *milik* or *mal*. Similar arrangements are found on every page. It seems to us that all the plots except Nos. 4 and 80 are *mal* lands. The Raja's name, no doubt, appears against various plots, but these have not been described either as *milik* or *mal*. From the method followed in the *khasra* we are of opinion that all the plots mentioned therein are *mal* lands except those that are described as *milik*. It follows, therefore, that when this *khasra* was prepared Raja Rajendra had no *milik* land at all. Whatever he had was *mal* lands. If he had no *milik* land, how could any *milik* land be sold in execution of Lachmipat's decree? That Raja Rajendra had *milik* land was set up, it seems, for the first time when Lachmipat in execution of his decree against the Raja put up some lands for sale as his *milik* lands and purchased them on different dates under four sale-certificates, *viz.*, Exhibit 1/3, Exhibit 1/4, Exhibit 1/5 and Exhibit 1/6. The present claim is confined to the plot of Exhibit 1/3, 1st plot of Exhibit 1/4, 2nd plot of Exhibit 1/5 and four plots in the second sale of Exhibit 1/6. Exhibit 1/6 refers to two sales and the four plots claimed are of the second sale. These plots comprise an area of 291 *bighas*.

After the purchase made by Lachmipat on the 6th December 1872, to which apparently none of the certificates relate, the heirs of Sobh Nath Misser instituted two suits, of which one was for possession of 305 *bighas* by reversal of the sale.

The 2nd suit was transferred to the Subordinate Jndge's Court and both the suits were tried in that Court together and both were dismissed on the 16th April 1874, on the ground that the form of the suit was defective, with permission to the plaintiff to sue afresh by one suit. The Suit No. 78 alone survived. It related to 305 *bighas* claimed as *mal* land. This suit was heard on the merits and dismissed by the Subordinate Judge on the 18th January 1875 and his decision was upheld by the lower Appellate Court as well as by this Court. This suit was dismissed on the ground of limitation, it being held that the plaintiffs or their predecessors never held possession by receipt of rent within twelve years before the suit.

The plaint of this suit is Exhibit 3 and it shows the lands for which this suit was brought. The defendant 1st party is Mr. Shillingford. He took a *dar-putni* of *Mouza* Sowria in 1891. He subsequently became a *putnidar* having purchased the *putni* in a public auction-sale. It appears since the time defendant 1st party became a *dar-putnidar* there have been disputes between him and Chatrapat with regard to possession of the lands which the latter claims as *milik* lands. On the other hand the defendant 1st party alleged that these lands were *mal* lands of Sowria.

Ghanasyam Misser, the husband of the plaintiff, had a money decree against Chatrapat and in execution of that decree he put up to sale all the lands known as *milik* lands of Chatrapat and himself purchased in June 1904 and July 1906 under sale-certificates Exhibit 1/1 and Exhibit 1/2

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In 1904 Settlement operations commenced and in the Settlement proceedings dispute between the parties arose. The Settlement Officer decided the dispute in favour of the defendant 1st party [*vide* Exhibit 4 (6)] and the Record of Rights was finally published in November 1907.

Two suits were then instituted by Ghansyam Misser against defendant 1st party, one in 1907 and the other in 1908. In the first suit claim was laid for 977 *bighas* without specification of boundaries and *khasra* numbers. This suit was withdrawn. The second suit was instituted in 1908 and in this boundaries in accordance with the sale-certificates and *khasra* numbers were given. In this second suit Sham Behari Tewari, Amin (D. W. No. 2), was deputed as a Commissioner to compare the disputed lands with the boundaries in the sale-certificates and to prepare a map. He has been examined in the present suit and his map has been exhibited. According to him except plot No. 9 of the plaint none of the other plots is covered by the sale-certificates. After the submission of his report the second suit was also withdrawn.

In the present suit 100 more *khasra* numbers have been added and four plots claimed in the former suit have been given up.

In the present suit the Civil Court Amin, Syed Zamin Ali, was appointed a Commissioner to report on the indentity of the plots claimed in the suit with the plots mentioned in the sale-certificate and also to prepare a map. He has done so, but his map differs in many respects from the map of Sham Behari. The reason of this appears from his own evidence. In order to show the worthlessness of his report and map it is enough to quote a few passages from his deposition in the present suit. He says: "Plot *Khasra* No. 267 has been shown as disputed land in plot No. 5 of the plaint. This has not been shown as disputed land in my map. *Kharsa* Nos. 62, 66, 58, 2, 3, 4, 5, 6 and 10 are claimed in the plaint as *milik* lands. These have been excluded from the disputed lands because the plaintiff's *amlas* did not point them out to me as disputed lands. I ought to have shown these lands in my map. *Khasra* Nos. 606, 607 and 177 have not been claimed in the plaint, but I have shown them in my map as disputed lands. *Khasra* Nos. 390-394 have been claimed as parts of plot No. 4 of the plaint. All the above plots excepting No. 391 have been omitted in the map." Again he said: "No. 391 has also been excluded. I have shown *khasra* No. 397 as disputed, though it is not in the plaint. *Khasra* No. 494 has been shown in the map as disputed, though this is not claimed in the plaint..... *Khasra* Nos. 548 in part and 549 to 551 have been claimed in the plaint as disputed in plot No. 3 of the plaint, but I have excluded them from the map because not claimed by the plaintiff's *amlas* on the spot. I have shown *Khasra* No. 668 in my map though not claimed in the plaint." From the above extract from the deposition of Amin Zamin Ali it is clear that no reliance can be placed on his map.

Ghanasyam's purchase was within twelve years before the present suit: he cannot claim more than what may appear in the sale-certificate of Lachmipat, the father of Chatrapat. The real point for our decision, therefore, is whether the lands in suit are covered by the sale-certificate, namely, Exhibits 1/3, 1/4, 1/5, 1/6 granted to Lachmipat. If they do not, the suit has been rightly dismissed and if they do, we have to see whether they are really *milik* lands of Raja Rajendra, in which case the plaintiff would be entitled to a decree and if they are not *milik* lands and were sold as such by Lachmipat, whether he and his successors-in-interest have been in possession for more than twelve years and whether this adverse possession gives them a title which cannot be cancelled by reason of the purchase of the *putni* by Mr. Shillingford, which ordinarily would be free of all incumbrance under section 11 of the Regulation VIII of 1819.

The above are the facts which give the various aspects of the case.

We have already observed that there is no documentary evidence on the record to show that Raja Rajendra had any *milik* land in Sowria except the sale-certificate granted to Lachmipat in execution of his decree against the Raja and the sale-certificates of Ghanasyam Misser. For the first time the Raja was alleged to have been in possession of

milik lands was in the execution proceedings taken by Lachmipat. It appears that no inquiry was made as to the nature of the lands advertised for sale. The sale was made and the decree-holder, *viz.* Lachmipat, was given possession over some land, on the strength of the sale-certificates.

If Lachmipat in the sale proclamation caused a number of plots to be described as *milik* of his judgment-debtor and after the sale in the sale-certificate they were described as such, it will be in the nature of an admission and as such cannot be used as evidence on behalf of Lachmipat or his successor-in-interest. It was so held in the case of *Ramani Pershad Narain Singh* v. *Mahanth Adaiya Gossain* (1). It is clear that the sale-certificates granted to Lachmipat, Exhibits 1/3, 1/4, 1/5 and 1/6, cannot be conclusive in his favour. Exhibits 1/1 and 1/2 are sale-certificates granted to Ghanasyam Misser (husband of the plaintiff) similarly cannot be conclusive on his behalf. If we eliminate these sale-certificates from our considerations there remain, nothing on the record to show that the lands now in dispute are *milik* lands except the oral evidence of witnesses examined by the plaintiff. The most important witness for the plaintiff is Garibullah (P. W. No. 1). He says he was the *Patwari* of the *milik* lands. He has attempted to prove a number of *kabuliats* and *wasil bakees*, but it appears to us that he is a most unreliable witness for various reasons. He was examined in the Munsif's Court at Kathihar with reference to this very dispute. He has throughout his deposition contradicted himself. In his examination-in-chief he proves himself to be a man of most extraordinary memory. He is no doubt a *Patwari*, as he says, of long standing, but it is so improbable that a *Patwari* should remember the details of boundaries of a number of plots, but in cross-examination he shows what a faithless memory he has. He was asked a number of questions with regard to other plots. He has failed even to say that in his previous deposition before the Munsif of Kathihar he had given details of these plots. We give here a few of his statements by way of sample:—"The above block of 4 or 5 *bighas* is not the *milik* of Ahmad Malik." On being asked if he had made such a statement in his previous deposition says, "I cannot state if such a statement is true or false." "I do not know if any block of land of 10 *bighas* was sold by Denai Hazam to Delwar Malik." His attention having been drawn to his previous statement at Kathihar says, "I cannot say if I made such a statement. I cannot say if Delwar Malik has any land in *Mouza* Sowria." On his attention being drawn to his previous statement says, "I cannot say if I made such a statement." Certain boundaries of a plot were given to the witness and he was asked if the land within those boundaries was in possession of Ahmad Malik, he said, "I do not know any such land". On his attention being drawn to his previous statement he said, "I do not know if I made such a statement". There are several more such statements.

He has proved a number of *kabuliats* granted to various tenants. But the lands mentioned in these *kabuliats* cannot be identified with any of the plaint lands and in the course of arguments it was conceded by the plaintiff's Counsel that these lands cannot be so identified.

There are certain *wasil bakees* on the record and this witness (Garibullah) has been examined also to prove these *wasil bakees*. But let us see if he proves them. He says, "In regard to all the above persons whose handwritings I have attested, I cannot identify their handwritings unless the signature is shown to me." On Exhibit 10 (15) there is the signature of one Botal Poddar. He identified the signature and handwriting as those of Botal, but when he was shown only the handwriting said, "I cannot say whose handwriting they were". Such a witness we cannot believe.

Gunjar Ali (P. W. No. 17) says he is a tenant on the *milik* land. He has also proved the handwritings of certain individuals on *wasil bakees*, but when put to the test he also said that he could not identify the handwritings without seeing the signatures. The rest of the witnesses are the tenants of the plaintiff, except Sher Ali (P. W. No. 19) who says he is a *naib patwari*.

(1) 31 C. 380.

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It is the plaintiff's case that the defendant 1st party is trying to take possession of the lands in dispute, on the allegation that they are *mal* lands and form part of his *putni*. It is also admitted that the dispute culminated in a proceeding under section 107, Civil Procedure Code, in which defendant 1st party was bound over to keep the peace, but on a motion to this Court the order was set aside.

It is a matter of common knowledge that when two *zemindars* begin to fight with regard to possession the tenants reap a rich harvest. It is not, therefore, surprising that a number of tenants have attorned to one or to the other. We are not, therefore, prepared to place any reliance on the evidence of the tenant witnesses when there is no documentary evidence to prove that Raja Rajendra had any *milik* land which is said to have successively come into the possession of Lachmipat, Chatrapat and Ghnasayam. There is, no doubt, of all the plots mentioned in the plaint it is only No. 9, which, on the evidence, has been identified with the sale-certificate of Lachmipat, but still the question remains whether this plot is *milik* land. Sham Behari, Amin, (D. W. No. 2) says:—"I was supplied with a *thak* map from the side of the defendant, Mr. Shillingford. That *thak* map (Exhibit C) and *khasra* (Exhibit D) were supplied to me. By comparison with the *thak* map and the locality I found the disputed lands in that suit to be *mal* lands. I held the inquiry in the presence of both parties". Sham Behari's map and report were prepared in the previous suit. We now come to the question of possession. If Raja Rajendra had no *milik* lands and if Lachmipat, on the allegation of the disputed lands being the Raja's *milik*, sold them in execution of his decree and purchased them and obtained possession over them through Court and after him his son, Chatrapat, and after him Ghanasyam, the plaintiff's husband, held possession thereof, while as a matter of fact these were *mal* lands, the question of adverse possession arises. The defendant, Mr. Shillingford's case is that granting that there was adverse possession of Lachmipat and others, when he purchased the *putni* under Regulation VII of 1819, he purchased the *putni* in question free of all incumbrances under section 11 of the Regulation and that adverse possession is an incumbrance and hence the plaintiff's contention that she and before her her predecessors-in-interest were in adverse possession, cannot avail her.

The plaintiff for the first time in this Court contends that the sale to Mr. Shillingford was not under the Regulation. It was first attempted to show that the sale took place in execution of a decree in a suit and it was so done because of certain expressions in the sale-certificate (Exhibit E) dated 11th December 1901. We find it stated therein that the sale was made "in execution of decree in this suit." From these words it was argued that the sale of the *putni* was in execution of a decree in a suit. On the Court pointing out that the sale-certificate shows that the sale was made by the Collector and the Officer granting the certificate was a Certificate officer, because under his signature we find C. O. *i.e.*, Certificate Officer, it was then contended that at any rate it was a sale under the certificate procedure and not under the Regulation and hence section 11 of that Regulation has no application. A *putni* can only be sold for rent under the Regulation. It is nobody's case that the *putni* was not sold for rent. The sale-certificate, it appears, was given on a printed form, after filling up the gaps, kept in the Certificate Office. This, we think, will not convert the *putni* sale into a certificate-sale. We understand from the pleadings that in the lower Court the plaintiff's case was not that the sale was not effected under the Regulation. We find it from the wording of issue No. 5, which is: "Are the lands in suit *milik lakheraj* of the plaintiff and are the defendants 3rd party tenants in the said lands, and if so, what effect has the sale of *putni*-tenure under Regulation VIII of 1819 on it ?" This shows clearly that the plaintiff had acquiesced in the sale having been under the Regulation. The only dispute was as to its effect. We do not find in the plaint any allegation that the sale was not under the Regulation, nor do we find in the memorandum of appeal any distinct allegation that the sale in

question was not under the Regulation, although the lower Court distinctly held that it was so. Grounds Nos. 14, 15, 16 rather go to show that it was accepted by the plaintiff that Sobh Nath Misser and his heirs were the defaulting *putnidars* when the *putni* was sold and purchased by defendant 1st party. For the above reasons there can be no doubt that the sale of the *putni* took place under the Regulation and the purchaser took it free of all incumbrances. This also disposes of the question of *res judicata*. It was contended, as observed before, that when in a previous suit it was held that the disputed lands were *milik* and the judgment was upheld by this Court, the present suit is barred by the rules of *res judicata*. In the course of arguments it was conceded by the plaintiff's Counsel that if the sale to Mr. Shillingford was a sale under the Putni Regulation the question of *res judicata* does not arise. We have already held that the sale was under the Regulation and hence no question of *res judicata* can arise. We now turn to the question whether adverse possession is an incumbrance within the meaning of section 11 of Regulation VIII of 1819. The authority relied upon by the appellant is the case of *Taraprasad Mittra* v. *Ram Nursingh Mittra* (2). In this case it was held that "the purchaser of an under-tenure sold at the suit of a landlord acquires rights higher than those of an ordinary purchaser by private contract, only to the extent conferred by express terms of law. The purchaser of a *putni talook* is not entitled to set at naught all decisions arrived at against the defaulting *putnidar*." But we have several more recent cases that have held otherwise. In the case of *Nuffer Chandra Pal Chowdhry* v. *Rajendra Lal Goswami* (3), it was held that "an encroachment by a trespasser comes within the meaning of an incumbrance and adverse possession against the defaulting *putnidar* is an incumbrance."

In the case of *Khantomonee Dasi* v. *Bijoy Chand Mahatab Bahadur*(4), it was held that a purchaser at a sale under Regulation VIII of 1819 was unaffected by any adverse possession of land appertaining to the *putni talook* which had been encroached upon.

The same view was taken in the case of *Karmi Khan* v. *Brojo Nath Das* (5).

In the case of *Gobinda Natha Shaha* v. *Surja Kanta Lahiri* (6), it was held that "the purchaser at a sale under Regulation VIII of 1819 is entitled to avoid any incumbrance created by the defaulting proprietor and is not bound by any adverse possession held against the latter."

In the case of *Satish Chandra Sinha* v. *Munjanali Debi* (7), it was held "that although the position of a purchaser at a sale under Regulation VIII of 1819 may not be precisely that of a purchaser at a sale for arrears of revenue, yet he is not privy in estate to the defaulting proprietor and he does not derive his title from him, as under section 11 of the Regulation he has acquired the property free of all incumbrances that might have been created by the act of the defaulter, his representatives or assignees and consequently a claim of rent by such a purchaser is not barred by *res judicata* by reason of the failure of a suit for rent by a previous *putnidar* on the ground that the relationship of landlord and tenant between the then plaintiff and the defendants was not established."

The above authority establishes, first, that the judgment in the suit mentioned above instituted by the then plaintiffs against Lachmipat for establishing that the lands purchased by the latter in execution of his decree against Raja Rajendra were *mal* lands and not *milik* lands of the Raja, does not operate as *res judicata* and that if the possession, of Lachmipat and his successors-in-interest was adverse possession then the defendant 1st party as a purchaser of the defaulting *putni* can avoid the incumbrance of adverse possession. The words "is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor" in section 11 of the Regulation require a little explanation. By the words "defaulting proprietor" is meant

(2) 14 W. R. 283; 6 B. L. R. App. 5.
(3) 25 C. 167.
(4) 19 C. 787.
(5) 22 C. 244.
(6) 26 C. 460.
(7) 15 Ind. Cas 869; 17 C W. N. 340.

the proprietor of the tenure in default and these words are not intended to be restricted to the particular proprietor for whose default the *putni* was brought to sale. It was so held in the case of *Gopendro Chunder Mitter* v. *Mokaddam Hossain* (8).

For the above reasons we are of opinion that there is no legal evidence to show that the disputed lands had ever been the *milik* lands of Raja Rajendra and that the lands in dispute in the present case have not been identified with the plots mentioned in the sale-certificate of Lachmipat, except plot No. 9 of the plaint and that there having been no *milik* lands of the Raja, such possession as Lachmipat and his successors-in-interest may have had would only be an incumbrance within the meaning of section 11 of Regulation VIII of 1819 and the purchase of the *putni* having been under this Regulation, the purchaser, Mr. Shillingford, purchased it free of all incumbrances. Plot No. 9 of the plaint, although identified with plots in the sale-certificates of Lachmipat, it cannot be treated as a *milik* land. It may have been in possession of Lachmipat and after him of his successor in-interest, but this possession having been adverse to the then *putnidar* was an incumbrance and hence avoidable.

The appeal for the above reasons is dismissed with costs.

COXE, J.—I agree that the appeal should be dismissed. The fact that the suit was twice withdrawn, and the proceedings at the time of the Record of Rights and before the *amins*, who have inquired into the matter, show conclusively that the plaintiff has no real idea what lands were covered by Lachmipat's purchase in the seventies. In this Court although the appeal has been pending for years, and although the parties have now known for a considerable time that the case was about to be taken up, yet the learned Counsel, who appeared for the appellant, made no real attempt to identify the land claimed with the lands purchased by Lachmipat. So utterly vague and indefinite is the claim that, though a mass of evidence has been directed to proving that the land claimed is identical with the land covered by the sale-certificates, yet learned Counsel devoted the greater part of his argument to contending that his client was at any rate entitled to the area of 305 *bighas*, covered by the suit No. 78 of 1873, which was a suit brought to set aside a sale of the 6th December 1872, to which none of the certificates relate. The oral evidence is quite worthless. The principal witness is one Garibulla, who declines to adhere to any previous statements he has made with regard to this land, and would doubtless be equally willing to repudiate his present statements to-morrow if he thought it advisable.

Assuming that plot No. 9 is identified as included in Lachmipat's purchase, I agree that any rights thus acquired were avoided by the *putni* sale. I entirely agree that the appellant is not entitled in appeal to take for the first time the plea that the sale was not a *putni* sale, when that question was never put in issue in the lower Court.

Appeal dismissed.

(8) 21 C. 702 at pp. 714, 719.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 421 OF 1912.

December 15, 1914.

Present:—Mr. Lindsay, J. C.

ALI BAKHSH—PLAINTIFF—APPELLANT

versus

GHURAI—DEFENDANT, AND ANOTHER—PLAINTIFF—RESPONDENTS.

Grove transaction, whether transfer of moveable or of immoveable property, question of fact—Registration Act (XVI of 1908), s. 17 (1) (a)—Trees, whether moveable or immoveable property—Evidence Act (I of 1872), s. 91—Legal relationship, existence of, proof as to—Gift by a Muhammadan—Deed of gift, inadmissible in evidence—Oral evidence, admissibility of.

The question whether a grove transaction amounts to merely a transfer of standing timber or to a larger transfer of an interest in immoveable property is one to be determined upon the circumstances of each case. [p. 181, col. 2.]

Where a transfer is made of certain plots of land containing trees of various kinds and a house, not with the intention that the trees are to be severed and used as timber, but with the intention that the plots are to be maintained as grove as they are, the transfer is one of immoveable property and the deed of transfer requires registration. [p. 181, col. 2.]

Mangal Sen v. *Musammat Naoli*, 9 Ind. Cas. 478, dissented from.

Sukry Kurdeppa v. *Goondakull Nagireddi*, 6 M. H. C. R. 71 at p. 73, referred to.

The fact of the existence of a particular legal relationship may be established by oral evidence, although the terms which govern the relationship may be expressed in writing. [p. 182, col. 1.]

ALI BAKHSH *v.* GHURAI.

Where a Muhammadan executes a deed of gift which is found to be inadmissible in evidence, oral evidence is admissible to prove that the gift has been validly made in accordance with the Muhammadan Law. [p. 182, col. 1.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 11th July 1912, upholding that of the Munsif, Musafirkhana, dated the 25th April 1912.

Mr. *Muhammad Wasim*, for the Appellant.

Mr. *Ali Muhammad*, for the Respondents.

JUDGMENT.—The dispute between the parties in this case relates to certain trees and a clump of bamboos the case of the plaintiffs being that they were entitled to a share of this property under the Muhammadan Law of inheritance. The defendant set up a deed of gift unregistered, which the Courts below have accepted in evidence as sufficient proof of the defendant's title. The lower Appellate Court has also referred to oral evidence on the record, which shows that a gift was made and possession delivered to the defendant, and has held that this evidence alone is sufficient to establish the fact that a gift was made. The first point argued in appeal is that the Courts below were wrong in admitting the unregistered deed of gift into evidence. The contention is that the transfer being one of immoveable property by way of gift the deed was compulsorily registrable under the provisions of section 17, sub-section (1), clause (*a*), of the Registration Act: and section 49 of that Act is, therefore, relied upon to show that the deed being unregistered could not operate to transfer any title to the defendant.

Both the Courts below seem to have treated the trees referred to in the document as "moveable property" within the definition of that expression contained in section 2, clause (9), of the Registration Act; that is to say, they were of opinion that the trees were standing timber which the Act regards as "moveable property." They held accordingly that the document was not liable to registration and was admissible in evidence. They relied upon a ruling of the Allahabad High Court reported as *Mangal Sen* v. *Musammat Naoli*(1), in which it seems to have been held that a grove of mango trees apart from the land on which it stands is not immoveable property for the purposes of registration. If that ruling assumes, as it appears to do, that "standing trees" and "standing timber" are convertible terms I am unable to follow it. The question whether a grove transaction amounts to merely a transfer of standing timber or to a larger transfer of an interest in immoveable property is one to be determined upon the circumstances of the case. As was observed by the Judges of the Madras High Court in the case reported as *Sukry Kurdeppa* v. *Goondakull Nagireddi* (2): "Certain things, such as a piece of land, are in all circumstances immoveable. Others, such as trees attached to the ground, are, so long as they are so attached, immoveable: when the severance has been effected they become moveable. A document, therefore, evidencing an interest in land must always require registration. One with respect to trees may or may not require it, according to the character of the transaction. If the parties contemplate the interest passing after conversion of the immoveable to a moveable, it will not. If the interest passed contemplates the continuance of the quality of immovability, it will." In the case before me the deed speaks of a transfer of two plots of land containing trees of various kinds and a house and there was obviously no intention that the trees should be severed and used as timber: on the contrary, it appears to have been contemplated that the plots should be maintained as groves, which they were at the time the transfer was made. There was clearly a gift of immoveable property and the deed required registration; and the finding of the Courts below to the contrary is an error of law. There remains the question whether the deed being inadmissible to prove a transfer by reason of want of registration, the defendant was entitled to produce and rely upon evidence *aliunde* to show that a valid gift had been made in his favour.

It is conceded that as the parties are Muhammadans the transaction was not governed by the provisions of Chapter VII of the Transfer of Property Act [cf. section 129 of that Act] and it is admitted that under Muhammadan Law a valid transfer by gift can be effected by delivery

(1) 9 Ind. Cas. 478.

(2) 6 M. H. C. R. 71 at p. 73.

of possession to the donee with the intention of passing the property to him. The oral evidence adduced in the case shows that there was such a delivery in this instance.

But it is argued that the donor having elected to have a deed executed as evidence of the transfer, no other evidence except the document itself is admissible in proof of the transaction and consequently if the reception in evidence of the deed is impossible for want of registration, the transfer cannot be proved at all.

Section 91 of the Evidence Act is relied upon in support of this contention, but that section only excludes evidence, other than the document itself, to prove the *terms* of a contract, or of a grant or of any other disposition of property. But the fact of the existence of a particular legal relationship may be established by oral evidence although the *terms* which govern the relationship may be expressed in writing (Phipson, Law of Evidence, 4th Edition, p. 528*); and it has been held in England that the existence of a partnership may be shown without producing the deed [see *Alderson* v. *Clay* (3), also the other authorities referred to in the passage from Phipson above mentioned].

I hold, therefore, that the oral evidence of gift adduced here was admissible and as it has been believed it must be taken that the defendant is in possession as owner by a valid transfer by way of gift.

The plaintiffs in these circumstances had no title and the suit necessarily failed.

The appeal is dismissed with costs.

Appeal dismissed.

(3) 1 Stark. 405; 18 R. R. 788.

*Fifth Edition, page 542—*Ed.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 580 OF 1913, WITH RULE No. 280 OF 1914.

January 5, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

ABDUL RAHMAN SARKAR—PLAINTIFF—APPELLANT

versus

PROMODE BEHARY DUTTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Occupancy holding not transferable without consent of landlord, purchaser of, right of, to apply under Order XXI, r. 89—Landlord, right of, when himself purchaser at rent-decree—Eastern Bengal and Assam Tenancy Act (I of 1908), s. 170 (4), applicability of.

A landlord can terminate the interest of a purchaser at an execution sale of an occupancy holding not transferable without the consent of the landlord and his right to do so is independent of an execution sale. [p. 183, col. 2.]

Therefore such a purchaser has no *locus standi* to make the application to have the sale for arrears of rent set aside under Order XXI, rule 89 of the Civil Procedure Code, where the purchaser under the rent decree is the landlord himself. [p. 184, col. 1.]

Tarak Das Pal v. *Harish Chandra Banerjee*, 16 Ind. Cas. 977: 17 C. W. N. 163; 16 C. L. J. 548; *Dayamoyi Dasi* v. *Ananda Mohan Roy Chowdhuri*, 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.), referred to.

The Eastern Bengal and Assam Tenancy Act, section 170 (4), does not debar the landlord when he has himself purchased the holding at a sale held in execution of a decree for arrears of rent due thereon, to challenge the right of the purchaser (who has not been recognised by him) to make the deposit on the ground that as against him such purchaser has acquired no title and, therefore, cannot come under Order XXI, rule 89. [p. 184, col. 1.]

Appeal against an order of the District Judge, Rangpur, dated the 24th September 1913, affirming that of the Munsif, second Court, Nilphamari, dated the 2nd of August 1913.

Babu *D. N. Bagchi*, for the Appellant.

Babu *Atul Chandra Gupta*, for the Respondents.

JUDGMENT.—This appeal and the connected Rule No. 280 of 1914 (issued upon an application under section 115 of the Civil Procedure Code) arise out of an application under Order XXI, rule 89 of the Civil Procedure Code, to set aside the sale of a holding in execution of a decree for rent.

No appeal lies in this case, and we have, therefore, to consider the question raised in the case in the Rule.

The question for decision is, whether the petitioner had a *locus standi* to make the application under Order XXI, rule 89 of the Civil Procedure Code. The opposite parties are the landlords of the holding, which was sold in execution of a decree for arrears of rent due thereon against the tenant and purchased by the landlords themselves. The petitioner purchased the holding at a sale held in execution of a mortgage-decree against the tenant, prior to the sale for arrears of rent, and was in possession thereof. He applied to have the sale for arrears of

rent set aside under Order XXI, rule 89 of the Code. The holding is an occupancy holding and not transferable without the consent of the landlord. The Courts below held that the petitioner had no *locus standi* to make the application.

Now, under Order XXI, rule 89, where immoveable property has been sold in execution of a decree, any person either owning such property or holding an interest therein by virtue of a title acquired before such sale may apply to have the sale set aside. The petitioner having purchased the holding at a sale held in execution of a mortgage-decree acquired a title to the property. But he purchased an entire holding: the landlord was, therefore, entitled to eject him if he chose to do so. As against the landlord, he had not acquired any title to the property.

It is contended on behalf of the petitioner that he has a title to the property so long as the landlords do not choose to enter on the holding. But it was the landlords themselves who were the purchasers at the sale sought to be set aside, and who would in ordinary course obtain possession of the holding, though as purchasers, and they insist upon their right to refuse to recognise the title of the petitioner under his purchase, and resist the application to have the sale set aside. The petitioner is brought face to face with the landlords, and we do not see how under these circumstances the petitioner can be said to be a person either "owning" the property, or "holding an interest therein by virtue of a title acquired" before the rent sale as against the landlords.

It will not be profitable to discuss the cases decided before the Full Bench case of *Daamoyi* v. *Ananda Mohan Roy Chowdhuri* (1).

There is one case decided subsequent to the Full Bench decision, Rule No. 175 of 1911, decided on the 22nd July 1914, *Ahmadullah Chowdhury* v. *Harkaru Saha*(2), which should be noticed. In that case it was held that the purchaser of a holding is entitled to deposit the decretal amount under section 170 (3) of the Bengal Tenancy Act. In that case the Court in referring to the decision in *Tarak Das Pal* v. *Harish Chandra Banerjee* (3) [where it was held that if the purchaser had been in possession for more than 12 years to the knowledge of the landlord he was held entitled to make the deposit under section 170 (3)] observed that the learned Judges did not hold it material to consider whether the purchaser had acquired by possession for a period longer than 12 years the status of a tenant of a non-transferable holding. It is true the learned Judges did not consider it material whether the purchaser had by such possession for 12 years *acquired the status of a tenant*, but the decision was based on the ground that the possession of the purchaser claiming to be a tenant for a period longer than 12 years to the knowledge of the landlord conferred on him the position of a person who had *an interest* in the holding within the meaning of sub-section 3 of section 170. In the present case the petitioner's purchase was within 12 years of the suit. Then the learned Judges (in Rule No. 175 of 1911 cited above) referred to the Full Bench decision and observed as follows: "One of the questions referred was: 'Whether a right of occupancy which is not transferable by custom or local usage is a right which can be transfered at all ?' And it was answered in the affirmative subject, however, to the qualification that 'where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding.' The landlord, therefore, can terminate the purchaser's interest at any time, and his right to do so is independent of an execution sale. We do not think, however, that on that account the interest is.....voidable on the sale.....the purchaser has an interest..... voidable on the sale, and the deposit was quite competent."

The case was one under section 170, clause (3), which relates to the deposit of the decretal amount prior to the sale, by a person "having an interest which is voidable on the sale." Order XXI, rule 89 of the Civil Procedure Code, relates to deposit after sale, by a person either "owning" the property or "having an interest by virtue of a title acquired before the sale."

(1) 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52; 42 C. 172.

(2) 27 Ind. Cas. 176; 18 C. W. N. ccxxxi.

(3) 16 Ind. Cas. 977; 16 C. L. J. 548; 17 C. W. N. 163.

MAHMUD ALI v. GOBIND PRASAD.

However that may be, in the present case the landlords themselves, as stated above, have purchased the holding, and would in ordinary course enter into possession of it (though as purchasers) and they resist the application.

Under the circumstances of the present case, we do not think that the application should be allowed, and the landlords driven to eject the petitioner as a trespasser.

The case comes from the District of Rangpur, and is, therefore, governed by the provisions of the Eastern Bengal and Assam Tenancy Act. It is pointed out on behalf of the petitioner that Order XXI, rule 89 of the Civil Procedure Code (corresponding to section 310A of the old Code), though made inapplicable to a holding attached in execution of a rent decree under the Bengal Tenancy Act is, not so made inapplicble under the Eastern Bengal Tenancy Act (see section 170), and the fourth sub-section of section 170 of the latter Act lays down that the withdrawal of the amount deposited under section 310A of the Code of Civil Procedure by the decree-holder landlord shall not operate as an admission of the transferability of the tenure or holding sold in execution of the decree, and it is contended that these provisions show that a person in the position of the petitioner may apply under Order XXI, rule 89, of the Civil Procedure Code when a holding is sold in execution of a decree for arrears of rent under the Eastern Bengal Tenancy Act. But all that sub-section 4 says is that the withdrawal of the deposit by the landlord would not operate as an admission of the transferability of the holding. Notwithstanding the withdrawal it is open to the landlord to contest the validity of the transfer, if he chooses to do so. The said sub-section does not debar the landlord, when he has himself purchased the holding at a sale held in execution of a decree for arrears of rent due thereon, to challenge the right of the purchaser (who has not been recognised by him) to make the deposit, on the ground that as against him such purchaser has acquired no title and, therefore, cannot come under Order XXI, rule 89.

We are accordingly of opinion that the petitioner in the present case has no *locus standi* to apply under Order XXI, rule 89 of the Civil Procedure Code.

The appeal must be dismissed, and the rule also will be discharged with costs, 1 gold *mohur*.

Appeal dismissed;
Rule discharged.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 24 OF 1914.

December 2, 1914.

Present:—Mr. Lindsay, J. C.

MAHMUD ALI—AUCTION-PURCHASER—APPELLANT

versus

GOBIND PRASAD—DECREE-HOLDER, AND ANOTHER—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66 (2), 90—Time of sale, omission to specify, whether irregularity.

An omission to specify the time of sale under Order XXI, rule 66 (2), is an irregularity within the meaning of Order XXI, rule 90, and, if substantial injury has been sustained by reason of it, the sale should be set aside. [p. 186, col. 1.]

Appeal against the order of the Subordinate Judge, Lucknow, dated the 18th May 1914.

Mr. *Zahur Ahmad*, for the Appellant.

Mr. *Bisheshwar Nath*, for the Respondents.

JUDGMENT.—This is an appeal against the order of the Subordinate Judge of Lucknow allowing an application made to him under Order XXI, rule 90, for the setting aside of a sale held in execution of a decree. The facts of the case may be stated briefly as follows. The property put up for sale was a grove consisting of two plots situated in Sheikhapur Aliganj. The estimated value of the property was given in the sale proclamation as Rs. 2,000 but at the sale which took place on the 20th March 1914, it was knocked down to Mahmud Ali, the appellant here, for Rs. 700. There is on record evidence given by the village *Patwari* which goes to show that the property is worth a good deal more than this sum. It is also important to notice that on two previous occasions the

Revenue Officer who had charge of the sale postponed it because the bids then received were inadequate. On the last occasion when the sale was adjourned Mahmud Ali, the appellant, was the highest bidder. He offered Rs. 1,600 for the property, which the sale-officer refused to accept as being insufficient.

On the 27th March the decree-holder objected to the sale on the ground that there had been material irregularity in conducting it. The specific irregularities alleged were:

(1) that the sale was conducted in a hurry before bidders could assemble;

(2) that the sale-officer should have started the bidding at Rs. 1,600 the highest bid at the previous sale;

(3) that the sale-officer had omitted to notice that on the two previous occasions of sale the property had been withdrawn as the bids were too low and that he ought, therefore, to have refused to accept the small sum offered on this third occasion;

(4) that the decree-holder, intending to bid himself, had sent his son, who arrived at 1-30 P.M. after the sale was over.

In a further petition of objection lodged on the 9th April the decree-holder raised two other pleas, *viz.*,

(5) that there had been no regular publication of the notice of sale and

(6) that no time for the holding of the sale had been specified in the sale-proclamation.

So far as grounds 1 to 3 are concerned it cannot, I think, be argued that they disclose any irregularity in the publication or conduct of the sale. If due notice of the time of sale is given, it is the business of intending bidders to be present and the sale-officer is under no obligation to wait till they choose to come. Nor again is the sale-officer bound to start the bidding at the figure which represents the highest amount offered at a previous attempt to auction the property. Further the acceptance of the last bid being a matter within the discretion of the sale-officer, I am not prepared to hold that a Court has power to interfere merely because in a case like the present he accepts at a new sale a sum lower than was offered at an earlier one.

As regards ground (5) referred to above, the Subordinate Judge found that there was no irregularity established in connection with the publication of the sale: that finding is in my opinion correct.

The lower Court took no notice in its judgment of the plea that no time for sale was specified in the proclamation. But it set aside the sale on the finding that the price obtained was altogether inadequate and that the acceptance of it amounted to an injury to the interests of both the decree-holder and judgment-debtor. The Subordinate Judge relied upon the inherent power of the Courts to make such orders as may be necessary for the ends of justice, which is recognised by section 151 of the Code of Civil Procedure.

It is contended here that no material irregularity in the publication or conduct of the sale having been established, the Court below was wrong in resorting to the provisions of section 151. I do not think it is necessary for me to discuss this question. The respondents' Counsel has sought to support the order of the Court below upon the ground that there was an irregularity owing to the time of the sale not being specified in the proclamation. This point was not dealt with by the lower Court. Had the Subordinate Judge taken the trouble to look at the proclamation which he had signed himself, he could have seen that no hour for the sale is mentioned. And presumably he is aware that under Order XXI, rule 66 (2), it is necessary to state the time of sale. He ought not to have allowed the proclamation to issue under his signature until he had satisfied himself that it was in order, which it was not. The omission to specify the time is on the face of it a breach of rule 66 (2) and, therefore, an irregularity—and it is no answer to say, as was said by the appellant's learned Counsel, that the proclamation was drawn up on the prescribed form which contains no special space for making an entry to show the time of sale. It was the business of the Court to insert the time whether any special space for the entry is to be found in the form or not. There was plenty of room for writing in the hour of sale.

The question then is whether the applicant-decree-holder sustained substantial

injury by reason of the irregularity he has been able to prove. In the circumstances set out above it is I think a reasonable and proper conclusion that he did. On the previous occasion when the property was withdrawn there was considerable competition for it—so much so that Mahmud Ali had to go up to Rs. 1,600. When we find that on the 20th March he was able to pose as the highest bidder with an offer of Rs. 700 for the very same property, it can be inferred that the competition was dull—a fact which may reasonably be attributed to the omission to specify the time of sale in the proclamation.

For these reasons, I am of opinion, that there was good and sufficient ground for setting the sale aside and that the appeal must fail. I dismiss it with costs accordingly.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 363 OF 1913.

November 13, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

ALLAMSETTI APPALA SURYANARAYANA AND OTHERS—DEFENDANTS Nos 1 TO 6—APPELLANTS

versus

PEELEEKHANA VENKATASIVA RAO PANTULU—PLAINTIFF AND ANOTHER DEFENDANT No. 7—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 60, 70—Mortgagor and mortgagee—Usufructuary mortgage—Consideration, portion of, unpaid—Unregistered letter passed, undertaking to give credit for interest, admissibility of—Registration Act (XVI of 1908), s. 49—Mortgagee admitting non-payment but contending that separate suit ought to be brought—Plea, if valid—Decree, if to be given for full amount of mortgage—Litigation expenses, liability for—Burden of proof.

Where a portion of the consideration for a usufructuary mortgage-deed for 10 years, executed by the plaintiff to defendants Nos. 1 and 2 and their deceased undivided elder brother G, remained unpaid and where at the time of the registration of the said document, G passed an unregistered letter to the plaintiff whereby he undertook to pay the said balance in 10 days and in case of default to pay interest on the same at 1 per cent. per mensem and give credit to this interest till the mortgage-bond remained undischarged; and where on failure of G or defendants Nos. 1 and 2 to pay the said sum, the plaintiff instituted a suit after the expiry of the 10 years, for redemption of the mortgage and for accounts and the defendants contended that they were entitled to be paid the full amount of the mortgage without deducting the amount mentioned as unpaid in the letter, which was inadmissible in evidence for want of registration, leaving the plaintiff to bring a separate suit for the amount:

Held, that the letter was not admissible in evidence to modify the terms of the mortgage-deed; that though the transaction covered by the letter was independent of the mortgage and the plaintiff was entitled to institute a separate suit for the recovery of any amounts that may be due under it yet the defendants were not entitled on that ground to claim that they must be paid the full amount of their mortgage without that sum being deducted. [p. 188, col. 1.]

Held, further, that it was the duty of the mortgagees to prove the exact amount of expenses incurred by them in carrying on litigation connected with the property mortgaged if they insisted to recover them from the mortgagor and that in the absence of any evidence to show what those expenses were they were not entitled to be given credit for any amount, even though it might appear that they were put to some expense. [p. 188, col. 2.]

Appeal against the decree of the District Court of Vizagapatam in Original Suit No. 6 of 1913.

FACTS.—The plaintiff executed a usufructuary mortgage-deed in favour of the defendants Nos. 1 and 2 and one Gavarayya, their deceased undivided elder brother, for Rs. 17,000 for a period of ten years. Defendants Nos. 3 to 6 are the undivided sons of Gavarayya and the 7th defendant is a sub-mortgagee of defendants Nos. 1 to 6. On the day on which the mortgage-deed was registered Gavarayya, as manager of the family, wrote a letter to the plaintiffs stating that out of the consideration of Rs. 17,000 recited in the mortgage-deed only Rs. 14,000 and odd had been paid and undertaking to pay the balance of Rs. 2,000 and odd within ten days from the date of that letter and further agreeing, in the event of his not so paying the said balance, to pay interest on that amount at one rupee per cent. per mensem and to give credit to the same at the time of the discharge of the mortgage. The defendants did not pay the plaintiff the sum of Rs. 2,000 and odd as promised in the letter within ten days from its date. The period of ten years fixed as the duration of the mortgage having expired, plaintiff sued to redeem the mortgage and recover possession of the property from the defendants and claimed among

other things that account should be taken on the footing that only Rs. 14,000 and odd had actually been advanced to him and further that he should be given credit for the interest on the unpaid balance at the rate of one per cent. per mensem. The defendants, while admitting in the written statement that only Rs. 14,000 and odd had actually been paid, contended that they must be taken to have paid the full consideration of Rs. 17,000 as recited in the mortgage-deed inasmuch as it was open to the plaintiff to recover it on the strength of the letter given by them. They also claimed deductions for certain repairs and litigation expenses. The District Judge found on all points in favour of plaintiff and gave a decree for possession. The defendants appealed.

The Hon'ble Mr. *B. N. Sarma*, for the Appellants :—The accounts should be taken on the footing that the full amount of Rs. 17,000 was paid on the mortgage-deed the letter (Exhibit B) is a form of payment and the plaintiffs could have sued upon it and recovered the amount. The rate of interest provided in it was penal, and the defendants must be allowed some reasonable amount for repairs and litigation expenses, though they did not strictly prove the same.

Mr. *B. Narasimha Rao*, for the Respondents :—The giving of the letter, Exhibit B, cannot be treated as equivalent to the payment of the balance. It did not furnish a cause of action to plaintiff for recovering the unpaid balance in the event of its not being paid within ten days. The only right which the plaintiff had under it was to claim credit for interest upon that amount at Re. 1 per cent. per mensem at the time of discharge. Exhibit B not being registered is inadmissible in evidence to affect the terms of the mortgage-deed. Lastly, the mortgagee in possession, being more or less a trustee of the mortgagor, he is bound strictly to account for the receipts and expenses. In the absence of such accounts the defendants are not entitled to ask the Court to give them some reasonable amount by way of repairs, etc.

JUDGMENT.—This is an appeal by the defendants Nos. 1 to 6 from a decree for redemption of a mortgage (1st November 1900) by the plaintiff in favour of the defendants Nos. 1 and 2 and one Gavarayya, the deceased father of defendants Nos. 3 to 6, who admittedly formed an undivided Hindu family, of which Gavarayya was the manager till his death. The 7th defendant is a sub-mortgagee of defendants Nos. 1 to 6. The decree directed the defendants to put the plaintiff in possession of the property and also pay him a sum of Rs. 1,300-12-6 for the amount that was found to be due to the plaintiff at the date of the suit, 29th October 1912, with future interest.

The defendants' main contention in appeal is that they were entitled to recover from the plaintiff a large sum of money and that the Judge is, therefore, wrong in directing them to pay the sum awarded. The consideration mentioned in the mortgage instrument, Exhibit A, was Rs. 17,000. But it is admitted that a sum of Rs. 2,454-8-0 was not paid and on the date of registration of Exhibit A (6th November 1900) a letter was written by Gavarayya to the plaintiff in which it was admitted that the sum aforesaid was not paid and he undertook to pay the amount in ten days from the date of that letter. If the money was not paid within that date, Gavarayya, said "with interest at one per cent. per mensem from this date,'.....'I shall give credit to interest on the sum pertaining to this letter till the bond executed by you in our favour is discharged." The defendants' contention is that this Exhibit modifies the terms of Exhibit A, and not having been registered is inadmissible in evidence for that purpose. But they say it is admissible to show that the plaintiff has got a separate cause of action upon it and, therefore, the defendants are entitled to claim the full amount of Rs. 17,000 as due under the document and an account must be taken upon that footing. If the plaintiff is entitled to recover the amount of Rs. 2,454-8-0 under Exhibit B in this suit, then the defendants contend that the sums which they say they have paid to the plaintiff were made in payment of that debt. If the defendants are not entitled to claim Rs. 17,000 under the mortgage, Exhibit A, then it is contended that the subsequent payments that have been made by them must be added

to the amount that was admittedly due at the time of the mortgage instrument. We are of opinion that Exhibit B is not admissible in evidence to modify in any respect the terms of Exhibit A. It is an independent transaction and if the plaintiff is entitled to recover any amount under it, he may bring a separate suit, nor are the defendants on that ground entitled to contend that they can claim the full amount of Rs 17,000 under the document, Exhibit A. It is proved in the case and it is admitted that out of Rs. 17,000, Rs. 2,454-8-0 was not paid. Exhibit B is not a promissory note or any bond which formed part of the consideration for Exhibit A. It is an undertaking to pay the amount payable under Exhibit A, within 10 days, with a provision for interest in case of non-payment; it was nothing more. We think, therefore, that when the bond was executed the only amount which was payable to the plaintiff under it is the sum of Rs. 17,000 less Rs. 2,000, and odd which was then unpaid. Then the question that we have to decide is whether any amount was subsequently paid by the defendants to the plaintiff to make up the full sum of Rs. 17,000. The first item is Rs. 186, mentioned in Exhibit B. It is said that on the settlement of an account of money due on a bond which is referred to in Exhibit A, a sum of Rs. 186 remained due to the defendants. If the accounts were settled at the time of Exhibit A, it is not shown why this was not included therein; it is not explained how a mistake, if any, was made. What is recited in Exhibit B is that accounts have to be looked into, and it is not shown that accounts have been looked into. Defence witness No. 1 cannot now explain how that amount is due; on the same day it is repudiated in Exhibit F, which we see no reason to disbelieve. We, therefore, disallow this item.

The next item of claim is Rs. 471. There have been various other transactions between the parties extending over a series of years and there is nothing whatever to show that this amount was paid towards this claim. The next item refers to a claim for Rs. 100. This claim is open to the same objection. It is contended on behalf of the appellants that Exhibit I contains a reference to the mortgage amount. It is a letter by the plaintiff to the defendants in which he states that he had received the sum of Rs. 100, but that the amount is not sufficient and he says he should be paid the whole amount. What it refers to can only be ascertained by reference to the letter requesting the defendant to send the money. That letter is not produced. In Exhibit C, the first statement of accounts sent by the defendants to the plaintiff, this item finds no entry. We must, therefore, hold that the defendants have failed to prove that this payment was made to make up the balance due under Exhibit A.

The next contention on behalf of the appellants is that they are entitled to credit for the expenses incurred by them in certain criminal proceedings and survey disputes. A complaint was filed by one Ramudu against Gavarayya, complaining that Gavarayya had tampered with a water channel and so caused water to flow to their own fields instead of to complainant's lands. The plaintiff was a witness in that criminal proceeding. The judgment in that case has not been produced and we are, therefore, unable to say whether the proceedings were carried on for the protection of the plaintiff's title to the land or whether the complaint was really due to a wrongful act done by the defendants. As to the survey dispute it is probable that some expenses were incurred by the defendants, but there is no evidence to show what expenses were really incurred. It is contended that as the defendants were put to some expenses we ought to allow the appellants at least something for such expenses, but it is the defendats' duty, as mortgagees, to show the expenses that they were actually put to; and, in default of such evidence, the Court will not be justified in making any presumption as to the expenses that the defendants may have incurred. This observation also applies to the claim with reference to the criminal proceedings which we have already noticed.

It is next contended that there was a settlement arrived at by which the plaintiff agreed to pay Rs. 1,000 for expenses incurred by the defendants in these criminal proceedings and survey disputes. It appears from the evidence of D. W. No. 4, who is stated to have been the mediator, that there was no settlement. The first defendant

himself admits "no writing was made as there was no actual settlement."

The defendants also claim about Rs. 200 for repairs and improvements. The mortgage document provides that repairs are to be effected after obtaining the plaintiff's sanction. For the repairs effected in 1902 and 1903 no such sanction was obtained. The accounts for all the years, as the Judge says, are very shabby ones. There is no proof that any repairs were necessary. We, therefore, disallow this claim.

We now proceed to deal with the memorandum of objections. The 1st defendant swears that the plaintiff's mother and her sister had to pay his family a sum of Rs. 821, that it was paid by the plaintiff's mother to plaintiff and the plaintiff accordingly granted a receipt, Exhibit IV, acknowledging the receipt of that amount towards the balance of Rs. 2,000 and odd due under Exhibit A. The plaintiff's mother denies that any amount was due by her to the defendants' family, but says that she had mortgaged her lands to Kuna people and had requested the defendants by the letter, Exhibit V, to pay Rs. 821 to her mortgagees and they had never paid the same. The plaintiff contends that it was with reference to that contemplated payment that he wrote the letter, Exhibit IV; it is admitted by the defendants that when the plaintiff's mother and her sister took from their family the loan of Rs. 821 they executed a document in evidence of that loan and placed them in possession of certain lands for payment of the interest due to them. The 1st defendant now says that that document and that *cowle* were returned by him to the plaintiff's mother when he received Exhibits IV and V. Apart from the statement in Exhibit IV, there is no reliable evidence to prove the loan to Rs. 821. The 1st defendant admits that the plaintiff's mother mortgaged the land to the Kuna people with possession subsequent to recovering the lands from him. No member of the Kuna people is examined to show that they obtained possession only after Gavarayya gave back possession, as is alleged. There is little doubt that if the defendants had advanced the sum of Rs. 821 on the Rapaka land, as it is stated in Exhibit V, there would have been a registered document. In these circumstances we are unable to hold that the defendants have proved that any sum of Rs. 821 was paid. We accordingly modify the decree of the lower Court by substituting the sum of Rs. 387-0-8 for Rs. 1,300-12-6 in paragraph 2 of the decree and in other respects we confirm it. The defendants Nos. 1 to 6 will pay the plaintiff's costs in appeal and on the memorandum of objections.

The 7th defendant has filed a memorandum of objections claiming that he is entitled to his costs. We see no reason to interfere with the order of the lower Court on that point. We dismiss the same with costs.

Decree modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 354 OF 1914.

January 22, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

SUBRAMANIA PATTAR—PLAINTIFF—PETITIONER

versus

NARAYANA PATTAR—DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 115, scope of—High Court, interference by, extent of—'Acting illegally or with material irregularity in the exercise of jurisdiction'—'Jurisdiction in clause (3) of section 115,' meaning of—Perverse view of a point arising for decision, and depriving a party of the fruits of prior proceedings, whether grounds for interference in revision.

A High Court will interfere in revision in all cases in which the order of the Court below is manifestly wrong. [p. 190, col. 2.]

Taking a perverse view of the point arising for decision in a case is a ground for interference in revision by the High Court. [p. 190, col. 2.]

Kristamma Naidu v. *Chapa Naidu*, 17 M. 410, followed.

A Judge acts illegally and irregularly in the exercise of his jurisdiction, if the result of his decision deprives a party of the fruits of prior proceedings. [p. 191, col. 1.]

The words "acting illegally or with material irregularity in the exercise of jurisdiction" cover cases in which a Court has failed to arrive at an obvious conclusion which the facts found necessitate or has so misapplied the principles of law as to result in a perversion of justice. [p. 191, col. 1.]

A Court of revision has no power to substitute its own finding of fact for that of the lower Court. [p. 191, col. 1.]

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The power to revise being discretionary, mere infringement of the law, even if apparent, is not enough to call for interference if there are no merits in the case of the party invoking the exercise of such power, as such infringement being only technical will afford no ground for interference. [p. 191, col. 1.]

The word 'jurisdiction' in clause (3) of section 115, Civil Procedure Code, is used in a much wider sense than is generally attributed to it and means "the authority or power, which a Court has, to do justice in the causes of complaint brought before it." It must not be restricted to the pecuniary, local, or other statutory limits of a forum before which proceedings are taken. [p. 191, col. 1.]

Shew Prosad Bungshidhur v. *Ram Chunder Haribux*, 23 Ind. Cas. 977; 41 C. 323, followed.

Amir Hassan Khan v. *Sheo Baksh Singh*, 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83, considered.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge of Tellicherry, in Appeal Suit No. 70[illegible] of 1912, preferred against that of the Court of the District Munsif of Kuthuparamba in Original Suit No. 419 of 1912.

FACTS.—The suit was upon a promissory note. Prior to the institution of the suit, there had been a private reference to arbitration and as a result thereof the plaint note was handed over to the plaintiff by the arbitrator. In his plaint the plaintiff failed to refer to the award. The Subordinate Judge held that the existence of the award was a bar to the suit and dismissed the same. Against the said decree the plaintiff preferred this Civil revision petition.

Mr. *P. S. Narayanaswami Iyer*, for the Petitioner:—The award only declared the rights of the parties, and as the note in question was delivered in pursuance of the award, the only inference possible is that the plaintiff could institute a suit upon it. The view of the Sub-Judge is perverse. *Kristamma Naidu* v. *Chapa Naidu* (1). The Court below has acted illegally and with material irregularity in the exercise of its jurisdiction. *Vide* also *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (2).

Mr. *K. Govinda Iyer*, for the Respondent:—There is no question of jurisdiction involved. The Sub-Judge was entitled to decide rightly as well as wrongly, and a wrong decision on a question of law is no ground for interference in revision. *Amir Hassan Khan* v. *Sheo Baksh Singh* (3).

JUDGMENT.—The decision of the Subordinate Judge cannot be upheld. The award only declared the rights of the plaintiff and of the defendant. It stated that the plaintiff was entitled to recover the amount due under the promissory note and that the defendant was not entitled to any damages from the plaintiff. It did not purport to give any decree respecting the amount due under the promissory note. The award has been worked out by the delivery of the promissory note to the plaintiff. The plaintiff is entitled under the award itself to bring a suit upon the promissory note. It was not necessary to have referred to the award in the plaint. The plaintiff is entitled to sue on the note without reference to it. The suit may also be regarded as one to enforce the obligation created by the award. In any view the plaintiff's claim is well founded. The Subordinate Judge is wrong in saying that the award is a bar to the institution of the suit. But I am very much impressed by the fact that this is a case under section 115 of the Code of Civil Procedure. In this Court, individual Judges have expressed opinions regarding the scope of that section which are not easily reconcilable. Different Benches have taken different views. As a result of the examination of the authorities, I find that the predominant view in Madras is that the High Court should interfere in all cases in which the petitioner can satisfy the Court that the order of the lower Court is manifestly wrong. My view of the present case is this. The Subordinate Judge, to use the language used by some of the Judges in *Kristamma Naidu* v. *Chapa Naidu* (1), has taken a perverse view of the point arising for decision. He has misread the terms of the award. The award hands over the promissory note to the petitioner; the only object of doing so is to enable him to recover the money due thereunder: and yet the Subordinate Judge says that the award is a bar to this suit. I am clearly of of opinion that the Subordinate Judge is wrong. The result is the petitioner is deprived of the very right which

(1) 17 M. 410.
(2) 23 Ind. Cas. 977; 41 C. 323.
(3) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83.

he sought to establish by arbitration. I hold that the Subordinate Judge acted illegally and irregularly in the exercise of his jurisdiction by depriving the petitioner of the fruits of the award. Section 115 should in my opinion be construed to advance justice; the words "acting illegally or with material irregularity in the exercise of jurisdiction" should be read as covering cases in which the Court below has failed to arrive at an obvious conclusion which the facts stated by him necessitate, or has so misapplied the principles of law as to result in the perversion of justice. The Court of revision will certainly have no power to substitute its own finding of fact for that of the lower Court; but if on findings come to by it and on admitted facts, the lower Court fails to draw the necessary inference, it is acting illegally and with material irregularity. A further qualification should be made. As it is discretionary to call for the records and to revise the proceedings of the Courts below, even an apparent infringement of law may not suffice, if the party seeking the aid of the Court has no merits in his favour but is only relying on technicalities. The word "jurisdiction" in clause (3) of section 115 should not be understood as merely indicating the pecuniary, local, or other statutory limits of a forum before which proceedings are taken. The opinion of Sir Lawrence Jenkins in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (2) that if the Court below commits irregularities in procedure, the High Court will have power to set aside its judgment, assumes that the word "jurisdiction" in clause (3) is used in a larger sense than is generally attributed to it. It means "the authority or power, which *A* (Court) has, to do justice in the causes of complaint brought before him." I do not think there is anything in *Amir Hassan Khan* v. *Sheo Baksh Singh* (3) which militates against this view.

It is with some hesitation that I have come to the conclusion that the judgment of the Subordinate Judge should be reversed and that the case should be sent back to him for disposal on the merits. Costs to abide the result.

Petition allowed;
Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 272 OF 1910.

August 19, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Mirza MOHAMMAD SHARAFAT BAHADUR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Shahzadi WAHIDA SULTAN BEGUM—PLAINTIFF—RESPONDENT

Muhammadan Law, Shia School of—Deferred dower, widow's claim for, as against other heirs of her late husband—Estate, widow's possession of—Decree for dower, enforcement of—Estate, Court's possession of, if necessary—Proper procedure in such cases—Administration suit, nature of—Childless widow, right of, to share.

Where in the face of an agreement for payment of the dower at a very large sum at the marriage of a Muhammadan lady, it is contended that neither the husband intended nor the wife expected that the dower should actually be paid at that sum:

Held, that before the contention could prevail it must be established that the sum named was so extravagant and beyond the means of the bridegroom to satisfy and the agreement for its payment could not have been intended by either party thereto to be operative and must be deemed merely as security for an adequate provision for the wife. [p. 193, col. 1.]

Mulkah Do Alum v. *Mirza Jehan Kadr*, 10 M. I. A. 252 (P. C.); 2 W. R. (P. C.) 55; 1 Suth. P. C. J. 554; 2 Sar. P.C.J. 106; 19 Eng Rep. 967 and *Suleman Kadr* v. *Mehdi Begum*, 20 I. A. 144, 21 C. 135, referred to.

Under the Muhammadan Law, when a widow is in possession of the undistributed property of her deceased husband, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower-debt is paid, provided that her possession was obtained lawfully and without force or fraud. [p. 193, col. 2.]

Ramzan Ali v. *Asghari Begum*, 6 Ind. Cas. 405; 7 A. L. J. 614; 32 A. 563; *Ali Bakhsh* v. *Allah Dad Khan*, 6 Ind. Cas. 376; 7 A. L. J. 567; 32 A. 551 and *Sabjan Bewa* v. *Ansaruddin*, 9 Ind. Cas. 1031; 13 C. L. J. 427; 38 C. 475, followed.

But in such a case the widow may be required to account for the profits received by her; but she would be entitled to have set off against the sum received by her the income she might have made from her dower-money if it had been paid to her immediately on the death of her husband. [p. 193, col. 2].

Ahmed Hossain v. *Khadija*, 10 W. R. 368; 3 B. L. R. 28 *note*, followed.

Atahur Ali v. *Altaf Fatima*, 10 W.R. 370, referred to.

The claim for dower is a debt due from the entire estate of the deceased, and ranks equally and rateably with the claims of other creditors. [p. 193, col. 2].

Mir Mahar Ali v. *Amani*, 11 W. R. 212; 2 B. L. R. A. C. J. 306 and *Ameer Ammal* v. *Shankaranarayanan*, 25 M. 658, referred to and followed.

Consequently the share taken by the widow, by right of inheritance, is liable proportionately for the satisfaction of her dower-debt in the same way

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as the shares taken by the other heirs and the liability of each heir is limited to the extent of assets in his or her hands. [p. 194, col. 1.]

Thus where the widow has obtained and retained possession of the entire estate, she has no cause of action for a money decree against the other heirs, a decree made against them being incapable of execution as, *ex hypothesi*, no portion of the estate sought to be pursued is in their hands. [p. 194, col. 1.]

In a case of this description, if the widow desires to have the question of her dower settled, the proper course for her to follow is to institute an administration suit, in which the property can be placed in the hands of the Court, the amount of her claim, if disputed, investigated, and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise. [p. 194, col. 1.]

In a case in which the widow is in possession of no portion of the estate, she may sue the persons in possession to enforce her claim, obtain a decree for the entire amount and realize the sum due out of the assets in their hands. [p. 194, col. 1.]

In the case where the widow is in possession of a portion of the estate and the other heirs have possession of the remainder, she can seek to recover her dower by way of an administration suit or by a suit against the other heirs, provided she offers to surrender possession of the property in her hands. If she adopts the latter alternative, the litigation really assumes the character of an administration suit. [p. 194, col. 1.]

Ghulam Ali v. *Sagirunnissa Bibi*, 23 A. 132; A. W. N. (1901) 124, followed.

A childless widow, under the Shia Law, takes no share in her husband's land, but she is entitled to her share in the value of the buildings created therein, as well as in his moveable property. [p. 194, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, first Court, Gaya, dated the 31st March 1910.

Dr. *Rash Behari Ghosh*, Dr. *Sarat Chandra Basak*, Moulvi *Muhammad Mustafa Khan* and Moulvi *Saogat Ali*, for the Appellants.

Messrs. *S. P. Sinha*, *Sultan Ahmad* and Babu *Chandra Sekhar Prasad Singh*, for the Respondent.

JUDGMENT.—This is an appeal by two of the defendants in a suit by a Muhammadan lady, for realization of Rs. 1,25,000 as deferred dower from the assets left by her husband. According to the plaintiff she was married on the 27th February 1892, and her dower was at that time fixed at the sum claimed. Her husband died on the 8th February 1909 before any portion of the dower had been paid. The defendants are relations of the deceased husband of the plaintiff, his step-brothers and sisters, his nephews and nieces, who, it is said, claim a share in the estate by right of inheritance. The defendants pleaded that the dower had been fixed at Rs. 35,000 only and had been fully paid up. The parties, it may be stated, are governed by the Shia School of Muhammadan Law. The Subordinate Judge has found that the dower was fixed at Rs. 1,25,000 and that no portion thereof was paid by the husband during his life-time. The Subordinate Judge has also held that although the plaintiff is in possession of the assets left by her husband, she is entitled to obtain a decree for the dower-debt in full. In this view, he has given the plaintiff a decree for Rs. 1,25,000 payable out of the properties left by her husband. On the present appeal, this decree has been assailed on three grounds, namely, *first*, that the evidence does not establish that the dower was fixed at the sum claimed; *secondly*, that if the alleged contract is taken to have been proved, there was no real agreement for the payment of the sum named; and *thirdly*, that as the plaintiff is in possession of the major portion, if not the entirety, of the moveables and immoveables left by her husband, she is not entitled to an unqualified decree for the whole sum claimed.

The first ground raises a question of fact, upon which we see no reason to disagree with the Subordinate Judge. The plaintiff has examined herself, her parents, the servants of her husband and one of his friends. The plaintiff is descended, on the parternal side, from the Imperial House of Delhi, and, on the maternal side, from the Royal Family of Oudh. Her husband was also similarly connected. It is by no means improbable that among the parties of the social position of the plaintiff and her husband, the dower would be fixed at a sum which might seem extravagant in the case of persons in an humbler station of life. There is, consequently, no reason to distrust the oral evidence that the dower was fixed at the sum mentioned. There is also no reliable evidence to show that any portion of the dower was paid by the husband during his life. The first ground, therefore, fails.

The second ground raises the question of the reality of the agreement for payment of the dower at such a large sum as Rs. 1,25,000. The argument in substance is that although this sum might have been named as the dower, neither the husband intended nor the wife expected that the dower should actually be paid at that sum,

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Reference has, in this connection, been made to the decisions of the Judicial Committee in *Mulkah Do Alum* v. *Mirza Jehan Kadr* (1) and *Suleman Kadr* v. *Mehdi Begum* (2). This contention is of no avail, because, before it could prevail, the appellants must establish that the sum named was so extravagant and beyond the means of the bridegroom to satisfy that the agreement for its payment could not have been intended by either party thereto to be operative and must be deemed merely as security for an adequate provision for the wife. This clearly would involve an inquiry into facts which have not been investigated, because the question now raised was not even so much as suggested at any stage of the trial. Indeed, it is not even mentioned in any of the twenty-four grounds in the memorandum of appeal presented to this Court. We have, on the other hand, evidence to show that the husband of the plaintiff was in affluent circumstances and has left assets which, according to the defendants, are worth more than two lacs of rupees. The second contention must accordingly be overruled.

The third ground raises the question of the relief to which the plaintiff is entitled. The defendants contended in the Court below that no relief could be awarded to the plaintiff as she was in possession of a considerable portion, if not the entirety, of the estate left by her husband. The plaintiff contended, on the other hand, that she was entitled to an unconditional decree for the whole dower irrespective of the question of her possession. The argument for the defendants is based on the theory that as the dower is payable out of the entire estate inherited by all the heirs (of whom the widow is one), she unites in herself the character of debtor and creditor, and so long as she is in possession of any portion of the estate, she should not be allowed to hold the assets in the hands of the other heirs responsible for the satisfaction of her entire claim. The argument for the plaintiff is founded on the principle that the fact of her possession does not interfere with her right to sue for dower, for which she has a lien upon each and every fragment of the estate, and that she should be given liberty to proceed against any part thereof, the rights as between herself and the other heirs to be left for adjustment in a separate suit framed for the purpose. In our opinion, the extreme contention on each side is open to just criticism. It is perfectly true, as pointed out in the cases of *Sabjan Bewa* v. *Ansaruddin* (3), *Ali Bakhsh* v. *Allah Dad Khan* (4) and *Ramzan Ali* v. *Asghari Begum* (5), where the earlier decisions, including those of the Judicial Committee in *Ameeroonnissa* v. *Mooradoonnissa* (6), *Bibi Bachun* v. *Hamid Hossein* (7) and *Bazayet Hossein* v. *Dooli Chand* (8), are reviewed and explained, that under the Muhammedan Law, when a widow is in possession of the undistributed property of her deceased husband, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower-debt is paid, provided that her possession was obtained lawfully and without force or fraud. It was pointed out, however, by Sir Barnes Peacock, C. J., in *Ahmed Hossian* v. *Khadija* (9), that the widow may be required to account for the profits received by her: but she would be entitled to have set off, against the sum received by her, the income she might have made from her dower-money if it had been paid to her immediately on the death of her husband [see also *Atahur Ali* v. *Altaf Fatima* (10), *Woomatool Fatima* v. *Meer-un-nissa Khanum* (11) and *Hamira Bibi* v. *Zubaida Bibi* (12)]. It is also clear that the claim for dower is a debt due from the entire estate of the deceased, and ranks equally and rateably with the claims of other creditors: *Mir Mahar Alli* v. *Amani* (13), *Imdad Hossein* v. *Hosseinee Bakhsh*

(1) 10 M. I. A. 252; 2 W. R. (P. C.) 55; 1 Suth. P. C. J. 554; 2 Sar. P. C. J. 106; 19 Eng. Rep. 967.
(2) 20 I. A. 144; 21 C. 135.
(3) 9 Ind. Cas. 1031; 38 C. 475; 13 C. L. J. 427.
(4) 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567.
(5) 6 Ind. Cas. 405; 32 A. 563; 7 A. L. J. 614.
(6) 6 M. I. A. 211; 19 Eng. Rep. 79; 1 Sar. P. C. J. 533.
(7) 14 M. I. A. 377; 10 B. L. R. 45; 17 W. R. (P. C.) 113; 2 Suth. P. C. J. 531; 20 E. R. 828; 3 Sar. P. C. J. 39.
(8) 5 I. A. 211; 4 C. 402; 3 Sar. P. C. J. 853; 3 Ind. Jur. 121; 2 Shome L. R. 169.
(9) 0 W. R. 368; 3 B. L. R. 28 *note*.
(10) 10 W. R. 370.
(11) 9 W. R. 318.
(12) 7 Ind. Cas. 497; 33 A. 182; 7 A. L. J. 1025.
(13) 11 W. R. 212; 2 B. L. R. A. C. J. 306.

(14), *Ameer Ammal* v. *Shankaranarayanan* (15). Consequently, the share taken by the widow, by right of inheritance, is liable proportionately for the satisfaction of her dower-debt in the same way as the shares taken by the other heirs, and the liability of each heir is limited to the extent of assets in his or her hands. It is consequently plain that where the widow has obtained and retained possession of the entire estate, she has no cause of action for a money decree against the other heirs; a decree made against them is incapable of execution as, *ex hypothesi*, no portion of the estate sought to be pursued is in their hands. In a case of this description, if the widow desires to have the question of her dower settled, the proper course for her to follow is to institute an administration suit, in which the property can be placed in the hands of the Court, the amount of her claim, if disputed, investigated, and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise. In a case in which the widow is in possession of no portion of the estate, she may sue the persons in possession to enforce her claim, obtain a decree for the entire amount, and realize the sum due out of the assets in their hands. In the case, where the widow is in possession of a portion of the estate and the other heirs have possession of the remainder, she can seek to recover her dower by way of an administration suit, or by a suit against the other heirs provided she offers to surrender possession of the property in her hands. If she adopts the latter alternative, the litigation really assumes the character of an administration suit. This view is supported by the decision in *Ghulam Ali* v. *Sagirunnissa Bibi* (16). We are unable to accept the contention of the plaintiff that though she is in possession of a considerable portion, if not the whole, of the estate, she is not bound to bring into Court the assets in her hands and yet is entitled to an unconditional decree for the entire dower, to be executed against the portion of the estate, if any, in the hands of the defendants. That this view, if accepted, might lead to grave injustice and mutiplicity of suits may be illustrated by a concrete case. A Muhammadan leaves property worth Rs. 10,000. The widow is entitled to Rs. 5,000 for dower. On the death of her husband, she takes possession of moveables worth Rs. 6,000, while the other heirs are in possession of lands worth Rs. 4,000. If the contention of the plaintiff were to prevail, the widow would be at liberty to sue the other heirs for recovery of Rs. 5,000 on account of dower, to obtain a decree and to sell up the lands in their possession to satisfy her claim. They would, then, be driven to sue her for contribution and for the adjustment of their mutual rights and obligations. On the other hand, if she was compelled to place at the disposal of the Court the properties in her hands, the Court might give suitable directions for the sale of such portion of the estate as might be deemed necessary; the balance of the estate would then be divided amongst all the heirs, in proportion to their shares under the Muhammadan Law. In the case before us, the assets consist in part of valuable jewellery, and the parties are at variance upon the question not only of the value but also of the extent of the assets. In these circumstances, it is essential that the Court should take an account of the properties comprised in the estate before the plaintiff realises her dues. A further difficulty is created by the circumstance that the parties are Shias, and the plaintiff is not entitled to a share in the whole estate. A childless widow, under the Shia Law, takes no share in her husband's land, but she is entitled to her share in the value of the buildings erected thereon as well as in his moveable property. The value of the interest acquired by the plaintiff in the estate left by her husband cannot, therefore, be dertermined till an account has been taken of the assets, moveable and immoveable. [Sharaya-Ul-Islam, tr. Querry, Volume II, section 242; Baillie, Volume II, page 295; *Himmut Bahadoor* v. *Sahebzadi Begum* (17); *Asloo* v. *Umdutoonnissa* (18), *Aga Mahomed Jaffer* v. *Koolsom Bibee* (19)]. The decree made by the Subordinate Judge cannot consequently be supported.

(14) 2 N. W. P. H. C. R. 327 at p. 332.
(15) 25 M. 658.
(16) 23 A. 132; A. W. N. (1901) 121.

(17) 14 W. R. 425.
(18) 20 W. R. 297.
(19) 24 I. A. 126; 26 C. 9; 1 C. W. N. 449.

MALAYAPPAIYAR *v.* PICHAI ASARI.

The result is that this appeal is allowed, the decree of the Subordinate Judge discharged, and the case remanded to him. The decree of this Court will declare that the plaintiff is entitled to Rs. 1,25,000 on account of her dower payable out of the estate left by her husband. As she has not claimed interest thereon, no decree for interest will be made; but if the defendants insist upon an account of the profits received by her from the estate of her husband in her possession, interest will be allowed by way of damages on the dower debt at 12 per cent. per annum from the 8th February 1909 to the date of this suit. Both parties will be required by the Court below to place at its disposal the entire assets, and such directions will be given for the disposal thereof, by sale or otherwise, as may be deemed necessary for the realization of the sum decreed in favour of the plaintiff. We are informed that during the pendency of this appeal the decree of the lower Court has been executed by the plaintiff, and the properties purchased by herself. As the decree of the lower Court is discharged, the sale will stand cancelled. The case will be remitted to the Subordinate Judge in order that the final decree may be drawn up, and steps taken for its realization as directed by this judgment. If the defendants insist upon an account of the profits of the estate in the hands of the plaintiff, the decree will be for the principal sum of Rs. 1,25,000 with interest thereon at Rs. 12 per cent. per annum from the 8th February 1909 to the date of suit, reduced by the amount of profits received by the plaintiff. If the defendants do not insist upon an account, the profits will be set off against the interest and the decree will be for Rs. 1,25,000 only. Each party will pay his own costs in this Court; the costs hitherto incurred in the Court below as also the costs incurred after remand will be in the discretion of the Subordinate Judge.

Appeal allowed;
Case remitted.

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 616 OF 1913.
February 2, 1915.
Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

MALAYAPPAIYAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

PICHAI ASARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 2 (a)—Interest after date fixed for redemption, whether allowed—Property, how to be proved self-acquired.

The fact that a mortgage-deed does not expressly refer to the payment of interest after the date fixed for redemption, is no reason for refusing to allow interest at the contract rate. The document should be construed as providing that the parties intended to make a complete contract. [p. 196, col. 2.]

A person who claims a particular property to be his self-acquisition must affirmatively prove that the acquisition was made out of the fruits of his own exertions unaided by family property. But this does not mean that the fact may not be proved by showing that there was no source of income available except such unaided exertions. [p. 196, col. 1.]

Where, therefore, it appeared that the joint family property was of very little title and there was no surplus income left out of which the properties in suit could be acquired:

Held, that the properties were shown by a process of exclusion to be self-acquired. [p. 196, col. 1.]

Mathura Das v. Raja Narindar Bahadur, 23 I. A. 138; 19 A. 39; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 1001 of 1911, preferred against that of the Court of the District Munsif of Tanjore in Original Suit No. 19 of 1910.

FACTS.—The suit was for foreclosure of a mortgage. The plea of the contesting defendants was, *inter alia*, that the property was joint family property and could not be foreclosed as against the non-executants of the deed, and that plaintiffs were not entitled to any *post diem* interest after 1st March 1890, the date fixed for payment in the document. Both the lower Courts held against the defendants and decreed the plaintiffs' suit. The defendants thereupon preferred this second appeal.

Mr. *G. Krishnaswami Iyer*, for the Appellants :—The lower Court erred in holding that the mortgaged property was self-acquired property. There is absolutely no evidence to support that finding. The burden of proving self-acquistion lay very heavily upon the

plaintiffs and they have not discharged the same. The source of income has not been traced. There is no provision for *post diem* interest in the document and the Courts erred in awarding the same. The securities must also be marshalled.

Dr. *Swaminathan*, for the Respondent, was not called upon.

JUDGMENT.—It was argued, in the *first* instance, that the concurrent finding of the lower Courts to the effect that the mortgaged properties were self-acquired, is unsupported by any evidence. The learned Subordinate Judge holds that the properties were self-acquired, because he finds that the joint family property was of very little title and there would be no surplus income left out of which the properties now in question could be acquired. He infers, therefore, that the properties were not acquired from family funds and that consequently they were self-acquisitions: It is true that the authorities cited to us lay down that the person who asserts that a particular property is his self-acquisition, must affirmatively prove that the purchase was made out of the fruits of his own exertions, unaided by family property, and it must be conceded that it is far more satisfactory to trace directly the source of income. But this does not mean that the fact may not be proved by showing that there was no source of income available except such unaided exertions. We think that the Subordinate Judge was justified in holding that the properties were shown by a process of exclusion to be self-acquired. We must, therefore, accept his finding.

It was *next* argued that the decree ought not to have given *post diem* interest at the mortgage rate. The relevant provision of law is contained in Order XXXIV, rule 2 (*a*), of the Code of Civil Procedure, which requires "an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day" fixed by the Court for payment. The question then is, whether, in accordance with the terms of the mortgage, any interest was due after the date fixed for redemption. It is true that the mortgage does not expressly refer to payment of interest after the 1st of March 1890, when it was contemplated that the mortgage would be redeemed. In *Mathura Das* v. *Raja Narindar Bahadur* (1), the Privy Council hold that it is not necessary to provide specifically for the payment of interest after the date fixed for redemption, for "it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind and suitable to the ordinary expectations of persons entering into a mortgage transaction." In our opinion the mortgage-deed now in question is not materially different. The decree of the Subordinate Judge will, therefore, stand with reference to the interest allowed.

The learned Pleader for the appellants suggested that the securities should be marshalled, but was unable to give us any particulars of the marshalling he proposed and we are unable to make any order to that effect. The appeal will be dismissed with costs. The time for payment is extended to two months from this date.

Appeal dismissed.

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 78 OF 1914.

December 14, 1914.

Present:—Mr. Fawcett, A. J. C.

MESSRS. GIBBON & Co.—PLAINTIFFS

versus

THE FIRM OF KUNDANMAL RAMNATH —DEFENDANTS

Mercantile Law—"Shipment," meaning of—Bill of lading, date on, prima facie *evidence of shipment—Contract Act (IX of 1872), s. 73—Aggrieved party, liability of.*

Where a contract provided "shipment" in February and the bill of lading was dated the 28th February although the ship actually sailed many days later:

Held, that, as "shipment" is equivalent to "putting on board" and as in the ordinary practice a bill of lading is not prepared till after the goods have been received on board and bears the same date as that of the mate's receipt, it was sufficiently proved (by production of the bill of lading) that the goods in question were actually shipped in February and that there was, therefore, no late or improper shipment to entitle the defendant to rescind the contract. [p. 197, col. 1.]

A party who has already put himself in the wrong by breaking his contract has no right to impose

new and extraordinary duties on the aggrieved party. That party can be expected only to use ordinary and reasonable diligence. [p. 199, col. 1.]

Messrs. *Nadirshah* and *Kikla*, for the Plaintiffs.

Mr. *Hiranand Bulchand*, for the Defendants.

JUDGMENT.—Plaintiffs sue to recover damages from defendants for loss on a re-sale of goods, for which it is alleged defendants had contracted. The contract in regard to the 100 tons Basic steel bars is admitted, and this part of the case can be disposed of very shortly.

Defendants took delivery of the first 50 tons, but refused to accept the second 50 tons, which arrived by another steamer at Karachi on the 22nd May 1913. They were given a notice on 27th June by plaintiffs' Pleader, and in their reply of 30th June (Exhibit 10) defendants based their refusal on three grounds, *viz.*, (1) that under the contract the whole consignment of steel bars had to be sent in one lot, (2) though the bill of lading date was 28th February 1913 the invoice date was 7th April 1913, and (3) the plaintiffs had not supplied the goods in accordance with defendants' specification. The steel bars were resold by plaintiffs on the 3rd July 1913 at a loss of Rs. 903-7-9.

In defendants' written statement these objections are practically repeated. They are, however, clearly unsubstantial. The contract was for "shipment of the whole lot in February 1913". This is not the same as "shipment of the whole in one lot," etc. To satisfy the contract all that was required was that the whole of the bars should be shipped in February 1913. The bill of lading bears date the 28th February 1913, and in view of the ordinary practice under which a bill of lading is not prepared till after the goods have been received on board and bears the same date as that of the mate's receipt (see evidence of plaintiffs' witnesses Nos. 6 to 8 and Halsbury's Laws of England, Volume XXVI, pages 151-3) it is sufficiently proved that the goods in question were actually shipped in February. "Shipment" of course is equivalent to "putting on board" [*cf.* Stroud's Judicial Dictionary, Volume III, pages 1870-1.]

There was, therefore, no late or improper shipment and defendants were not entitled to rescind the contract on that ground.

It is admitted that the 100 tons contracted for were according to specification, but defendant says that 6 tons extra, which he had asked for, were not sent. This is, however, entirely outside the contract in suit, and any damage which defendants may be entitled to in respect of the extra 10 tons, the supply of which was accepted in Exhibits D and E, could not even be claimed as a set-off under Order VIII, rule 6, Civil Procedure Code. It has nothing to do with which the 100 tons which plaintiffs had contracted to supply and which alone were in issue in this suit.

I, therefore, hold on issue 3 that defendants were not justified in declining to take delivery of the 50 tons Basic steel bars.

Issues 1 and 2 were not pressed and are clearly based on incorrect ideas of the law.

The main contest in this suit is as regards the 50 tons Basic steel plates, which forms the subject of the 4th issue. Defendants deny that they entered into any contract to purchase these, but this denial is directly opposed to Exhibit 3 (admittedly signed by them) under which they confirm the purchase in question. The defence is that this was only an offer to buy, which was not accepted, and so never reached the stage of a contract. The terms of Exhibit 3 are directly against this allegation, and it involves a charge against the plaintiffs' agent, Framroz, of fraud both by wording the document so as to make it a confirmation of a contract instead of a mere offer for submission to the plaintiffs, and by dating the document "13th November" instead of 6th November, when, according to defendant Motiram, the offer was actually made and reduced to writing in Exhibit 3. Admittedly the offer for the 196 bundles of corrugated iron sheets was made on 6th November and Motiram says both offers were given together on that day, while Framroz says the offer for the steel plates was not made till some four days later. In this he is corroborated by his telegram book, which shows that he did not telegraph the offer till the 11th November (Exhibit 13), whereas he had wired about the corrugated sheets and received a reply from Messrs. Gibbon & Co. accepting

the defendants' offer by 8th November (see Exhibit O). The telegram book at pages 108 and 111 also corroborates Framroz's statement that he had wired to Gibbon & Co. on the 6th November about it and received a reply from them on 8th November, but I do not also rely on these entries, as they have not been put in evidence. If defendants' offer for the steel plates had been made also on the 6th, it is almost inconceivable (having regard to ordinary mercantile celerity, especially when contracts are made by telegram) that Framroz would not have wired about it on the 6th, or at any rate prior to the 11th, when he actually sent the telegram. That he sent it on the 11th is also corroborated by Exhibit 11, the reply telegram received by him, which is dated London, 12th November, and was received here on the 13th November. The translation of this is given in Exhibit 14 and it is clear that the 'last telegram' referred to is the one sent on the 11th November, and not the one of 12th November at page 116 of the telegram book, which was not sent till late on that day and contained only one offer. Having received the acceptance of defendants' offer on the 13th November, it is natural that Framroz should have taken the confirmatory letter, Exhibit 3, on that date and included in it the other contract regarding the corrugated sheets, which had not yet been confirmed, although an acceptance notice had been sent about it. This also explains why no acceptance notice was sent regarding the steel plates. As plaintiffs went at once and got Exhibit 3 it was clearly unnecessary for him to send such a notice.

It is true that in his deposition before the Magistrate, Exhibit 3, Framroz is recorded as saying that both offers were due to faulty memory, just as he failed to remember that he had sent an acceptance notice for the corrugated sheets. If Framroz was (as alleged by the defendants) a forger, who put a false date and contents in Exhibit 3 and also presumably fabricated evidence in his telegram book to support the truth of Exhibit 3, it is most unlikely that he would not have been prepared with replies which would have entirely agreed with his case, instead of tending to support defendants.

The telegram book appears regularly kept, and no suspicion even had been thrown on it by defendants' Pleader. It and Exhibit 11 as well as the correspondence between the contents of Exhibits 1 and 3 strongly corroborate Framroz's evidence, and I see no ground whatever for doubting the genuineness and truth of Exhibit 3. Defendants have, I think, taken advantage of the fact that it includes the purchase of corrugated sheets, and of the absence of an acceptance notice for the steel plates, to set up the false allegation that defendants never made the contract evidenced by Exhibit 3. I think it is palpably false one and that I need not discuss in detail the other indications which go the same way. I will only mention that I was not favourably impressed with the demeanour of defendant Motiram in the witness-box; that his brother Kundanmal, who is alleged to have been present when Exhibit 3 was written and signed on 6th November, has not been called as a witness; and that I see no reason to disbelieve the evidence of Mr. Choksi that defendant Motiram did admit in his presence that he had entered into the contract in question, which is corroborated by Exhibit 16. I think it is also clear from Exhibits 23 and 7 that the market was then falling and a loss on the contract was anticipated, which would give defendants a motive for making this false denial of the contract. The fact that defendants did not refuse the bills till 12th March 1913 (Exhibits G and I), though interest on them ran from 4th February and 18th February respectively, (see documents Nos. 1, 4 and 7 in Exhibit 12) is also suspicious. It may be added that Exhibits K, L and M sufficiently explain the fact of the draft, Exhibit J, being drawn on Framroz, which was relied on by defendants as evidence of their allegation that Framroz traded on his own account.

I, therefore, hold on the 4th issue that defendants did enter into the contract to purchase 50 tons Basic steel plates as per Exhibit 3 and that they committed breach of contract by denying the purchase and refusing to take delivery.

As regards the damages (issue 6), the case is covered by section 107 (read with section 95) of the Contract Act. In the case of the steel bars there is no evidence

that notice of intention to re-sell was given to the defendants. The re-sale was, however, justified in any case by the explanation to section 73 of the Contract Act, and no objection has been taken by defendants' Pleader to this course, except that there was undue delay in selling. In the case of the steel bars, there was certainly no such delay, as defendants finally repudiated the contract on 30th June 1913 (Exhibit 10) and the re-sale was only three days after, on 3rd July. The rate at which they were resold was Rs. 4-8-0 per cwt. The purchaser, Mohanlal, no doubt says the market rate then was Rs. 4-12-0; but this is for small quantities, and the defence witness Sirumal corroborates his statement that there is usually a difference of 1 to 3 or 4 annas between the wholesale and retail rates. The rate in the retail market on 16th and 17th July appears to have been about Rs. 4-12-0 or Rs. 4-13-0 (see the two instances of those dates given by Mohanlal and Sirumal), and there is nothing to contradict Mohanlal's evidence as to the retail market rate on 3rd July. Rs. 4-8-0 for the 48 tons sold seems, therefore, to have been a fair price. The charges incurred and entered in the memorandum of account have not been questioned and have been sufficiently proved. I hold, therefore, that plaintiffs are entitled to recover the amount of loss on the re-sale *viz.*, Rs. 803-7-9, as damage in respect of the steel bars contract.

As to the steel plates, the 25 tons lot of the National Bank was sold by public auction on the 4th June 1913 at Rs. 5-4-6 per cwt, while the 25 tons of Cox & Co. were sold privately on 3rd July 1913 at Rs. 4-14 per cwt. It is contended that the re-sale was unreasonably delayed by Framroz and that the loss could have been lessened, if there had not been such delay. I do not, however, think this is established. As is pointed out in Pollock and Mulla's Indian Contract Act, 3rd Edition, at page 325, the rule (in the explanation to section 73) must, of course, be applied with discretion; a man who has already put himself in the wrong by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party. That party can be expected only to use ordinary and reasonable diligence. Again though there, was a definite refusal by defendants to accept in March 1913. This does not affect the ordinary measure of damages, which is the difference between the contract price of the goods and the market price on the day on which they ought to have been accepted. [*cf.* Pollock and Mulla's Indian Contract Act, page 44, Addison's Law of Contracts, 10th Edition, page 584, and Halsbury's Laws of England, Volume 25, paragraph 467 at page 268]. There does not appear to have been any unreasonable delay by Framroz in this case. The goods were first advertised for sale by public auction on 30th April and 2nd May (Exhibit 17), but the auctioneer says he had to alter the dates to 4th and 6th June because on the first proposed dates there was no proper attendance. On the 4th June the National Bank lot was auctioned at Rs. 5-4-6 per cwt. This, if anything, would seem to have been above the proper market rate, though Mohanlal states he sold at Rs. 5-1-9 on 7th June and bought at Rs. 5 on 23rd May from Gibbon & Co. At any rate there is nothing to show that it was below the market rate—25 tons of steel plates is not a commodity which is very readily saleable, and I think this lot was certainly re-sold by Framroz within a reasonable time. There is more question about the re-sale of the second lot, which instead of being sold by public auction on the 6th June, was sold privately on 3rd July at Rs. 4-14-0 per cwt. This was no doubt a proper rate at that time, as evidenced by the fact that the first lot, when again sold on the 21st July by public auction, fetched only Rs. 4-12-0 per cwt. But it may be said that plaintiffs' agent, Framroz, committed an error of judgment in not having the second lot auctioned on 6th June, as originally intended. The auctioneer says Framroz did so because he thought he would get a higher price by selling privately than if he sold by auction, but the result was otherwise. It may have been that Vishindas, the purchaser at the first auction, had repudiated his purchase before the 6th June, and this put the plaintiffs off having another auction; but this is not clearly asserted or proved, and in any case it scarcely justifies the action taken. I think, therefore, defendant is entitled to claim that the damages should be calculated as if the goods had been re-sold on 6th

June instead of the 3rd July. But so far as the evidence on the record goes this does not help him. The only evidence adduced as to the market rate is the statement of the witness Mohanlal, who sold 40 cwt. on 7th June 1913—the date is not given exactly in the deposition but this is the date corresponding to that actually mentioned by the witness—at Rs. 5-1-9 per cwt. Having regard to the difference between wholesale and retail rates, it is certainly not erring in favour of plaintiffs to take the highest rate which might have been got for the goods, if sold by auction on 6th June, at Rs. 5 per cwt. The Rs. 5-4-6 obtained at the other auction cannot be relied on in view of the fact that the purchaser, Vishindas, failed to take delivery, and the probability that the real purchaser was defendant No. 2's brother, as asserted by Vishindas. But even supposing Rs. 5 per cwt. had been obtained, this would only have made a difference of about Rs. 63, which would be swallowed up in the auctioneer's commission at $2\frac{1}{2}$ per cent. which would come to about the same sum.

In the circumstances I think there is no reason to depart from the ordinary rule in section 107 of the Contract Act and that plaintiffs are entitled to recover the loss actually incurred on re-sale of the 50 tons in question. This is sufficiently proved to be Rs. 1,294-7-0 as claimed in the memorandum of account attached to the plaint.

Interest at 6 per cent. per annum on the aggregate loss of Rs. 2,197-15-5 is claimed in the plaint, but issue 5 raises the question of plaintiffs' right to recover this. I think the case does not fall under section 1 of Act XXXII of 1839, but that plaintiffs are entitled to recover interest as damages for the time that they have been kept out of receipt of the full value of the goods as contracted for. The rate of Rs. 6 per cent. is admittedly payable by defendant for delay in payment of bills drawn in respect of the goods, and this rate is, therefore, the proper one to charge. It appears, however, from plaintiffs' memorandum of account that interest has already been charged up to 11th August and 4th August 1913 in respect of the steel plates, and 7th August 1913 in respect of the steel bars. Plaintiffs, therefore, are entitled to interest only from those dates *i. e.*, from 12th August 1913 on Rs. 655-8-11, 5th August 1913 on Rs. 628-14-9 and 8th August 1913 on Rs. 903-7-9 to date of suit *viz.*, 25th February 1914. This, however, comes to more than Rs. 50, the actual amount claimed in the plaint.

I accordingly pass a decree for the recovery from defendants of Rs. 2,247-15-5, as claimed, with interest thereon at 6 per cent. per annum from date of suit till payment and costs of the suit.

Suit decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1845 OF 1911.

February 11, 1913.

Present:—Justice Sir Ralph Benson, and Mr. Justice Sundara Aiyar.

DARBHA LINGAYYA—DEFENDANT—APPELLANT

versus

DARBHA KANAKAMMA—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Maintenance—Absolute right—Widow having independent means of support, whether debarred from claiming maintenance out of her husband's estate.

The right of a Hindu widow of a co-parcener to be maintained out of the family property is an absolute right due to her membership in the family and does not depend upon her necessity arising from her want of other means to support herself. [p. 201, col. 1.]

Therefore, a widow who is able to maintain herself out of other property is not debarred from claiming maintenance out of her husband's estate. [p. 201, col. 2.]

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 722 of 1910, preferred against that of the Court of the Additional District Munsif of Masulipatam in Original Suit No. 451 of 1909.

Mr. *V. Ramesam*, for the Appellant.

Mr. *P. Nagabhushanam*, for the Respondent.

JUDGMENT.—The plaintiff, a Hindu widow, instituted the suit which has given rise to this second appeal for maintenance against the defendant, her husband's brother. Both the lower Courts have found that the defendant is in possession of family property yielding about Rs. 100 a year. The

plaintiff has private property out of which she could get Rs. 40 or Rs. 50 a year. The lower Courts have awarded to the plaintiff Rs. 20 a year. Mr. Ramesam for the defendant contends in second appeal that the income of the family property being small, and the plaintiff having independent means of maintenance, she is not entitled to get maintenance out of her deceased husband's estate. His argument is that a widow who is able to maintain herself out of other property has no right to claim out of her husband's estate anything for that purpose. In our opinion this view cannot be supported. It is based on an entirely wrong conception of the right sought to be enforced. The wives of the male co-parceners in a Hindu family are not entitled to equal shares with the males in the family estate, nor do they take their husband's shares by representation on their death, but in place thereof they are entitled to a portion of their estate for their enjoyment during their life-time, sufficient to maintain them in comfort according to the means of the family. This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves. At a partition made by the husband during his life-time between his sons his wife was, at one time, entitled to an equal share with his sons. *Mitakshara*, Chapters 1 and 2, *Slokas* 8 and 9. According to the *Dayabhaga* the husband's undivided share descends to his widow in its entirety. According to *Katyayana*, the widow may claim either a portion of the estate or an allowance for her maintenance. The same view is maintained by *Vrihaspathi*. [See G. Sirkar Sastri's Viramitrodaya, page 173.] Mr. Ramesam relies on *Ramawati Koer* v. *Manjhari Koer* (1) in support of his contention. That case no doubt is in his favour. But with all deference, we are unable to concur in the view taken there. The authorities cited in the judgment do not support the view. The passage cited from Mr. Mayne's work shows only that the private means of a widow may be taken into account in determining the quantum of maintenance to be decreed to her. The decision of the Privy Council in *Narayan Rao Rama Chandra Pant* v. *Ramabai* (2) has really no bearing on the point. Mr. Sirkar Sastri's view in his book on Hindu Law is not to the effect that the right to maintenance can be extinguished by the possession of other property by the widow. We must hold that the plaintiff is entitled to some maintenance out of her husband's estate. We cannot say that the amount awarded is excessive.

We dismiss the second appeal with costs.

Appeal dismissed.

(1) 4 C. L. J. 74.

(2) 6 I. A. 114; 3 B. 415; 6 C. L. R. 162.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 80 OF 1914.

December 23, 1914.

Present:—Mr. Lindsay, J. C.

ABDUL KARIM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUL RAZZAK AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Divorce among Hindus—Change of religion, effect of—Legitimacy disputed—Parents, lawful union between, shown to be impossible—Treatment as legitimate son, evidence as to, force of—Presumption.

The Hindu Law does not recognise divorce, although the Courts do recognise divorce amongst Hindus upon proof of a custom allowing it. [p. 203, col. 1.]

Under the Hindu Law a change of religion does not dissolve the marriage tie. [p. 203, col. 1.]

In cases where legitimacy of a person is disputed and it is shown that a lawful union between his parents was impossible, but at the same time there is plenty of evidence as to treatment of that person as a legitimate son, the presumption arising from the course of treatment of this kind is a very weak one and must yield to proof of circumstances which, when established, preclude all possibility of a lawful union between his parents. [p. 203, col. 2.]

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 18th April 1913.

Syed *Zahur Ahmad*, for the Appellants.

Mirza *Sami Ullah Beg*, for the Respondents.

JUDGMENT.—This was a suit by the plaintiffs for the recovery of a share of property alleged to have been left by one Abdul Aziz, who is said to have died in or about the year 1894. The principal plaintiff in the case was Abdul Karim, who described himself in the plaint as

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being the son of Abdul Aziz. The other two plaintiffs are persons to whom this plaintiff, Abdul Karim, has transferred a portion of his claim. The defendants to the suit were Abdul Razzak, a brother of the deceased Abdul Aziz, and *Musammat* Wazir Begam, who was a widow of Abdul Aziz and alleged to be the step-mother of the plaintiff, Abdul Karim. Both these defendants denied the legitimacy of Abdul Karim. They asserted that he had got no right to succeed to any property left by Abdul Aziz. The property to which the plaintiffs laid claim was described in five lists attached to the plaint. Lists Nos. 1 to 4 related to certain items of property, moveable and immoveable, which, it was said, were in possession of Abdul Aziz at the time of his death. The property in list No. 5 consisted of four items, namely, certain plots of immoveable property, which it was said had been mortgaged under mortgage-deeds executed in favour of the first plaintiff, Abdul Karim. There were two mortgage-deeds executed in respect of item No. 4 and one each in respect of the remaining three items. With regard to item No. 1, it appears that the mortgage of this piece of property was executed after the death of Abdul Aziz at a time when the first defendant, Abdul Razzak, was acting as the legally appointed guardian of the person and property of the plaintiff No. 1. With regard to the property specified in the first 4 lists attached to the plaint, the case for the defendants was that this property was not the sole property of Abdul Aziz. In fact it was stated that although certain documents of title relating to properties described in these lists had been executed in the name of Abdul Aziz, the money spent on acquiring them belonged to Abdul Aziz's father, one Abdul Rahim. As regards the mortgages to which list No. 5 related, the case was that these mortgages were taken *ism farzi* in the name of Abdul Karim and conveyed no title to him. The Court of first instance has dismissed the suit *in toto* and the plaintiffs come here in appeal. The first and most important question for determination here is as to the status of the plaintiff, Abdul Karim. Is it or is it not proved that he is a legitimate son of the deceased Abdul Aziz, from whom he claims? A number of facts bearing upon this question of status of Abdul Karim are admitted and beyond dispute. It is clear that Abdul Aziz was married lawfully to the second defendant in the case, *Musammat* Wazir Begam. Some time after this marriage, it is admitted that Abdul Aziz contracted some sort of union with a sweeper woman, whose name was *Musammat* Radhia. The case for the plaintiffs was that this woman had been divorced by her husband Jia Lal, a sweeper, that she had afterwards been converted to Islam and that following on her conversion she had contracted a valid marriage, *nikah*, with Abdul Aziz. There can be no doubt that Abdul Aziz for a good many years before his death lived constantly with this woman, who is said to have taken the name of Alarakhi after her marriage. It is also clear that by this woman Abdul Aziz had several children and there seems to be no doubt that the woman and her children and Abdul Aziz all lived together in a portion of what had once been the family house. After Abdul Aziz's death the defendant Abdul Razzak got himself appointed guardian of the person and property of the children, whom his brother Abdul Aziz had left by this woman. This guardianship seems to have continued until the first plaintiff, Abdul Karim, came of age. The suit was, therefore, one really of a two-fold nature. It was partly a suit to recover property under a title of inheritance, and partly a suit as against the guardian, Abdul Razzak to compel him to restore the property which, it was alleged, was the property of the first plaintiff who had been his ward. A good deal of evidence was produced in the case and it has been conceded on behalf of the respondents here that there is plenty of material on the record to show that Abdul Aziz in his lifetime and after him the defendant, Abdul Razzak treated the plaintiff, Abdul Karim, as if he were the legitimate son of Abdul Aziz. It is argued, however, that in spite of this treatment the other facts which appear in the case preclude the conclusion that the first plaintiff was of legitimate descent. The story of *Musammat* Alarakhi, who was called as a witness in the case, was to the effect that she had once been married to Jia Lal, a sweeper, and that shortly after her marriage she attracted the attention of Abdul Aziz. She stated in her

evidence that there never had been any guilty intimacy between her and Abdul Aziz. Nevertheless she had to concede that her husband suspected her of misconduct. She said that her husband had put her away, that after he had put her away she became a convert and was married within a few days of her conversion to Abdul Aziz. The evidence relating to the conversion and to the marriage of *Musammat* Alarakhi with Abdul Aziz is rather scanty, and it is doubtful whether a Court would be justified in finding on such evidence that a valid union between these two persons had taken place. However, it would be needless for me to discuss this portion of the case, for, as contended on behalf of the respondents, the first thing which had to be established in order to make out that there had been a valid marriage between these parties was that the woman Alarakhi, formerly *Musammat* Radhia, had been validly divorced by her husband. *Musammat* Radhia and her husband were Hindus and the Hindu Law does not recognize divorce, although the Courts do amongst Hindus recognise divorce, upon proof of a custom allowing it. Incidentally it may be mentioned that under the Hindu Law change of religion would not dissolve the marriage tie; and, therefore, even if it could be held that *Musammat* Radhia embraced Islam, as she says she did, the first marriage still remained binding. The question, therefore, is whether there is on record any evidence which would show that Jia Lal had lawfully put away his wife, *Musammat* Radhia, before she contracted an union with the deceased Abdul Aziz. As regards this portion of the case we have only the statements of *Musammat* Radhia (now Alarakhi) and her husband, Jia Lal. In her evidence *Musammat* Alarakhi spoke of a custom of divorce amongst her people by the decision of a *panchayet*, but she admitted in her statement that at the time her husband put her away no such *panchayet* had been convened. All that she says is that her husband took her before the *taluqdar* of the village and announced his intention of giving her up as his wife. The account of the affair given by Jia Lal was that having had good reason to suspect his wife of infidelity, he determined to get rid of her. He took her accordingly to the landlord of his village and informed the latter that he intended renouncing her. He says further in the course of his evidence that twenty-five people of his *biradri* were with him at the time, a statement which conflicts with the story told by the woman. He further mentions that at the time of giving up the woman he crossed a *lathi* seven times and broke a potsherd. Jia Lal says after this took place, he left the village and went to Hardoi where he remained for sixteen or seventeen years. It can hardly be contended that this scanty evidence is any proof of a custom among the sweeper class allowing divorce. In fact there is no evidence of any custom at all. It may be perhaps that the incidents which Jia Lal refers to in his statement, namely, the crossing of the *lathi* and the breaking of the potsherd, have some connection with a custom of divorce, but the fact remains that there is no direct evidence that any such custom obtains. It must be held, therefore, that so far as the evidence on the record goes there is no proof whatever that the marriage tie between Jia Lal and his wife was ever dissolved in any way which the law or the Courts can recognise. Probably what took place was that Jia Lal, finding his wife unfaithful to him, gave her up and deserted her. Thereupon she came under the protection of Abdul Aziz. It may be, as alleged by the plaintiffs, that Abdul Aziz did go through the form of a *nikah* ceremony with this woman after she had become a Muhammadan; but even if this be assumed, there remains the fact that her existing marriage with Jia Lal was an obstacle to any lawful union. On this ground, therefore, I must hold that the finding of the Court below that Abdul Karim is not the legitimate son of Abdul Aziz must be maintained. I do not ignore the fact which is admitted by the respondents that there is a great deal of evidence of treatment in this case, that is to say, evidence which goes to show that Abdul Aziz was fond of these children, whom this woman had borne to him, and that he treated them as legitimate offspring. At the best, however, the presumption which arises from a course of treatment of this kind is a very weak one and must yield to proof of circumstances which, when established, preclude all possibility of a lawful union between the parents. On this part of the case, there-

fore, my finding is against the appellants. The result of this finding is to dispose of a large portion of the claim which was set up by Abdul Karim and the other plaintiffs in the Court of first instance. It follows that even if, as is alleged, all the property described in lists Nos. 1 to 4 attached to the plaint did belong to Abdul Aziz at the time of his death, the first plaintiff and his transferees, plaintiffs Nos. 2 and 3, can have no claim against it.

There remains the case of the property specified in list No. 5, that is to say, property which was held in mortgage under deeds which were executed in the name of the plaintiff, Abdul Karim as mortgagee. I have already mentioned that there are five mortgages covering the four items of property set out in list No. 5. Four of these were executed at the end of 1893 or the beginning of 1894, just before the death of Abdul Aziz, and in all of these cases the plaintiff, Abdul Karim, is described as the mortgagee and as the son of Abdul Aziz. The defence as regards these mortgages was that they were *ism farzi* and that the money was advanced really by Abdul Rahim, who was the father of Abdul Aziz. The lower Court in this connection seems to have made out a case which was not set up by the defence. The Subordinate Judge, acting upon some evidence which was produced before him, came to the conclusion that Abdul Rahim and his two sons, Abdul Aziz and Abdul Razzak, lived together as if they were members of a joint Hindu family. He came to the conclusion that the incomes which were earned by the persons were thrown in some way or other into a joint stock and treated as joint family property and he concluded that these sums of money, advanced under the mortgages we are now considering, must have been money belonging to the joint family. It certainly cannot be doubted that at the time these particular mortgages were executed, Abdul Karim was a child of tender years and it is not to be believed, therefore, that he had any money of his own which he could advance on the mortgages. Still we have it proved that at the time these mortgages were executed, Abdul Aziz was living with *Musammat* Alarakhi and the children she had borne to him, and it is also proved that Abdul Aziz was exercising his profession as a physician and earning a respectable income. Further, there is plenty of evidence coming out of the mouth of the defendants' own witnesses to show that after Abdul Aziz took up with the sweeper woman, the rest of his family had very little intercourse with him. In fact, it may be taken as fairly certain that the cohabitation of Abdul Aziz with the sweeper woman resulted in his being ostracized by his family and relations. It is not the least likely in such circumstances that any money which Abdul Aziz was earning was thrown by him into any common stock with the earnings of his father or his brother. On the contrary the reasonable presumption is that whatever Abdul Aziz earned he kept for himself and for his family. When we find, therefore, that these mortgage-deeds were executed within a few months of the death of Abdul Aziz, that Abdul Aziz was fond of this woman, Alarakhi, and her children, that he was living more or less apart from the rest of his family and that he was earning a decent income, the reasonable inference to be drawn is that Abdul Aziz advanced money on the mortgages intending to make a provision for his son, Abdul Karim. In the face of these circumstances the burden of proof lay heavily upon the defendants to show that the money lent under these mortgages had been advanced by Abdul Aziz's father, Abdul Rahim. The burden was not discharged. In fact there is no respectable evidence of any kind to establish this defence.

There is of course the story of Abdul Razzak, but I could not possibly accept this man's evidence regarding any matter without the strongest possible corroboration. It is proved to my satisfaction that in the course of his evidence before the Court below he perjured himself times and again. I hold, therefore, that as regards the four mortgages which were executed just before the death of Abdul Aziz, the plaintiff is entitled to have it decided in his favour that the mortgagee-interests arising out of those transactions belong to him. There remains the fifth mortgage, which covers item No. 1 described in list No. 5. This was a mortgage of a grove, a house and some other property executed in the name of Abdul Karim on the 16th of February 1896 to

secure a loan of Rs. 700. This mortgage was executed after the defendant Abdul Razzak had been made a guardian of the person and property of the minor Abdul Karim. As regards this transaction too the defence was that it was *benami*. Abdul Razzak's story was that the money was his own and that he had taken the mortgage in the name of Abdul Karim. The only explanation which he was able to give of this somewhat curious piece of dealing was that he had got the deed executed in favour of the minor, so that he might himself avoid all appearance of transgressing the Muhammadan Law against the taking of interest. According to Alarakhi's story Abdul Razzak, after the death of Abdul Aziz, took this money Rs. 700, from her and advanced it on the mortgage in question. *Musammat* Alarakhi is of course an interested witness and the story she has told in Court is not perhaps to be relied upon in all respects, but as regards truthfulness, I think, it may well be said that her statement commands more respect than the statement of the defendant Abdul Razzak. It seems to me from all the circumstances of the case extremely probable that after Abdul Aziz died, the defendant Abdul Razzak, taking advantage of his position, proceeded to lay his hands upon all the property which came within his reach and although it is in evidence that for a short time he made some scanty provision for the maintenance of *Musammat* Alarakhi, it also appears that he afterwards turned her out of the family house. I do not for one moment believe the version which Abdul Razzak gives about the lending of this money on mortgage, and I think I may safely accept Alarakhi's story when she says that she gave up Rs. 700 to Abdul Razzak in order that a mortgage might be taken in favour of her son, Abdul Karim, whom she described as being the real owner of the mortgagee-interests. I find, therefore, in favour of the appellants that Abdul Karim is the owner of the mortgagee-interests referred to in list No. 5 attached to the plaint.

Appeal partly allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2797 OF 1913.

December 17, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

Sowcar KAMURUDEEN SAHIB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NOOR MAHOMED USMAN SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Auction-purchaser, suit against, when maintainable—Presumption—Transfer of title by benamidar, *how created—Trust, verbal, whether valid.*

A Court auction-purchaser must be treated as the real purchaser for all purposes so long as the suit is brought against him and not by him except in the cases provided for by clause 2 of section 66 of the Civil Procedure Code, 1908. [p. 206, col. 1.]

The mere consent or permission to hold possession given after the Transfer of Property Act came into force, cannot transfer title from a *benamidar* to a real owner. [p. 207, col. 1.]

Where it was alleged that the auction-purchaser was put in possession of the properties as a trustee for the real purchaser but no valid trust deed was produced:

Held, that the suit was barred by section 66 of the Civil Procedure Code, 1908. [p. 208, col. 2.]

Kandasawmy Pillay v. *Rangasawmy Nainar*, 16 Ind. Cas. 30; 12 M. L. T. 211; (1912) M. W. N. 882; 23 M.L. J. 301; 36 M. 564at p. 567, *Monappa* v. *Surappa*, 11 M. 234; *Musammat Buhuns Kowur* v. *Lalla Buhooree Lall*, 14 M. I. A. 496; 18 W. R. 157; 10 B. L. R. 159 (P. C.); 3 Sar. P. C. J. 69; 20 Eng. Rep. 871, *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya*, 2 I. A. 154; 23 W. R. 358, distinguished.

Bishan Dial v. *Ghazi-ud-din*, 23 A. 175; A. W. N. (1901)44, *Petherperumal Chetty* v. *Muniandy Servai*, 35 C. 551 at p. 558; 12 C.W.N. 562; 7 C.L.J. 528; 5 A.L.J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98 (P. C.), followed.

Sankunni Nayar v. *Narayanan Nambudri*, 17 M. 282; 4 M. L. J. 65, *Natesa Ayyar* v. *Venkataramayyan*, 6 M. 135; *Minakshi Ammal* v. *Kalianarama Rayer*, 20 M. 349; 7 M. L. J. 213, distinguished.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 357 of 1913, preferred against that of the District Munsif of Vellore, in Original Suit No. 285 of 1911.

Mr. *T. R. Ramachandra Aiyar*, for the Appellants.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. They are the heirs of one Abdul Gunnay Sahib, deceased. Their case is that Abdul Gannay Sahib, in order to defraud his creditors, purchased the plaint properties

in the name of Noor Abdul Kadir Sahib, in a Court auction sale held in execution of the decree passed against Abdul Gannay Sahib and that in pursuance of the same scheme, he (Abul Gannay) put Abdul Kadir Sahib in possession of the properties, but on the understanding that Abdul Kadir should be a trustee of the property for Abdul Gannay Sahib and make over all the profits to Abdul Gannay till such time as Abdul Gannay could safely take back actual possession. The Court auction-sale took place in November 1898 and it was confirmed in January 1899, though the sale-certificate seems to have been issued only in June 1899. The possession of Abdul Kadir Sahib began in the beginning of 1899, evidently as soon as the sale was confirmed in January 1899.

The lower Courts dismissed the suit of the plaintiffs on the strength of the provisions of section 66 of the Civil Procedure Code. They held that the effect of that section was not affected by the allegation in the plaint that till October 1909 the *benamidar* (Abdul Kadir Sahib) and his heirs, the defendants, had been regularly paying the profits of the properties to Abdul Gannay Sahib and his heirs, the plaintiffs, in pursuance of the arrangement of January 1899.

It is argued in second appeal, so far as I have followed the arguments of the appellants' learned Vakil, Mr. T. R. Ramachandraier, that as Abdul Gannay put Abdul Kadir in possession of the properties in January 1899 and as Abdul Kadir took upon himself the duties of a trustee in respect of these properties for Abdul Gannay, Section 66 of the Civil Procedure Code cannot be an obstruction to the success of the plaintiffs' suit which is brought by the beneficiaries against the heirs of the trustee.

As regards the provisions of section 66, Civil Procedure Code, I see no reason to depart from the opinion I gave expression to in the case *Kandasawmy Pillay* v. *Rangasawmy Naïnar* (1). The verbal changes introduced in the old section 317 by clause (1) of the present section 66 make it clear, to my mind, that when the certified purchaser or any other person "claiming title under a purchase certified by the Court" is the *defendant* in a suit, he is entitled to plead that his purchase cannot be made out to be *benami* by the plaintiff of that suit owing to the interposition of the statutory bar raised by the section 66, and that the Court auction-purchase should be treated by the Court as a fully operative conveyance by reason of the purchaser's occupying the advantageous position of the defendant in the suit, even though it might have been a *benami* purchase. It follows that the Court auction-purchaser must be treated as the real purchaser for all purposes so long as the suit is brought against and not by him (or those claiming under him), excepting in the cases provided for by clause (2) of section 66. The present is not a case coming within any of the exceptions mentioned in the clause (2) and hence, in my opinion, it should be taken that the defendants are the persons owning the full legal and equitable titles in the plaint properties for the purpose of the decision of this suit brought against them. In other words, if Abdul Kadir should be treated as a real purchaser, then the title fully vested in Abdul Kadir in January 1899. By the change introduced in the wording of this provision in the new Code, persons claiming title under Abdul Kadir became also the real owners of the property as they claim title under that same purchase by Abdul Kadir. Their title cannot be lost unless Abdul Kadir or themselves have created afterwards a valid trust in favour of Abdul Gannay or his heirs. Under the Trusts Act, section 5, "No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the Will of the author of the trust or of the trustee." It is not alleged that Abdul Kadir or the defendants have, by a registered non-testamentary instrument or by a Will, created any such trust. As regards mere possession, even taking it that Abdul Gannay and his heirs were in possession from January 1899 till October 1909, by reason of receiving the profits as alleged in the plaint, the

(1) 16 Ind. Cas. 30; 36 M. 564 at p. 567; 12 M. L. T. 211; (1912) M. W. N. 882; 23 M. L. J. 301.

plaintiffs could not have obtained any title by adverse possession. as they were not in possession for the statutory period of twelve years before their receipt of profits ceased according to the plaintiffs' own case.

As for the cases *Monappa* v. *Surappa* (2), *Musammat Buhuns Kowur* v. *Lalla Buhooree Lall* (3) and *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya*(4), quoted on plaintiffs' side, these decisions have been considered in the case *Bishan Dial* v. *Ghazi-ud-din* (5), and the learned Judges, following the *dictum* of their Lordships of the Privy Council found in one of these very cases, *Mussammat Buhuns Kowur* v. *Lalla Buhooree Lall* (3), held that "the mere permission to hold possession cannot alone give or transfer a title from the *benamidar* to the real owner" and they also point out that the cases relied on were decided before the passing of the Transfer of Property Act of 1882. It seems to me clear that mere conduct or mere permission to hold possession given after the Transfer of Property Act came into force, cannot transfer title from one party to another.

On these grounds I hold that the lower Courts were right in dismissing the plaintiffs' suit and I would, therefore, dismiss the second appeal with costs.

TYABJI, J.—This appeal arises out of a suit for establishing the plaintiffs' right to the properties referred to in the plaint and for directing the defendants to deliver the properties to the plaintiffs. The defence is that section 66 of the Civil Procedure Code is a bar to the suit.

It is not denied that the defendant is "a person claiming title under a purchase certified by the Court" and I, therefore, see great difficulty in reading section 66, sub-section (1), in such a manner as to prevent the bar against the plaintiffs' suit. The appellant relies, however, in the first instance, on the arguments based on a *dictum* cited with approval by the Privy Council in *Petherperumal Chetty* v. *Muniandy Servai* (6) from Mayne's Hindu Law, to the effect that "where a transaction is once made out to be a mere *benami*, it is evident that the *benamidar* absolutely disappears from the title." The argument is that the defendant was a *benamidar* and that, therefore, he is not a purchaser at all and the plaintiff must succeed in the suit. But it seems to me that this is exactly the course of action against which section 66 is directed. Section 66 is intended to prevent it being set up in Court that a purchase at auction-sale was *benami* for the plaintiff except in the three classes of cases mentioned in sub-section (2): *First*, a suit for a declaration that the name in the certificate of sale was inserted fraudulently; *secondly*, a suit for a declaration that the name was inserted in the certificate without the consent of the real purchaser; *thirdly*, a suit based on the right of a third person who does not himself claim to be the real purchaser, but claims to be entitled to proceed against the property on the ground that though it is nominally sold to the certified purchaser, yet it is liable to satisfy the claim of such third person against the real owner. Each of the three cases refer to a case where the plaintiff has not been a party to any fraud, but wishes to get to rid of the effect of an attempted fraud against himself by the certified purchaser with or without the connivance of the real owner or real purchaser as the case may be. It cannot be contended that the present suit comes under any of the three classes of suits.

Reliance is then placed upon the cases *Monappa* v. *Surappa* (2), *Sankunni Nayar* v. *Narayanan Nambudri* (7), *Natesa Ayyar* v. *Venkatramayyan* (8) and *Minakshi Ammal* v. *Kalianarama Rayer* (9).

Monappa's case(2) proceeds on a basis which, it seems to me, is no more applicable in the case of immoveable property exceeding Rs. 100 in value after the Transfer of Property Act has come into operation. For

(2) 11 M. 234.

(3) 14 M. I. A. 496; 18 W. R. 157; 10 B. L. R. 159 (P. C.); 20 E. R. 871; 3 Sar. P. C. J. 69.

(4) 2 I. A. 154; 23 W. R. 358.

(5) 23 A. 175; A. W. N. (1901) 44.

(6) 35 C. 551 at p. 558; 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266; 35 I. A. 98 (P. C.).

(7) 17 M. 282; 4 M. L. J. 65.

(8) 6 M. 135.

(9) 20 M. 349; 7 M. L. J. 213.

it is held there that, although the purchase at the auction-sale passed title to the person in whose name the certificate was made out, yet subsequently there was some conduct on the part of the purchaser which operated as a re-transfer to the claimant. The Transfer of Property Act now lays down in which ways alone a transfer of immoveable property of such value can be made and it is not alleged that there is anything that can satisfy the requirements of the Act. The question, therefore, remains whether, at the time of the Court auction, any transfer was effected to the person who was certified as the purchaser and on that question section 66, sub-section (1), provides that the title of the certified purchaser cannot be attacked on the ground that the purchase was made on behalf of the plaintiff.

The other case relied upon by the appellant, *Sankunni Nayar* v. *Narayanan Nambudri* (7), is also distinguishable. There the Court held that the transaction was not a *benami* transaction. The facts of that case did not fall within section 317 of the old Code corresponding to section 66 (1). There the property was purchased by one Raman Nambyar as manager on behalf of the plaintiff, who was a minor; (the learned Judges speak of him both as manager and as agent). Raman Nambyar acknowledged himself as the manager or agent and acted as such. The first defendant succeeded him as manager or agent and he for the first time set up his own title. The suit was brought by the plaintiff on attaining majority to have his own title declared. The case would now apparently fall under the first or second of the three classes of suits excepted in section 66 (2). That sub-section did not form part of the earlier Code.

I need not refer in detail to the other two cases. Finally, it was argued that section 66 itself recognises a distinction between the real purchaser and the purchaser certified as such in the sale certificate. That fact does not favour the appellants. The section recognises the distinction and also specifies the cases in which the certified purchaser may be ousted by the real owner or the real purchaser. The case before us is not one of those specified.

I agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 149 OF 1912.

February 9, 1915.

Present:—Mr. Lindsay, J. C., and Pandit Kanhaiya Lal, A. J. C.

Babu NARENDRA BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

Sheikh WALI MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption, suit for—Sale, subject to mortgage—Possession, physical, property incapable of—Mortgagee in possession—Vendee subsequently taking possession from mortgagee—Registration of sale-deed, date of, limitation starting from—Limitation Act (IX of 1908), Sch. I, Art. 10.

Where a certain *zemindari* property in possession of mortgagees and incapable of physical possession at the time of sale is transferred by a registered sale-deed subject to the mortgage, the limitation for a pre-emption suit runs from the date when the sale-deed is registered, and not from the date when the vendee takes possession of the property from the mortgagees. [p. 209, col. 1.]

Batul Begum v. *Mansur Ali Khan*, 24 A. 17; 3 Bom. L. R. 707; 5 C. W. N. 888 (P. C.); 28 I. A. 248 and *Raghunath Parshad* v. *Ram Dayal*, 7 O. C. 8, referred to.

Mr. *A. P. Sen*, for the Appellant.

Mirza *Sami Ullah Beg*, for Respondents Nos. 2, 3, 4, 6, 7, 8, 10, 11 and 12.

JUDGMENT.—This appeal arises out of a suit for pre-emption, brought by the plaintiff-appellant in respect of certain *zemindari* property sold by Babu Kalika Bakhsh Singh, father of defendant No. 27, in favour of defendants Nos. 1 to 26 on the 6th May 1907. The deed of sale was registered on the 7th May 1907. The suit was brought on the 17th June 1912, that is, more than five years after the date of registration.

The Court below dismissed it on the ground that the claim was barred by limitation. Article 10 of the Indian Limitation Act provides a period of one year for suits to enforce a right of pre-emption from the date when the purchaser takes under

the sale sought to be impeached, physical possession of the whole of the property sold, or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. It is contended on behalf of the plaintiff-appellant that a portion of the property sold was in the possession of usufructuary mortgagees, for payment to whom Rs. 4,000 were left by the vendor out of the sale consideration with the vendees, that the vendees did not pay that money and recover possession of that portion of the property till the 18th September 1911, and that the claim was within time from that date. But when property is sold subject to a mortgage, what is sold is the equity of redemption, which, by its very nature, does not admit of physical possession at one time, though it may admit of physical possession at another time, but the law does not contemplate that the starting point of the period of limitation in such cases is to be postponed till it becomes capable of physical possession. A house in the occupation of a tenant or mortgagee may not admit of physical possession till the tenancy or mortgage comes to an end, but the law does not permit a person claiming to pre-empt such a house to wait till the vendee has chosen to eject the tenant or redeem the mortgage. The capability of the property for physical possession is determined by the date of the sale. No vendor can give better possession than he himself enjoys, and unless the entire land of the village or *mahal* sold is in his actual cultivation, no delivery of physical possession at the time of the sale is possible. In *Batul Begum* v. *Mansur Ali Khan* (1), their Lordships of the Privy Council, in discussing the limitation applicable to a suit brought to pre-empt certain property which had passed to a mortgagee by foreclosure, observed:—"The 'property sold,' 'the subject of the sale,' was in this case the 5-annas 4-pie share of each of the three villages and the 8-anna share of the fourth. Various questions of more or less subtlety suggest themselves as to the relation of the holder of such a right to the possession of the estate. All those questions are, however, superseded by the extreme absoluteness of the language of the tenth Article of the Limitation Act. What has to be considered is, as the High Court accurately formulated, the question, Does the property admit of physical possession? The word 'physical' is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used,—first in 1859 prescribing 'possession,' then in 1871 requiring 'actual possession,' and finally in 1877 substituting the word 'physical' for 'actual,' it is seen that that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Court are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C. J., in regard to the words 'actual possession' is applicable with still more certainty to the words 'physical possession' and that what is meant is a 'personal and immediate possession.'" That view was adopted by this Court in *Raghunath Parshad* v. *Ram Dayal* (2), and it was held that the words "physical possession" in Article 10 excluded any notion of constructive possession by a landlord through his tenants. The property sold in this case is a 10 *biswas* share of a village, which has been formed into a separate *mahal* by partition. It is not shown that the land appertaining thereto is entirely in the cultivatory occupation of the vendor. The property did not, therefore, admit of physical possession on the date of the sale, and the present suit is beyond time. The heirs of Sheikh Nasib, one of the respondents, who was a purchaser of a 6 pies share and is proved to have died a year ago, have, moreover, not been brought on the record.

The appeal is, therefore, declared to have abated as against him, and is dismissed with costs as against the other defendants-respondents, who will get their costs from the plaintiff-appellant.

Appeal dismissed.

(1) 24 A. 17 at p. 25; 3 Bom. L. R. 707; 5 C. W. N. 888 (P. C.); 28 I. A. 248.

(2) 7 O. C 8.

MARAYYA CHETTY v. SAMI CHETTI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 115 OF 1914.

January 22, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

M. A. R. AND Co. MARAYYA CHETTY—PLAINTIFF—PETITIONER

versus

SAMI CHETTI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXX, rr. 1, 2—Suit on behalf of firm by one member as agent—Other members made plaintiffs, after limitation—Suit, whether barred—Limitation Act (IX of 1908), s. 22, applicability of.

A suit on behalf of a firm by one of its partners as agent, once instituted within time, does not become time-barred merely because it is barred when the other partners are brought on record as co-plaintiffs. [p. 210, col. 2.]

Kastur Chand Bahirardas v. *Sagarmal Shriram*, 17 B. 413; *Vadilal* v. *Shah Khusal*, 27 B. 127; 4 Bom. L. R. 968, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Additional District Munsif of Salem, in Small Cause Suit No. 355 of 1913, dated the 4th August 1913.

FACTS.—The suit was for the recovery of money due upon dealings, instituted by the plaintiff who has prefixed to his name the initials of his firm. The defendant contested the suit upon the ground, *inter alia*, that the suit was bad for non-joinder of the other partners of the firm. The District Munsif dismissed the suit, holding that if the other partners were added the suit would become time-barred. Against this dismissal the plaintiff preferred this civil revision petition, under section 25 of Act IX of 1887.

Mr. *K. Jagannatha Iyer*, for the Petitioner:—The District Munsif's decree dismissing the suit cannot be supported. The suit was instituted by the plaintiff as one of the partners of the firm and its accredited agent. Under Order XXX, rules 1 and 2, the defendant was entitled to insist on the disclosure of the names of the several partners. Even after that the suit should proceed as if the several partners had been named in the plaint, but only in the name of the firm. See also *Kasturchand Bahirardas* v. *Sagarmal Shriram* (1) and *Vadilal* v. *Shah Khushal* (2).

Mr. *V. Purushottama Iyer*, for the Respondent:—The suit is instituted by the plaintiff not as a partner, but in his individual capacity. The amount is mentioned as having been advanced by him and not by the firm. The addition of the initials of the firm to the name of the plaintiff is merely descriptive of the plaintiff and is not intended to convey the idea that he was a partner of the firm and that it was the firm that was suing. The case of *Kastur Chand Bahirardas* v. *Sagarmal Shriram* (1) was that of a manager. In *Vadilal* v. *Shah Khushal* (2) the contention was that the plaintiff was solely entitled. Both those cases do not apply to the facts of this case.

JUDGMENT.—The decision of the District Munsif upon the second point is clearly wrong. The suit is brought by Marayya Chetti and he prefixes to his name the 'initials' of the Company. Under Order XXX, rules 1 and 2, it is open to the defendant to ask for particulars regarding the members who constitute the firm, and, if the particulars are not supplied, to insist upon the suit being dismissed. I must regard the suit as one brought on behalf of the firm by one of its members as its agent. In this view, I cannot agree with the District Munsif in the conclusion that if other partners are added as co-plaintiffs the suit will be barred by limitation. It is pointed out in *Kasturchand Bahirardas* v. *Sagarmal Shriram* (1) that when the manager on behalf of the firm sues to recover money, the fact that others are brought in at a subsequent stage will not enable the defendant to plead limitation, and that principle has been accepted in *Vadilal* v. *Shah Khushal* (2). I am of the same opinion. I must hold that the view of the District Munsif on the second point is wrong.

Mr. Purushottama Iyer draws my attention to the fact that a suit is pending by the partnership against his client in the Kumbakonam Munsif's Court, wherein the present amount is said to have been given credit by the plaintiff. Neither the plaint nor the written statement in that suit is before the Court. In the absence of those pleadings it is impossible to say whether the contention of Mr. Purushottama Iyer is well founded. I must ask the District Munsif to send for those pleadings,

(1) 17 B. 413.
(2) 27 B. 157; 4 Bom. L. R. 968.

to exhibit them and to dispose of the second issue in the light of the averments contained in those documents.

Costs will abide and follow the result.

Petition allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 70 OF 1913-14 OF SULTANPUR DISTRICT.

July 23, 1914.

Present:—Mr. Holms, J. M.

SHEORAJ SONAR—PLAINTIFF—APPELLANT

versus

Raja PRATAB BAHADUR SINGH—DEFENDANT—RESPONDENT.

Ejectment, notice of—Rent, wrong entry of, effect of.

A mere accidental wrong entry of rent in a notice of ejectment does not invalidate it, if the entry does not in any way prejudice the tenant.

Appeal from the decree of the Commissioner, Fyazabad, dated the 23rd May 1913, upholding that of the Assistant Collector, Sultanpur, dated the 13th February 1913.

Babu *Ganpat Sahai*, for the Respondent.

JUDGMENT.—The claim to be an occupancy tenant, which is now made in the ground of appeal, was never made before. This is really an appeal on the facts. However, as appellant was not represented by Counsel I have looked into the matter. He does not claim that there has been any change in the rent entitling him to a fresh statutory period. All that he says is that rent was wrongly entered in the notice. Respondent says that he has no claim against him for arrears of rent, and this being so, even if the rent were wrongly entered, I doubt if it would have invalidated the notice, but the findings of the lower Courts are against him as to the rent.

Appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 464 OF 1912, WITH ORDER No. 6774 OF 1912.

January 22, 1915.

Present:—Mr. Justice Sharf-ud-din and Mr. Justice Coxe.

BENI SINGH—DEFENDANT—APPELLANT

versus

BARHAMDEO SINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 14, Sch. I, Art. 181—Transfer of Property Act (IV of 1882), s. 89—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5 (2)—Application to make decree absolute, limitation for—Court, duty of, to pronounce judgment—S. 14 of Limitation Act, whether applicable to appeals.

Where a decree on a mortgage was passed on the 28th July 1905, fixing 28th January 1906 as the date for payment and no payment having been made an application was made on the 31st May 1909 to make the decree absolute:

Held, that the application to make the decree absolute was barred by Article 181 of the first Schedule to the Limitation Act. [p. 212, col. 2.]

Article 181 of the first Schedule to the Limitation Act applies to an application under section 89 of Act IV of 1882. [p. 212, col. 2.]

Madhab Moni Dasi v. *Pamela Lambert*, 6 Ind. Cas. 537; 12 C. L. J. 328; 37 C. 796; 15 C. W. N. 337, distinguished.

Bituk Nath v. *Musammat Munni Dai*, 23 Ind. Cas. 644; 124 A. L. J 596; 19 C. L. J. 574; 16 Bom. L. R. 369; 27 M. L. J. 1; 16 M. L. T. 1; 36 A. 284; 1 L. W. 729; 18 C. W. N. 740; *Abdul Majid* v. *Jawahir Lal*, 23 Ind. Cas. 649; (1914) M. W. N. 485; 27 M. L. J. 17; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N 963; 19 C. L. J. 626; 16 M. L. T. 44; 1 L. W. 483; 36 A. 350, followed.

Applications under Order XXXIV, rule 5, clause 2, come within the scope of Article 181. [p. 212, col. 2.]

Madhab Moni Dasi v. *Pamela Lambert*, 6 Ind. Cas. 537; 12 C. L. J. 328; 15 C. W. N. 337; 37 C. 796; *Amolak Chand Parak* v. *Sarat Chandra Mukherjee*, 11 Ind. Cas. 943; 16 C. W. N. 49; 38 C. 913; *Kylasa Goundan* v. *Ramasammi Ayyan*, 4 M. 172; *Balaji* v. *Kushaba*, 30 B. 415; 8 Bom. L. R. 2 8; *Puran Chand* v. *Roy Radha Kishen*, 19 C. 132 (F. B.), referred to.

A Court is bound to dispose of a pending suit, whether any application is made to it or not asking it to proceed to judgment. [p. 213, col. 1.]

Where an appeal was preferred to the High Court against a lower Appellate Court's order of remand but the proceeding continued in the first Court and was disposed of on the 19th September 1910, and on the 21st April 1911, the High Court dismissed the appeal, and on the 16th May 1911, the plaintiff appealed to the lower Appellate Court, against the order of the 19th September 1910:

Held, that the appeal to the lower Appellate Court was barred by limitation, as section 14 of the Limitation Act had no application to appeals and the case did not come under section 5 of the Act. [p. 212, col. 1.]

Appeal from an order of the Sub-Judge of Muzaffarpur, dated the 4th December 1911,

BENI SINGH v. BARHAMDEO SINGH.

reversing that of the Munsif of Matihari, dated the 19th September 1910.

Babus *Mohendra Nath Roy* and *Siva Nandan Roy*, for the Appellant.

Dr. *D. N. Mitra*, for the Respondent.

JUDGMENT.

COXE, J.—The plaintiff-respondent in this appeal obtained a decree on a mortgage on the 28th July 1905. The date fixed for payment was the 28th January 1906. On the 31st May 1909, he applied, as the Courts below discribe it, to make the decree absolute and his application was granted the same day. The defendant appealed, and the appeal was decreed and the case remanded to the Court of first instance on the 7th March 1910. An appeal was preferred to this Court against the order of remand probably about June 1910. The proceeding, however, continued in the first Court and was disposed of on the 19th September 1910. The Court of first instance held that the application to make the decree obsolute was barred by Article 181 of the Schedule to the Limitation Act. On the 21st April 1911, this Court dismissed the appeal against the order of the 7th March 1910, and on the 16th May 1911, the plaintiff appealed to the lower Appellate Court against the order of the 19th September 1910. The appeal was decreed and the defendant has appealed to this Court.

It is contended on his behalf, *firstly*, that the appeal to the lower Appellate Court was barred by limitation and, *secondly*, that the application of May 1909 was barred by Article 181 of the Schedule to the Limitation Act. It appears to me that the appeal must succeed on both grounds.

With regard to the first point, the Subordinate Judge has held that limitation is saved by section 14 of the Act. That section, however, has no application to appeals, nor do I think that the case comes within section 5. We are informed that the plaintiff protested against the continuance of the proceedings in the Court of first instance after the presentation of his appeal to this Court. But the fact that this protest was overruled should have warned him that the lower Appellate Court also might take a similar view; and he ought, therefore, in my opinion, to have presented his appeal against the order of the 19th September 1910 within the period allowed by law.

On the second point, the Judge has held that Article 181 does not apply to an application under section 89 of Act IV of 1882, and relies on the case of *Madhab Moni Dasi* v. *Pamela Lamber* (1) as authority for holding that there is no limitation for such an application. This view evidently cannot be sustained. In the first place, in May 1909, when this application was presented, section 89 of the Transfer of Property Act had been repealed. In the second place, the decision that there is no limitation to such an application can no longer be regarded as good law, having regard to the decisions in *Batuk Nath* v. *Musammat Munni Dei* (2) and *Abdul Majid* v. *Jawahir Lal* (3).

It remains to decide whether an application under Order XXXIV, rule 5, clause 2, comes within the scope of Article 181. On this point there appears to be some difference of opinion, one Bench of this Court in the case of *Madhab Moni Dasi* v. *Pamela Lambert* (1) having thought that it does not so come, while another Bench in the case of *Amolak Chand Parak* v. *Sarat Chandra Mukherjee* (4) having thought that it does, though neither judgment can be regarded as a definite decision on the point.

It appears to me that the question turns on the point whether the application relates to action which the Court ought to take of its own motion, whether the party applies or not. In the case of *Kylasa Goundan* v. *Ramasammi Ayyar* (5), which was a case of the delivery of a certificate of sale to a purchaser, the Court observed: "The provisions of the Limitation Act relating to applications, though in their terms doubtless most extensive, must be held to apply to applications for the exercise, by the authority to which the application is addressed, of powers which it would not be bound to exercise without such application, and not to applications to the Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character,"

(1) 6 Ind. Cas. 537; 12 C. L. J. 328; 37 C. 796; 15 C. W. N. 337.

(2) 23 Ind. Cas. 644; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 36 A. 284; 1 L. W. 729; 18 C. W. N. 740.

(3) 23 Ind. Cas. 649; (1914) M. W. N. 485; 21 M. L. J. 17; 12 A. L. T. 624; 16 Bom. L. R. 395; 8 C. W. N. 963; 19 C.L.J. 626; 16 M.L.T. 44; 1 L.W. 483; 36 A. 350.

(4) 11 Ind. Cas. 943; 38 C. 913; 16 C. W. N. 49.

(5) 4 M. 172.

and in the case of *Balaji* v. *Kushaba* (6), it was held that if any act imposes on a Court a duty to do an act "which duty is in no sense conditional on an application being made for the purpose," the Limitation Act has no application. The matter was considered in the Full Bench case of *Puran Chand* v. *Roy Radha Kishen* (7), which was a case of an application to ascertain mesne profits, and there it was stated: "The same principle was laid down in the case of *Kylasa Goundan* v. *Ramasami Ayyan* (5) and *Vithal Janardan* v. *Vithojirav Putlajirav* (8), in which it was held that to make the provisions of Article 178 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made. There are numerous sections in the Code which direct that for certain relief, an application must be made; but there is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time asking the Court to proceed to judgment. The form of procedure and the manner of dealing with suits is amply provided for by the Code. In the present case, so far as we can see, the Court was bound on the oral application of appellant's Pleader, indeed without any such application at all, to fix a date for the first hearing of the inquiry, and after hearing the parties and fixing such issues as might be necessary for the disposal of the subject-matter in dispute, to proceed with it as if it were dealing with a case based on a plaint." The principle laid down in this case was followed in the case of *Dwarka Nath Misser* v. *Barinda Nath Misser* (9), which related to an application for effecting a partition in accordance with a preliminary decree.

A Court is bound, in my opinion, to dispose of a pending suit, whether any application is made to it or not. In a case, for instance, of the assessment of mesne profits or of effecting a partition, the Court can, of course, adjourn the case under Order XVII, rule 1, but otherwise must proceed with the case and dispose of it, whether any application is made to it or not. This duty seems to have been neglected in the case of *Dwarka Nath Misser* v. *Barindra Nath Misser* (9) above cited; but the proceedings in that case seem to me to have been wholly irregular. But under Order XXXIV, rule 5, the Court, not only is not bound to proceed with the case, but cannot do so unless an application is made to it. The parties are at perfect liberty to drop the proceedings, and if the plaintiff prefers not to make an application, the Court has no jurisdiction to direct a sale. This consideration seems to me to distinguish a case of this nature from the cases I have cited above and I think, therefore, that the application mentioned in Order XXXIV, rule 5, clause 2, is an application which comes within the scope of Article 181.

I would, therefore, decree the appeal and dismiss the application with costs of all Courts.

SHARF-UD-DIN, J.—I agree.

Appeal decreed.

(6) 30 B. 415; 8 Bom. L. R. 218.
(7) 19 C. 132 (F. B.).
(8) 6 B. 586.
(9) 22 C. 425.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2000 OF 1912.
October 23, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

DULLA—PLAINTIFF—APPELLANT

versus

HARI KISHEN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 11, proviso—"Agnate", meaning of—Joint sale by two vendors, divisibility of—Vendee showing right equal to pre-emptor as to portion, right of.

Where a pre-emption suit is brought in respect of a sale by two vendors jointly and where there is no specification of the shares of the price payable to each, the vendee is entitled to retain that portion of the property in regard to which he can show that his rights are equal to those of the pre-emptor. [p. 217, col. 1.]

The word "agnate" in the proviso to section 11 of the Pre-emption Act, 1905, is not limited to a deceased agnate to whom the vendee has succeeded by inheritance. [p. 214, col. 2.]

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 31st October 1912.

Mr. *Umar Bakhsh*, for the Appellant.

Mr. *Tek Chand*, for the Respondents.

DULLA v. HARI KISHEN DAS.

ORDER OF REFERENCE.

SHADI LAL, J.—(*May 25th*, 1914.)—This appeal, which arises out of a pre-emption suit involves points of law the decision of which depends upon the construction to be placed upon the proviso to section 11 of the Pre-emption Act of 1905.

The relevant facts are that Ram Lal, a *Khatri*, and Puran Chand, a *Sud*, together sold the land in dispute to Hari Kishen, a *Khatri*, who is the brother of Sawan Mal. Sawan Mal has been recorded as an owner in the estate since 1885 and the name of his brother, Hari Kishen, was added in 1906 and is still recorded. The suit of the plaintiff, who is a member of an agricultural tribe, has been decreed as to half the land which belonged to Puran Chand and dismissed as to the other half which belonged to Ram Lal. The plaintiff has preferred this appeal against the finding dismissing the suit as to Ram Lal's half.

It is quite clear that the vendee as a co-sharer has a preferential right under section 12; and the sole question is, whether he complies with the requirements of the proviso to section 11. In the first place, can it be said that the vendee is a member of the same tribe as the vendor? If the sale be considered as a divisible transaction, then the vendee, who is a *Khatri*, is a member of the same tribe with Ram Lal, who is also a *Khatri*, and is entitled to pre-empt the latter's half share.

The sale-deed states that each of the two vendors was equally entitled to the land sold, but it does not expressly mention the price which was to be paid to each vendor. It may perhaps be urged that there is a specification of the shares of land sold by each vendor, but it is clear that there is no specification of the shares of the price paid to each. Now, if the principle of the judgments of this Court dealing with the converse case of a sale in favour of more than one vendee be applied to this transaction then it cannot, in my opinion, be regarded as a divisible one [*vide, inter alia, Maghi* v. *Narain* (1)]. And, if the sale is an indivisible transaction, then the vendee, who is a *Khatri*, cannot be said to be a member of the same tribe as the vendors, who are *Khatri* and *Sud*.

The second point which requires determination is, whether the vendee can rely upon the entry in favour of Sawan Mal prior to 1906 for the purpose of satisfying the 20 years' rule laid down by the proviso. In other words, can Sawan Mal be regarded as "Hari Kishen's agnate who has previously held his agricultural land"?

Both these points are not free from difficulty and should, in my opinion, be authoritatively decided by a Division Bench. I, therefore, refer the appeal for decision to a Division Bench and direct that an early date be fixed for its hearing.

The case coming on for hearing before Mr. Justice Jhonstone and Mr. Justice Shadi Lal, the Coart delivered the following

ORDER.—This appeal has been referred to a Division Bench because in it arise two questions which are not free from difficulty and which, in the opinion of the referring Judge, are such as call for an authoritative decision. The referring order states the two questions, of which it is convenient to take the second first, namely—can the vendee, relying for his rights on the proviso to section 11, Pre-emption Act, 1905, invoke the entry in favour of his brother Sawan Mal prior to 1906 for the purpose of satisfying the 20 years' rule, *i.e.*, can Sawan Mal be rightly regarded as Hari Kishen's "agnate who has previously held his agricultural land?"

Hari Kishen was not recorded before 1906 as holding the land, but Sawan Mal was so recorded in 1885 and continued to be so recorded until 1906. A brother is an agnate, of course, and Sawan Mal had held since 1885, and had been recorded as holding the land, the present holding of which Hari Kishen puts forward as the basis of his pre-emptive right.

On the face of it, therefore, he has proved his point, and the only contention against him worth noticing is that the proviso contemplates possession by the alleged pre-emptor preceded by possession of a *deceased* agnate to whom he has succeeded by inheriance. There is no authority, however, for introducing this sort of limitation into the proviso, which must be interpreted according to

(1) 20 Ind. Cas. 31; 6 P. R. 1914; 256 P. L. R. 1913; 165 P. W. R. 1913.

ts plain grammatical meaning. If the Legislature had intended any such limitation, nothing would have been easier than for it to have manifested that intention by the addition of a few words. We, therefore, answer the first question in the affirmative.

The other question is more difficult. A *Khatri* and a *Sud*, joint owners of a piece of agricultural land apparently in equal shares, jointly sell it to a *Khatri*, Hari Kishen aforesaid, for a single sum of money, with no specification of how much is to go to the *Khatri* vendor and how much to *Sud* vendor. (There was in the first Court a question whether the purchase was by Hari Kishen alone or by him and Sawan Mal together, but in the lower Appellate Court the former proposition was admitted as respresenting the real fact). Plaintiff, a member of an agricultural tribe, comes in no higher up in section 12 of the Act than "(*c*) thirdly." It is clear, therefore, that if the proviso to section 11 is fully satisfied by the aforesaid vendee, plaintiff has no case. We have seen that the vendee satisfies the 20 years' rule, but does he satisfy the words "member of the same tribe as the vendor" in the proviso, seeing that one vendor is a *Khatri* and the other a *Sud*, *Khatris* and *Suds* being wholly distinct tribes ?

The first Court ruled that Hari Kishen did not satisfy the 20 years' rule and so had no pre-emptive rights as against plaintiff. As we have shown above, we do not agree with this way of looking at the matter. That Court then went on to hold that, inasmuch as one of the two vendors was not of the same tribe as the vendee and the transaction of sale is an indivisible one, the proviso to section 11 could not be availed of by the vendee ; and on these findings it decreed the claim in full. The lower Appellate Court, on the other hand, holds that the 20 years' rule is satisfied in this case, and that the vendee is, at all events, entitled to retain the half sold by his fellow-tribesman, the *Khatri* vendor. Against this decision plaintiff has appealed, and it is fairly clear that the *crux* of the whole matter is, whether the sale is, *for the purposes of this case*, divisible or not.

I have examined several rulings of this Court. As pointed out in *Maghi* v. *Narain* (1), the Allahabad ruling—*Ram Nath* v. *Badri Narain* (2)—had been already considered by this Court and dissented from, and again in that very ruling this Court refused to follow it. I, therefore, confine myself to the cases decided here. In *Maghi* v. *Narain* (1), the Judges remarked:—

"The principle hitherto accepted by this Court is that a sale transaction is to be regarded as indivisible in those cases where the purchase-money is paid in a lump sum without specification of the amounts paid by the various vendees and that the mere fact that the shares to be taken by the vendees respectively are specified in the sale-deed does not alter the nature of the transaction and is at most an arrangement among the purchasers *inter se* which does not affect the vendor.....The case, however, is different where there is a specification not only of the shares to be taken by the vendees, but also of the amounts to be respectively paid by the latter."

The distinction made is clear and need not be stated again. It was based, so far as the *Punjab Record* goes, upon the rulings noted (below*) and fairly represents theview therein contained. In *Kasar Singh* v. *Punjab Singh* (3), the reason why such sales as these were held not divisible, is stated to be that neither of the vendees could have sued to enforce the contract of sale for his share alone on payment of a proportionate share of the purchase-money, and that the vendor could have successfully resisted any such claim on the ground that he was not bound to take anything less than the whole amount.

In all these cases the question was whether the sale could be divided up into separate sales of so much to one vendee and the rest to the other. In none of them did the question arise whether the sale by two vendors could be treated as a sale of so much by one vendor and so much by the other. I accept, for the sake of argument, as settled,

(2) 19 A. 148; A. W. N. (1897) 20.
(3) 66 P. R. 1896.

*Murad v. Mine Khan, 94 P. R. 1895; *Kasar Singh* v. *Punjab Singh*, 66 P. R. 1896; *Achhru* v. *Labhu*, 48 P. R. 1907; 81 P. L. R. 1908; 107 P. W. R. 1907, *Brij Lal* v. *Massan*, 1 Ind. Cas. 91; 6 P. R. 1909; 7 P. W. R. 1909; 23 P. L. R. 1909.

in relation to the former question, the views stated in *Maghi* v. *Narain* (1): the difficulty is whether the latter question should be answered on the same lines.

For instance, as a criterion in relation to the latter question, is it right to say that the answer to it depends on whether the vendee, if the vendors had refused to hand over possession, could have sued one vendor separately on his part of the sale? I think perhaps he could not; though, if one vendor had handed over half and the other had refused to hand over the other half, I think the vendee could have sued the recusant vendor. On both these alternatives opinions might differ: but whatever the correct views may be, it seems to me a little doubtful whether the principles laid down in the rulings noted above have any bearing on the somewhat different facts of the present case.

The law of pre-emption as now existing in the Punjab is a purely artificial law. It draws a sharp distinction between this tribe and that; and the absence of specific provision for dealing with the present difficulty seems to me *some* reason for supposing that the Legislature never contemplated the possibility of two persons of different tribes making a joint sale. The immediate aim of the proviso to section 11 apparently was to facilitate the acquisition by members of a tribe of land coming on the market held by other members of the same tribe, or in other words, to ensure, so far as such an Act could do it, the retention by a tribe, as such, of the land or shares in land it was holding when the Act came into force. This aim, at all events, would clearly be forwarded by letting the vendee keep the half bought from the *Khatri* vendor.

This is, no doubt, no sufficient ground in itself for finding in favour of the vendee; but where the Act does not help at all, and where there is reason to doubt the applicability of the principles laid down in *Maghi* v. *Narain* (1), I think we should see whether in the rulings of this Court other principles more in point cannot be found. I find in a large number of cases it has been ruled that a pre-emptor need not sue for the whole bargain —*e. g.*, *Sardar Lal Singh* v. *Dewa Singh* (4); *Ilahi Bakhsh* v. *Kaki* (5); *Shahu* v. *Haku* (6); *Gaukra* v. *Harbhaj* (7); *Ram Rakha Mal* v. *Devi Das* (8); *Uttam Chand* v. *Lahori Mal* (9); *Sanwal Das* v. *Gur Parshad* (10), and so forth. The point taken in these was that, where a pre-emptor has superior rights as to part of the property sold, but not as to the rest, he should sue only for the former part. Thus, a pre-emptor is authorized, in certain circumstances, to treat a sale as divisible which might well for other purposes be by law indivisible, *e. g.*, as between the vendor and vendee. But a pre-emptor and a contesting vendee have certain mutual resemblances—each has claimed the right to buy and the vendee has exercised his right, while the pre-emptor is a would-be-purchaser who has to invoke the aid of the Court.

Though a pre-emptor's claim has been pronounced to be one for substitution of himself for the vendee and not for re-sale to himself, a theory apparently favouring the doctrine of indivisibility of such sales as the present, we have seen that the pre-emptor may nevertheless, under the last named rulings of this Court, divide up a sale, for all other purposes indivisible, in order to take over only those things in respect of which he has a superior right of pre-emption; and, this being so, why should not the analogy hold that a vendee, who is a pre-emptor who has actually made a purchase, should be allowed to say, when attacked by another pre-emptor: "Let me keep that which under the rules I have as good a right to as the plaintiff"? Why should he, any more than the aforesaid pre-emptor, be defeated wholly by the doctrine of indivisibility? No doubt it will be said that in the rulings just quoted the dividing up was of separate parcels of property and not of shares in one property; but if the extent

(4) 07 P. R. 1882 (F. B.).
(5) 87 P. R. 1895.
(6) 44 P. R. 1 00.
(7) 16 P. R. 1905; 41 P. L. R. 1905.
(8) 89 P. R. 1905; 17 P. L. R. 1906.
(9) 112 P. R. 1907; 75 P W. R. 1907.
(10) 4 Ind. Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909.

of the shares is clear, I fail to see how this affects the argument.

I am, therefore, disposed to answer the question by saying, without specifically endorsing or rejecting the *dicta* in *Maghi* v. *Narain* (1), that I am of opinion that the principles therein laid down should not be extended beyond the facts of that case; that rulings of this Court show that sale transactions, indivisible from certain points of view and at the instance of certain parties, may (even *must*) in certain circumstances be divided up at the instance of pre-emptors; that a vendee is in a position somewhat analogous to that of a pre-emptor and should certainly not be subject to disabilities to which a pre-emptor is not subject; and that, therefore, when a vendee buys from two vendors *A* and *B* jointly, each owning $\frac{1}{2}$, he should, when attacked by a pre-emptor, be permitted to retain the half sold to him by *A*, if he can show that, though the plaintiff's rights are superior as to *B's* half, his (vendee's) rights are equal to the plaintiff's in *A's* half.

The third ground of appeal not having been argued before us, it is convenient to refer the case back to a Single Bench for final adjudication.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 435 OF 1912.

December 23, 1914.

Present:—Mr. Lindsay, J. C.

AMIR MIRZA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Nawab HAIDAR MIRZA AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Will, interpretation of—Moveable property only, charge on—Res judicata.

Where a Will provided that a certain stipend was to be paid to a person out of the testatrix's allowance from *wasika* and notes, etc., and that the whole of her landed property was to be divided among her relations according to their lawful shares:

Held, that the stipendiaries must look for payment only to the fund consisting of the notes and the rest of the testatrix's moveable property, and not to her immoveable property. [p. 218, col. 2.]

Nawab Sahib Mirza v. *Saiyid Muhammad*, Selec Case No. 306, followed.

Sahib Mirza v. *Umda Khanam*, 19 C. 444, 19 I. A. 83 explained.

Where a Court does not itself actually decide a point, but simply expresses its concurrence with an *obiter dictum* quoted from a ruling its finding on the point is not *res judicata*. [p. 220, col. 2.]

Appeal from the decree of the District Judge, Lucknow, dated the 17th June 1912 modifying that of the Additional Munsif, Lucknow, dated the 8th November 1911.

Munshi *Farzand Ali*, for the Appellants.

Syed *Shahinshah Husain*, for Respondants Nos. 1 to 5.

Mr. *Ali Uddin*, for Respondent No. 7.

Pandit *Gokaran Nath Misra*, for Respondent No. 10.

JUDGMENT.—The principal question for consideration in this second appeal is the interpretation of the Will of Nawab Malika Jahan Begam, widow of Muhammad Ali Shah, formerly King of Oudh.

This lady died in the year 1881 and a long time prior to her death, that is to say, in the year 1860, she had executed a Will by which she made provision for the payment of certain annuities or stipends to some of her relations, dependants and servants.

One of the persons in whose favour this provision was made was *Musammat* Afzal Bahu, the mother of the principal plaintiff in this case, Amir Mirza, who was declared to be entitled to receive an allowance of Rs. 50 a month. Afzal Bahu died long before the present suit was brought and Amir Mirza being one of her heirs under the Muhammadan Law came into Court, alleging that he was entitled to Rs. 772 odd in respect of his inherited share of this stipend, this sum being arrears for three years ending with the month of March 1911.

The second plaintiff in the case was one Muhammad Ali Khan, whom the first plaintiff had transferred a moiety of his interest in the claim. The suit was laid against fifteen defendants, most of them descendants of Malika Jahan, some of them transferees from these descendants, and it was sought to make them all liable for the sum claimed in the plaint,

AMIR MIRZA v. HAIDAR MIRZA.

Before proceeding to discuss the particular grounds upon which certain of these defendants, with whose cases we are concerned here, were alleged to be liable to contribute to the payment of the sum claimed, it will be convenient to refer to a decision of their Lordships of the Privy Council reported in *Sahib Mirza* v. *Umda Khanam* (1), a case in which the particular clause of the Will now in contest was construed. It is conceded that the decision of their Lordships on the true construction of the Will does not operate as *res judicata* in the present case: but it is obvious that such an opinion as to the meaning of the clause in dispute must command the highest respect and I may add that the interpretation of the Will accepted by their Lordships has been followed by a Judge of this Court in *Nawab Sahib Mirza* v. *Saiyid Muhammad* (2), decided on the 8th July 1896. According to the statement of facts in their Lordships' judgment Malika Jahan was a lady of great wealth. She had landed property, a *wasika* allowance of Rs. 405 a month, a pension of Rs. 4,500 a month, which was stopped in 1873, and a life interest in the income of 12 lakhs of rupees which were settled by treaty. At the time of her death she left moveable property of the value of over nine lakhs of rupees, including Government promissory notes of the value of close on seven lakhs.

The fifth clause of the Will, which is the one upon which the principal plaintiff here relies in support of his claim, ran as follows:—

"Rupees 981 of the Queen's coin, out of my allowance from *wasika* and notes, *et cetera*, shall be paid monthly from the Government treasury to my relations, dependants and servants as detailed below.....and the remainder of my allowance from *wasika* and notes, *et cetera*, and the whole of my landed property, *i. e.*, houses and groves, *et cetera*, and *jagir* villages, shall be divided among my grandsons and granddaughters according to their lawful shares and be paid to the agent of each of them."

As to this the ruling of their Lordships was that the annuities or stipends for which this clause of the Will made provision were payable out of the testatrix's moveable property which she had power to dispose of by Will, and that the words of the gift were large enough to charge the annuities or stipends in question upon the Government notes held by the testatrix and also upon the rest of her moveable property. They added their opinion that if the words of the Will were to be taken in a more restricted sense, the gift of these annuities or stipends must be regarded as a demonstrative legacy in which view they would be payable out of the testatrix's general estate in the event of the failure of the particular fund pointed out for payment.

These latter remarks were *obiter dictum* and I agree with the view taken by Mr. Spankie in *Nawab Sahib Mirza* v. *Saiyid Muhammad* (2) that this decision cannot be treated as declaring that the annuities or stipends were a charge on the immoveable property left by Malika Jahan. And, as remarked by Mr. Spankie, there was no decision that as the particular fund out of which these annuities were payable had failed, they were a charge upon the general estate of the testatrix. The case with which Mr. Spankie was dealing was similar to the one now before me. The plaintiffs as representatives of one Bismillah Begam were claiming arrears of stipend to which this lady had been entitled under the Will. The Subordinate Judge on an erroneous interpretation of the Privy Council decision just referred to had declared that the stipends were payable out of the general estate of Malika Jahan and Mr. Spankie held that this view was wrong. He ruled that the plaintiffs were entitled to receive the annuity from the Government notes held by Nawab Malika Jahan and the rest of her moveable property.

In this state of things the nature of the right created by the Will in favour of the annuitants or stipendiaries is clear. They must look for payment to the fund consisting of these notes and the rest of Malika Jahan's moveable property.

To come now to the facts of the present case it is necessary to state, in the first place, that when Malika Jahan died in the year

(1) 19 C. 444; 19 I. A. 83.
(2) Select Case No. 306.

1881 her entire estate was divided between four persons, Nawab Sahib Mirza, Imdad Ali Khan, *Musammat* Amir Jahan Begam and Sultan Mariam Begam.

Of these *Musammat* Amir Jahan Begam is still alive and she was impleaded in this suit as defendant No. 1. Sultan Mariam Begam is dead and her daughter, Nawab Malika Begam, appears in the suit as defendant No. 2. Imdad Ali Khan is also dead : his daughter, Nawab Razia Begam, was impleaded as defendant No. 3. Nawab Sahib Mirza is dead too, and the defendants Nos. 4 to 10 are his sons and daughters.

The Munsif who entertained the suit repeated the error which had been committed by the Subordinate Judge whose decision was reversed by Mr. Spankie, and held all these defendants liable to the plaintiffs' claim on two grounds, (1) that they represented the entire estate left by Malika Jahan and (2) that decree for the arrears of the stipend payable to Afzal Bahu had in previous suits been obtained against the heirs of Malika Jahan, "the defendants Nos. 1 to 10 or their predecessors."

Against this decision two appeals were preferred in the Court of the District Judge. One of these appeals was made by the defendants Nos. 5, 6, 7, 8, No. 5 being a son and the other three, *viz.*, Nos. 6, 7 and 8, daughters of Nawab Sahib Mirza. The other appeal was taken by the defendant No. 10, Abid Mirza, a minor son of Nawab Sahib Mirza. Both of these appeals were disposed of by one judgment, the result of which was to discharge these appellants from liability to the plaintiffs' claim. The learned Judge held that as the plaintiffs could only resort to the particular fund charged with the payment of the stipend and as they had failed to show that these appellants were in possession of any of the items of property which constituted this fund, the claim must fail. He also dismissed the contention that as regards these appellants the question of their liability was *res judicata.*

In appeal here the case is that the lower Court's decision is wrong and that the plaintiffs' claim should have been decreed against these defendants as well. In short, the appellants desire me to restore the decree of the Court of first instance. Having stated in an earlier portion of the judgment my opinion as to the nature of the rights of the annuitants who are entitled to take the benefit of clause 5 of Malika Jahan's Will, it necessarily follows that any plaintiff suing as an annuitant must disclose a cause of action against all defendants whom he seeks to make liable and he could only do so by establishing that the defendants whom he seeks to charge are in possession of any of the property charged with the payment of the annuity, that is to say, the Government notes and other moveable property which Malika Jahan left at the time of her death.

Now as regards the five persons whom the District Judge has released from liability in respect of the plaintiffs' claim, there is not a single allegation in the plaint that they were in possession of any of the items of property which go to make up the fund out of which the annuity is payable. All that we find is a statement of the fact that Nawab Sahib Mirza was one of the persons who took a share of Malika Jahan's estate and that these particular defendants are heirs and legal representatives of Sahib Mirza.

Every one of these five defendants in his written statement of defence denied being in possession of any of the items of moveable property left by Malika Jahan and charged with the payment of the stipend, and no evidence was adduced by the plaintiffs to rebut this statement of defence.

It was contended here that the burden of proof lay upon these defendants to show that they were not in possession of any of the property chargeable with the payment of the annuity and section 106 of the Evidence Act was cited in support of this argument. I fail to see how the present whereabouts of the items constituting the fund out of which the annuity is to be paid, can be said to be a matter especially within the knowledge of these persons. It is true that their father, Nawab Sahib Mirza was one of four persons who succeeded to the estate of Malika Jahan; it is likewise true that in a suit filed in the year 1893 by *Musammat* Afzal Bahu against Sahib Mirza, and other defendants a decree was passed in the lady's favour. But how is it to be argued from these facts that these five defendants, who are only some of the heirs of Sahib Mirza, are to be fixed with any special knowledge regarding any items of the moveable property in ques-

tion which may have been in Sahib Mirza's possession in his lifetime? They say simply that after their father's death they never got any of this particular property, and it was not for them to bring forward evidence to show what had happened to the property and in whose hands it was at the time of the suit. The fact is that the plaintiffs in this case were assuming that their right was to obtain relief as against the entire estate of Malika Jahan and on that understanding they thought it sufficient to implead all Malika Jahan's living descendants as if they in some way or other represented her estate chargeable as a whole with the payment of the stipend. That, however, is not the situation, as was clearly explained by Mr. Spankie in his judgment in *Nawab Sahib Mirza* v. *Saiyid Muhammad*(2). It was for the plaintiffs to show that these five defendants were liable to the claim, and the only way in which that liability could be established was by proving that they were in possession of property charged with the payment of the stipend.

I come now to the other contention, namely, that the question of liability of these defendants is *res judicata*. I have already mentioned that in the year 1893 a suit was brought by Afzal Bahu against Sahib Mirza and other defendants in which a decree was obtained for arrears of the stipend due and in which apparently it was also decided by way of declaration that the stipend was payable to her heirs, generation after generation. One of the issues raised in that suit (Issue No. 4) was "Can the plaintiff hold the entire estate left by the deceased (*i. e.*, Malika Jahan) liable or only a portion of it, and which portion?"

The Subordinate Judge decided this issue by quoting *in extenso* the judgment of their Lordships of the Privy Council above referred to in so far as it deals with the construction of the Will, and, as he expressed it, his finding on the issue was "to the same effect." He did not definitely find that the stipend was a charge upon the general estate of Malika Jahan: he merely reproduced the judgment of the Privy Council, including the *obiter dictum*. The result, therefore, appears to be that matters were left in the same situation as they were after the judgment of their Lordships had been delivered, and that what was in fact decided was what their Lordships intended to decide and did decide, namely, that the stipends were a charge upon the Government notes and other moveable property left by Malika Jahan.

I cannot, therefore, find in favour of the appellants that the decision of the Subordinate Judge operates as *res judicata* so as to preclude these five defendants from maintaining that the general estate of Malika Jahan is not charged with the payment of its stipend. Of course an erroneous decision of law may be *res judicata*. But we have to see what was actually decided and all I can find is that the Subordinate Judge adopted the decision of the Privy Council, the true interpretation of which has already been arrived at.

I may add here that in 1896 and 1898 there were further suits between these parties, Sahib Mirza, the father of these five defendants, being impleaded. Those suits were decreed *ex parte*. I hold, therefore, that it cannot be said that these five defendants are bound by previous litigation to which their father was a party, so as to prevent them from pleading that liability to pay the stipends is founded upon the fact of possession of the particular property upon which the payment of the stipends is charged. The result is that I am of opinion that the decision of the lower Appellate Court is right and that on the correct view of the nature of the rights of the first plaintiff, and on the meterials alleged and proved in the course of the suit, the five defendants against whom the lower Court dismissed the suit were properly discharged from liability.

I may mention that a preliminary objection to the hearing of the appeal was taken, on the ground that it could not proceed as the plaintiffs had accepted satisfaction of the decree from one of the defendants. I was doubtful at the time and still am as to whether this preliminary objection was well taken. I have not decided the point, considering it best to give a judgment on the merits of the appeal. I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 106 AND 107 OF 1911.

December 7, 1914.

Present:—Sir John Edward Power Wallis, KT., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

A. C. CHIDAMBARA MUDALIAR—PLAINTIFF—APPELLANT IN BOTH

versus

IN A. S. NO. 106 OF 1911

N. KRISHNASWAMI PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS

IN A. S. NO. 107 OF 1911

DORAISWAMI PILLAI AND OTHERS—PLAINTIFFS AND 2ND DEFENDANT—RESPONDENTS.

Probate and Administration Act (V of 188), ss. 82, 92, applicability of, to cases not governed by Hindu Wills Act (XXI of 1870)—Mofussil Will—Joint executors—One executor taking Probate—Another executor, if disentitled to act without Probate—Executor, if can renounce for consideration—Compromise between co-executors, if valid—Retainer, executor's right of, if exists even though claim is barred—Limitation Act (IX of 1908), Sch. I, Art. 120, whether governs claims of executors for moneys spent on behalf of estate—Limitation law, if applicable to administration actions.

An executor has only a right of retainer and no charge on the properties not in his possession, which at one time formed part of the estate. Such a claim is governed by Article 120 of the Limitation Act. [p. 225, col. 1.]

Peary Mohun Mukerjee v. *Narendra Nath Mukerjee*, 5 Ind. Cas. 404; 7 M. L. J. 63; 14 C. W. N. 261 (P. C.); 7 A. L. J. 125; 11 C. L. J. 220; 12 Bom. L. R. 257; 20 M. L. J. 171; 37 C. 229 at p. 234; 37 I. A. 27, followed.

In an administration action the law of limitation is of no avail. So long as the liability to account subsists, limitation cannot be pleaded to defeat an adjustment which the right to account gives, but the party liable to account is entitled to all the equities flowing from the taking of the account, the right and liability being inseparable. [p. 225, cols. 1, 2.]

Where during the pendency of a petition for grant of joint Probate in favour of a person who had been appointed co-executor under a Will, in which petition allegations of mismanagement had been made against the other executor who had taken out Probate of the Will, the executors compromised the matter whereby it was agreed that in consideration of the former executing a mortgage of the trust estate in favour of the latter or his nominee the latter should renounce his executorship in favour of the former:

Held, in a suit instituted by the latter against the former on a mortgage so executed, that the transaction was not *bona fide* and that the mortgage was invalid. [p. 224, col. 2, p. 226, col. 2.]

Held, further, that in a suit under section 92, Civil Procedure Code, the executor, who had thus renounced his executorship, was entitled to a decree against the estate for the amounts legally spent by him on its behalf, even though the claim thereto might have become barred by limitation, as his liability to account did not cease and his right to be reimbursed could not, therefore, be lost by lapse of time. [p. 225, col. 1, p. 228, col. 1.]

Per *Wallis, C. J.*—Section 82 of the Probate and Administration Act applies to all Hindus and is not confined in its scope to such of them as are governed by the Hindu Wills Act (XXI of 1870). [p. 224, col. 2.]

On a petition for the grant of Probate to an additional executor, the Court has no jurisdiction to sanction a compromise between the executors, imposing a heavy burden on the estate. [p. 224, col. 2.]

Quære.—Whether an executor can at all enter into a compromise with his co-executor? [p. 224, col. 2.]

Cook v. *Collingridge*, 23 R. R. 155; 37 E. R. 979; Jacob, 607; 1 L. J. (o. s.) Ch. 74; *De Cordova* v. *De Cordova*, 4 A. C. 692; 41 L. T. 43; *In re Fish, Bennett* v. *Bennett*, (1893) 2 Ch. 413; 62 L. J. Ch. 977; 2 R. 467; 69 L. T. 233 and *In re Houghton, Hawley* v. *Blake*, (1904) 1 Ch. 622; 73 L. J. Ch. 317; 90 L. T. 2 2; 52 W. R. 505; 20 T. L. R. 276, referred to.

Per *Seshagiri Aiyar, J.*—Under the Probate and Administration Act, it is not competent to one executor to compound the claim of his co-executor. [p. 226, col. 2.]

In re Houghton, Hawley v. *Blake*, (1904) 1 Ch. 622; 73 L. J. Ch. 317; 90 L. T. 252; 52 W. R. 505; 20 T. L. R. 276, *In re New, In re Leavers; In re Morley*, (1901) 2 Ch. 534; 70 L. J. Ch. 710; 50 W. R. 17; 85 L. T. 74; *De Cordova* v. *De Cordova*, 4 A. C. 692; 41 L. T. 43, referred to.

The language of sections 82 and 92 of the Probate and Administration Act, does not render it obligatory on one of two co-executors to apply for Probate of the Will before exercising his powers as executor, even though his other co-executor has obtained Probate of the Will. Section 92 of the said Act should be confined to cases where Probate is compulsory before dealing with property. [p. 227, col. 1.]

Although a trustee can be removed from his office for good cause shown, it is not competent to a trustee to purchase his co-trustee out. [p. 227, col. 2.]

An executor-creditor, in possession of the estate, can claim a right of retainer and a lien upon it. [p. 227, col. 2.]

Trevor v. *Hutchins*, (1896) 1 Ch. 844; 65 L. J. Ch. 738; 74 L. T. 470; 44 W. R. 417; *In re Rhoades*, (1899) 2 Q. B. 347; 68 L. J. Q. B. 804; 80 L. T. 742; 47 W. R. 561; 6 Manson 277; 15 T. L. R. 407 and *Pulman* v. *Meadows*, (1901) 1 Ch. 233, 70 L. J. Ch. 97; 84 L. T. 26, referred to.

Appeals against the decrees of the Court of the Subordinate Judge of Trichinopoly, in Original Suits Nos. 45 of 1908 and 31 of 1909 respectively.

FACTS.—The facts of the case appear sufficiently for the purpose of this report from the judgments of their Lordships.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellant:—The Court below erred in charging the appellant as for unlawful default. The property was in the possession of the son-in-law who was cultivating the same. He rendered accounts. The Court ought not to have held that the appellant ought to have got more or at least as much as the testator might have realized. He could be charged only with what he actually collected

The expenses of prior litigation ought to have been allowed. He ought not to have been made liable for the moveables. He ought to have been awarded interest on the amount due upon the pledge. The word '*Irejir*' in the Will means 'sale proceeds,' the word used to denote income being *varumbadi*. Probate was issued only in November 1899. Exhibit ZZ is the 1st defendant's application for appointment as co-executor. AAA is the counter-petition. Accounts were rendered and perused. An administration action can be compromised. *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (1), *In re Houghton, Hawley* v. *Blake* (2). An executor can in a proper case compromise a suit by a co-executor. [See also *Manika Lal Atmaram* v. *Manchershi Dinsha Coachman* (3) and *In re Haji Ismail Haji Abdula* (4), cited in *Shaik Moosa* v. *Shaik Issa* (5), *Janaki* v. *Dhanu Lall* (6), *Arayambal* v. *Kamalambal* (7) and *Narasimulu* v. *Gulam Hussain Sait* (8).] The appellant was justified in not ousting Ramaswami Pillai. Exhibit BBB shows the attitude of the parties. The appellant cannot be charged for the income of 1897. He filed a petition for probate which was contested and orders were passed only in 1898. If Ramaswami misled appellant, the latter cannot be charged. The Commissioner says that the accounts appear to have been kept in the ordinary course of business. They have not been impeached as incorrect. The 1st defendant having got possession in 1902, he ought to account for that year's profits. 'Account of the proceeds' implies that the proceeds were delivered over to the 1st defendant. Litigation expenses ought to have been allowed, as the suit was necessary for bringing the estate into possession and the amounts spent are reasonable. As regards moveables the appellant's interference would have ended in a serious disturbance. The mere getting of a list from the 1st defendant cannot have the effect of making the appellant liable for neglecting to get possession. The pledge of moveables being admitted appellant's failure to sell them is no valid reason for disallowing interest. If the suit is upon the mortgage, no other question arises. The suit was tried on the footing that the plaintiff would be entitled to recover whatever sums may be found due to him irrespective of the mortgage. The appellant will be entitled to a first charge on the sum so found due. The suit will not be barred as not brought within 12 years. *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee* (9). The right of indemnity is incidental to the position of a trustee.

Messrs. *S. Srinivasa Aiyangar* and *V. C. Seshachariar*, for the Respondents:—The suit is upon a mortgage executed to a *benamidar*. The mortgage as such is invalid, as it was given by one who had no right to represent the estate. Order granting probate was passed in July 1897. In 1901, the 1st defendant applied for joint probate under sections 82 and 92 of the Probate and Administration Act, V of 1881. The plaintiff alone could act as executor until probate was granted to 1st defendant also. According to English practice liberty is given for executors other than those taking out probate to come in. [See also *Pran Nath Ghosh* v. *Jado Nath Bhattacharji* (10) and *Satya Prashad Pal* v. *Motilal Pal* (11).]

Though probate is not necessary in the case of mofussil Wills, the provisions of the Act except those relating to grants are applicable. The mortgage is further invalid for want of good faith. *Cook* v. *Collingridge* (12). Notice by the 1st defendant admitting the correctness of accounts was only a step-in-aid of the scheme to defraud the estate. Exhibit PP, the mortgage document, was the next step. Till probate was actually granted, 1st defendant was not an executor. The case *In re Houghton, Hawley* v. *Blake* (2) is distinguishable as there, there was a debt independent of the executorship, whereas in the present case the amount of the bond

(1) 5 Ind. Cas. 236; 11 C. L. J. 346; 14 C. W. N. 451.

(2) (1904) 1 Ch. 622; 73 L. J. Ch. 317; 90 L. T. 252; 52 W. R. 505; 20 T. L. R. 276.

(3) 1 B. 269. (4) 6 B. 452.

(5) 8 B. 241.

(6) 14 M. 454.

(7) 4 Ind. Cas. 1097; 5 M. L. T. 86; 19 M. L. J. 65.

(8) 16 M. 71.

(9) 5 Ind. Cas. 404; 37 C. 229 at p. 234; 7 M. L. T. 63; 14 C. W. N. 261 (P. C.); 7 A. L. J. 125; 11 C. L. J. 220; 12 Bom. L. R. 257; 20 M. L. J. 171; 37 I. A. 27.

(10) 20 A. 189; A. W. N. (1898) 14.

(11) 27 C. 683 at p. 688.

(12) 37 E. R. 979; 23 R. R. 155; Jacob 607; 1 L. J. (o. s.) Ch. 74.

represents the accounts of the executor's administration. Further, *In re Houghton, Hawley* v. *Blake* (2) is not supported by the authority relied upon for the decision, as in that case the point never arose for decision. An executor can never discharge himself by accounting to his co-executor. *Hasanali Mahomedali* v. *Esmailji Sulemanji* (13) and Williams on Executors. *De Cordova* v. *De Cordova* (14) lays down that one executor cannot compromise a co-executor's claim and such a transaction would be declared void *without any enquiry whatever*. The appellant has ceased to be executor under Exhibit QQ, and as he has not sued for the payment of any sums due to him, he is not entitled to anything. *In re Fish, Bennett* v. *Bennett* (15) holds that an arrangement between co-trustees and executors settling accounts was not binding on the *cestui que trust* and may be re-opened. An executor will not be allowed to jump out of a scheme. See *Baroda Prosad* v. *Gajendra Nath* (16), where the English cases are noticed. An executor cannot compromise proceedings for becoming sole executor, as such a compromise would amount to the purchase of the right. As regards litigation expenses, the moveable properties were really in the possession of the plaintiff (Exhibit L). P. W. No. 6, Ramaswami, says that plaintiff was in possession of keys. Even so early as 1900, the defendants, in their written statement in the suit of 1900, stated that the plaintiff and Chidambara were colluding. By dividing the moveables the parties only created evidence of possession. The suit was, therefore, unnecessary and plaintiff could not recover the expenses thereof. As regards barred debts the plaintiffs never made any honest attempt to recover them. Bonds were not necessary for filing suits. The Subordinate Judge does not charge the plaintiff with neglecting to get Police assistance, but only means that he might have adopted the expeditious method of applying for such assistance if the charge of breaking open doors is true. The plaintiff is not entitled to recover the moneys paid for the photo and medical attendance as they were paid after the plaintiff ceased to be an executor.

Mr. *C. V. Anantakrishna Iyer*, in reply:—Section 4 of the Probate and Administration Act applies to the case. No probate is necessary. The real executor cannot be shut out by section 82 of that Act. That section does not apply to the present case. The 1st defendant stated in Exhibit NN, which is one day prior in date to the mortgage document, that he had become executor. As regards *bona fides*, accounts had been gone into and it is only the result of such examination of accounts that is now sought to be recovered. The case is analogous to that of a widow selling property and the mortgage must be upheld to the extent to which it is supported by consideration. See Laws of England by Halsbury, Vol. 14 page 326.

JUDGMENT.

WALLIS, C. J.—These are appeals from a judgment in two suits which were tried together. One was a suit by Chidambara Mudaliar, one of the executors of the deceased Naga Pillai, on a mortgage for Rs. 6,500, executed by the 1st defendant, another of the executors, in favour of four persons, who, it is alleged, transferred it to the plaintiff. The mortgage, as found by the Subordinate Judge, was really executed by the 1st defendant as executor of the deceased under his Will, Exhibit OO, *benami* for the plaintiff in the following circumstances. The plaintiff, though it was unnecessary for him to do so, thought proper to obtain probate of the Will, Exhibit EE, from the District Court of Trichinopoly and for some time administered the estate under the grant. In January 1901, the 1st defendant, the son of the deceased, who had come of age, presented a petition, Civil Miscellaneous Petition No. 83 of 1901, for the issue of probate to him along with the plaintiff and alleged therein that the plaintiff had failed to file in Court within one year the accounts required of him as executor under the Probate and Administration Act, V of 1881. The plaintiff then filed certain

(13) 9 Bom. L. R. 606 at p. 628.
(14) 4 A. C. 692; 41 L. T. 43.
(15) (1893) 2 Ch. 4 3; 62 L. J. Ch. 977; 2 R. 467; 69 L. T. 233.
(16) 1 Ind. Cas 289; 13 C. W. N. 557; 9 C. L. J. 383 at p. 394.

accounts, which were referred to a Commissioner by an order made on the above petition, under what provision of law does not appear, as the accounts required by the Probate and Administration Act are filed merely for the information of all concerned and to enable them to take proceedings against the executor if the occasion calls for it. On the 8th July 1901 the Commissioner presented a report, Exhibit XI, in which he stated that the plaintiff had not kept proper accounts, that his management had been fraudulent, and that he was unfit to continue as executor. On the 11th February 1902, the 1st defendant and the plaintiff, as petitioner and counter-petitioner in Civil Miscellaneous Petition No. 83 of 1903 already mentioned, presented a petition of compromise, Exhibit XIII, stating that it had been agreed that the 1st defendant should accept the plaintiff's accounts showing Rs. 6,686 as due to him from the estate, and should execute a mortgage of the estate for that amount in the plaintiff's favour, and that the plaintiff should renounce the executorship and hand over certain articles. The mortgage, Exhibit LL, which is that now sued on, was executed by the 1st defendant on 14th April 1902, and on 22nd April 1902 the parties presented a further petition, Exhibit PP, stating that the mortgage had been executed and that the plaintiff was willing to renounce the executorship and to comply with the other terms mentioned in the petition and praying the Court to pass orders in accordance with the compromise. On this the Court passed the following order: "Accepted and ordered in terms of the petition."

The Subordinate Judge has held, in my opinion rightly, that this mortgage is not binding on the estate. One objection taken is that it was executed after the grant of probate to the plaintiff and before the grant to the 1st defendant. Now section 82 of the Act provides that after a grant of probate no other than the person to whom the same shall have been granted shall have power to act as representative of the deceased until such probate is recalled or revoked; and it is contended that though it was not obligatory on the executors of the Will to have taken out probate, yet one of them having done so the terms of the section expressly prohibit the other executor, to whom probate had not been granted, from acting as the representative of the deceased and that the fact of probate having been subsequently granted to such executor is not sufficient by virtue of section 12 to validate acts done by him in express disobedience to section 82. The Act does not say that this section is only to apply to cases governed by the Hindu Wills Act, XXI of 1870, but (section 2) that Chapters II to XIII, which include this section, are to apply to every Hindu, and I do not think it is open to us to refuse to apply the provisions of the section on grounds of real or supposed inconvenience. On the other hand it may be said that the balance of convenience is in favour of the section being applicable. There is, however, a more serious objection to the mortgage. In the face of the Commissioner's report, Exhibit XI, which must have been known to the 1st defendant, as it was obtained at his instance, a compromise by which the plaintiff's claim against the estate for Rs. 6,686 was admitted cannot be said to have been entered into *bona fide* in the interests of the estate and would appear to have been entered into by the 1st defendant mainly with the object of getting the plaintiff to withdraw in his favour from the office of executor. It appears not to be free from doubt whether an executor can enter into a compromise with his co-executor at all. See *Cook* v. *Collingridge* (12) and *De Cordova* v. *De Cordova* (14) and the strong language of the Court of Appeal in *In re Fish, Bennet* v. *Bennet* (15), as to such settlements between trustees. Assuming, however, that a co-executor has such a power, as held by Kekewich, J., in *In re Houghton, Hawley* v. *Blake* (2), it is essential that the compromise should be a *bona fide* one, and I do not think that the compromise above referred to can be considered to be a *bona fide* one, or in any way binding upon the estate. As regards the order made by the District Judge accepting the compromise, it does not appear that the true facts were then brought to his notice, or how on a petition for the grant of probate to an

additional executor, he had jurisdiction to sanction a compromise between two executors imposing a heavy burden on the estate. It was then contended that the plaintiff was entitled to a charge on the estate for the sums found due to him in the account taken in the suit. An executor, however, has only a right of retainer and no charge on properties not in his possession, which at one time formed part of the estate. *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee* (9). This case is also authority for the position that such a claim by a plaintiff is governed by Article 120 and is, therefore, barred. I think that the Subordinate Judge should have dismissed the plaintiff's suit on the mortgage and that it must now be dismissed and his appeal must be dismissed with costs throughout. The amount allowed in that suit will be allowed in the account taken in the other suit and included in that decree.

The connected suit was instituted under section 92 of the Civil Procedure Code, with the requisite permission, for the removal of the defendant, the plaintiff in the other suit, from the position of trustee of the charities created by the Will, and also prayed for an account against him which was ordered. The account was taken in the connected suit which was tried with this suit, with the result that a sum of over Rs. 300 was found due to the defendant, and a decree for that amount was given him in the connected suit. There is no appeal against that decree, but the appellant contends that a larger sum ought to have been found due to him and it is urged in reply that, as his claim against the trust is barred by limitation, no decree can be given to him in the suit under section 92 of the Code of Civil Procedure for the amount found due to him on taking the account. We are unable to agree with this contention. Though the appellant's right to sue is barred, his claim is otherwise unaffected, and it would not be right to remove him from the office of trustee without providing for payment to him, in the account which has been taken as between him and the trust, at the instance of the plaintiffs, more especially as in the connected suit we have held that the mortgage by which he sought to secure his claim against the estate is not binding on it. There is, moreover, no reason why a decree for the amount found due should not be given against the estate. As regards the particular items I agree with the judgment about to be delivered. No order as to costs.

The memorandum of objections is dismissed with costs.

SESHAGIRI AIYAR, J.—One Naga Pillai made a Will on the 4th January 1897 and died two days after. The plaintiff in this case was appointed one of the executors. The Will provided that the 1st defendant, who was then a minor, should be co-executor, after coming of age, with the plaintiff. The testator, after providing for certain legacies, directed the founding of a feeding house. Immediately after his death the genuineness of the Will was questioned. The plaintiff applied for probate in the District Court of Trichinopoly. It was opposed, but he succeeded in obtaining an order for its grant in July 1897. There was an appeal against the order to the High Court. The probate was actually granted to him only in November 1899.

The first defendant attained majority in 1897 and in January 1901, he applied for the issue of a joint probate to himself and the plaintiff in supersession of the one granted to the plaintiff (ZZ). One of the grounds for recalling the original grant is contained in paragraph 8 of the petition, which alleged that the plaintiff had not rendered any account of his administration. This petition was opposed by the plaintiff (AAA). The District Judge directed the plaintiff to furnish a detailed account of the estate. On this being done, the 1st defendant was permitted to state his objections. A Commissioner was afterwards appointed to examine the accounts. His report is Exhibit XI, dated the 8th July 1901. This was not favourable to the plaintiff. While its consideration was pending before the District Judge, the plaintiff and the 1st defendant filed a *razinamah* (Exhibit PP) in Court. This was accepted by the District Judge on the 22nd April 1902. It was agreed to in this compromise that certain articles in the possession of the plaintiff should be handed over to the 1st defendant; that the plaintiff should renounce his rights to the joint-executorship with the 1st defendant, and that in consideration

of these terms and of the allegation that the plaintiff had spent monies on behalf of the estate, a mortgage on the trust property should be executed by the 1st defendant in favour of certain nominees of the plaintiff for the sum of Rs. 6,686. The deed of mortgage was actually executed on the 14th April 1902, eight days prior to the acceptance of the compromise by the Court. See Exhibit LL.

Plaintiff now sues on this mortgage to recover from the 1st defendant, personally and on the liability of the mortgaged trust properties, the amount due to him. The other defendants are the widow, the daughter's sons, and the alienees of some of the mortgaged properties. The 1st defendant impeaches the mortgage on various grounds. The principal question for decision in this appeal is whether the mortgage is binding on the trust.

Mr. S. Srinivasa Aiyangar argued that an executor is not competent to compromise the claim of his co-executor and that the mortgage is invalid upon that ground. Mr. Anantakrishna Aiyar relied upon the decision of Kekewich, J., in *In re Houghton, Hawley* v. *Blake* (2), and argued that a *bona fide* composition of the claim of a co-executor stands on the same footing as that of a stranger. This case has neither been followed, nor cited with approval in any of the subsequent cases. The learned Judge bases his conclusion upon the decision of the Court of Appeal in *In re New, In re Leavers; In re Morley* (17). I have read that case carefully and I do not find any support for the proposition laid down by Kekewich, J., in that case. There the point argued related to the jurisdiction of the Court of Chancery to sanction transactions entered into by trustees which were beyond the powers conferred by the deed of trust, but which were for the obvious advantage of the *cestui que trust*. Lord Justice Romer, says at page 545: "Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the Court must be considered and dealt with according to its special circumstances." I do not think this statement of the law supports the view of the learned Judge. On the other hand, the observations of Sir Barnes Peacock in *De Cordova* v. *De Cordova* (14) are distinctly against his view. Moreover, the decision of Kekewich, J., was under section 21 of the Trustees Act (56 and 57 Vict., c. 53) of 1893, and the pronouncement regarding common law rights is only an *obiter dictum*. There is nothing in section 92 of the Probate and Administration Act, V of 1881, to enable an executor to compromise the claim of the co-executors. Chapter VI, dealing with the powers of an executor, is silent on the question. I have, therefore, come to the conclusion that it is not competent under the Act to one executor to compound the claim of his co-executor. Further, in this case, the compromise cannot be said to have been entered into *bona fide*. I have referred to the circumstances which existed at the time of the *razinamah*, and they show that the 1st defendant was anxious to secure powers to himself, and that the plaintiff wanted to get money. Neither of them seems to have had the interests of the trust in their minds. Consequently, if an application were made to a Court to sanction the arrangement, it would have been rejected. The acceptance by the District Judge of the compromise should not be construed as giving his sanction for it.

Mr. Srinivasa Aiyangar also argued that as probate was taken out by the plaintiff, the 1st defendant had no status as executor until he was recognized as such by the order of the Court on the 22nd April 1902, and that the mortgage of the 14th April was *ultra vires* of his powers. Under section 4 of the Probate and Administration Act, the property of the testator vests in the executors. It was pointed

(17) (1901) 2 Ch. 534; 70 L. J. Ch. 710; 50 W. R. 17; 85 L. T. 174.

out in *In re Pawley and London and Provincial Bank* (18) that the estate of the deceased vests in all the executors and not only in those who have proved the Will or acted in the administration of the estate. Further it is settled law that it is not incumbent on a Hindu executor to obtain probate before acting, although there is nothing to prevent him from taking out probate. Under these circumstances, I cannot agree that section 82 of the Act is a bar to the 1st defendant acting as representative of the deceased because the plaintiff had alone obtained probate of the Will. Section 92, which empowers only persons who have proved the Will or taken out administration to act on behalf of all the executors, should be confined to cases where probate is compulsory before dealing with the property. The result of acceding to the contention of Mr. Srinivasa Aiyangar will be this—whereas if no probate had been taken, every Hindu executor can deal with the property of the deceased, the fact that one of them obtains a probate, will compel the executor that has not joined in the original application to apply himself to the Court, if he wants to exercise the powers vested in him. I do not think the language of sections 82 and 92 of the Probate and Administration Act compels us to give our sanction to such an anamolous position.

On the view that I have taken that the mortgage-deed was not executed *bona fide* and for the benefit of the estate and that it is not competent to one executor to compromise the claims of his co-executor, this appeal fails and the appeal and the suit on the mortgage should be dismissed with costs throughout.

IN APPEAL NO. 107 OF 1911.

This appeal is connected with Appeal No. 106 of 1911. In the present case two plaintiffs, representing the public, sued under section 92 of the Code of Civil Procedure for the removal of the two executor trustees appointed under the Will of Naga Pillai, for an account of the estate and for settling a scheme. The Subordinate Judge settled a scheme for the management and directed the new trustees to discharge the debts payable to the plaintiff (appellant) in the connected appeal. There is no contest now regarding the scheme. But the 1st defendant (plaintiff in the connected suit) has appealed, claiming larger sums of money than has been decreed to him. The plaintiffs have preferred no appeal against the direction to pay the appellant. Before deciding the amount due to the appellant, we have to deal with the objection raised by Mr. Srinivasa Aiyangar that, as the claim of the appellant was barred, he is not entitled to any relief in the suit. By Exhibit QQ, dated the 22nd of April 1902, the 1st defendant ceased to be an executor to the estate of Naga Pillai. It was competent to the Court to revoke the probate granted to him under section 50 of the Probate and Administration Act for failure to exhibit an inventory. This was done. But the order says nothing about the right of trusteeship. Although for good cause shown a trustee can be removed from his office, it does not appear that the mind of the District Judge was directed towards this question. Certainly, it was not competent to the co-trustee to purchase the appellant out.

This appellant was a creditor of the estate and he also spent his own monies on behalf of the estate. It must be taken that these claims were barred by limitation at the date of the present suit. Mr. Anantakrishna Aiyar's contention is that the appellant has a charge upon the property and has 12 years to enforce that charge under Article 132 of the Limitation Act. This is negatived by the decision cited by him, *Peary Mohun Mukerjee* v. *Narendra Nath Mukerjee* (9). It was pointed out in that case that an executor creditor-should bring his suit within six years of the accrual of the cause of action, under Article 120 of the Limitation Act. There are numerous Indian and English authorities enunciating the same view. No doubt, if he had the estate in his possession, he might claim a right of retainer and might claim a lien upon it. This has been laid down in *Trevor* v. *Hutchins* (19), *In re Rhoades* (20) and

(18) (1900) 1 Ch 58; 69 L. J. Ch. 6; 48 W. R. 107; 81 L T. 507.

(19) (1896) 1 Ch. 844; 65 L. J. Ch. 738; 74 L. T. 470; 44 W. R. 417.

(20) (1899) 2 Q. B. 347; 68 L. J. Q. B. 804; 80 L. T. 742; 47 W. R. 561; 6 Manson, 277; 15 T. L. R. 407.

Pulman v. *Meadows* (21). But the appellant had no property of the trust in his possession at the time of the suit. Consequently if he filed a suit for the amounts due to him, he would have been barred by limitation. Does the fact that an account is claimed against him enable him to get a decree for monies actually due? Mr. Srinivasa Aiyangar contended that this is in the nature of a cross-claim by the appellant and that he is not entitled to a decree. The question is not covered by any authority. It is true that the remedy to recover the money is barred by limitation. As was pointed by Mr. Justice Pontifex in *Nursing Dogal* v. *Hurryhur Saha* (22): "If the creditor had a lien on the goods of his debtor on a general account, he would be entitled to hold the goods for a debt, the recovery of which was barred by the Limitation Act." I think this principle extends to all cases where there is liability to account, whether there is a subsisting lien or not. As I said before, the appellant has not been shown to have ceased to be a trustee, and under section 92 of the Civil Procedure Code, he is liable to be called upon to render an account. He cannot escape liability on the ground that he was not administering the estate from April 1902. If he was under this disability at the time of the suit, he is in equity entitled to the monies that he may be found to have spent on behalf of the trust. I have been able to find only one case as having any bearing on the present discussion and that is reported in *Mclaren* v. *Public Trustee, In re Robinson* (23). In that case one of the *cestui que trust* was wrongly overpaid by the executor. In dealing with the claim made by the other *cestui que trust* for recovering it, Warrington, J., held that the suit was barred by limitation, but pointed out that in an administration action the bar of limitation will be of no avail. The principle of the decision seems to be that although the remedy by suit may be barred, so long as the right to account subsists between the parties, limitation cannot be pleaded to defeat the adjustment which the right to account gives. In analogy of this case, I hold that as the appellant was under a liability to account to the trust at the date of the suit, he was entitled to all the equities flowing from the taking of the account. The liability should not be separated from the right. Moreover, the plaintiffs in this case have not objected to the decree which has been given in appellant's favour for a portion of the amount sued for and the reasoning of *Kandasamy Chetty* v. *Annamalai Chetty* (24), which precludes the agitation of a question in partial bar of a claim, applies. I would, therefore, disallow the respondents' contention.

On the merits, I see no reason to differ from the Subordinate Judge regarding the claim for the income of the lands. The appellant has been shown to have been grossly negligent and the lower Court was right in fixing the average income as it has done; nor is there any reason for differing from its conclusions regarding the two jewels, the liability to account for barred debts, the rate of interest, and the claim for the doctor's bill, discussed in paragraphs 63, 66, 64 and 49 respectively.

As regards the claim for the amount spent in attempting to recover certain properties for the trust, I must hold that the Subordinate Judge has taken a very narrow view of the position of the appellant. It was necessary for him to go to Court and the fact that in the compromise he came to with his co-executor, he asked him to carry on the litigation against himself and others, does not show that in instituting the suit he did not act honestly. This claim must be allowed.

The second disputed item relates to the value of certain moveable properties which the Subordinate Judge finds the appellant failed to recover for the estate. He did sue for it. The lower Court's view that if he had taken steps earlier to call in the aid of the Police the property would have been secured, is not a proper ground for charging a trustee with mismanagement. This claim against the appellant should be disallowed.

The appellant is also entitled to the sum of Rs. 26 which he advanced for a portrait of

(21) (1906) 1 Ch. 233; 70 L. J. Ch. 97; 84 L. T. 26.
(22) 5 C. 897; 6 C. L. R. 48; 3 Shome L. R. 154.
(23) (1911) 1 Ch. 502; 80 L. J. Ch. 381; 104 L. T. 331, 55 S. J. 271.

(24) 28 M. 67, 15 M. L. J. 402.

the testator with a view to putting it up in the feeding house.

These three amounts will count in favour of the appellant in the adjustment of the accounts. Subject to this modification, the appeal must be dismissed. Parties will bear their costs throughout.

The appellant is entitled to the payment of the amount decreed from out of the *corpus* of the trust estate.

Appeal No. 106 *dismissed, and decree modified in Appeal No.* 107.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 73 OF 1912-13 OF SULTANPUR DISTRICT.

August 2, 1914.

Present:—Mr. Tweedy, S. M. and Mr. Holms, J. M.

RAUSHAN ZAMAN KHAN—PLAINTIFF—APPELLANT

versus

RAMA NAND MISRA—DEFENDANT—RESPONDENT.

Wajib-ul-arz, *entries in, interpretation of—Attestation of entries by landlord alone, effect of*—Muafidar, *whether bound by entries.*

The entries in a *Wajib-ul-arz* attested by the landlord alone and not by the *muafidar* are not binding on the latter.

Appeal from the decree of the Commissioner, Fyzabad, dated the 19th May 1913, reversing the order of the Deputy Commissioner, Sultanpur, dated 11th December 1912, reversing that of the Assistant Collector, Sultanpur, dated the 26th September 1912.

FACTS.—The plaintiff sued the defendant for resumption of *muafi* land held by the latter. The defendant claimed that the land was not resumable under the terms of the grant and produced in support thereof a *patta* of 145 years back containing the words "*yeh bigha par nigah na kare.*" The plaintiff claimed that the land was resumable and produced in support thereof a copy of an extract from the *wajib-ul-arz* prepared at the time of the First Regular Settlement, in which it was provided that the land in suit was resumable at the will of the landlord. The evidence produced in the case proved it quite satisfactorily that the defendant's possession over the land in suit extended for more than 50 years and by more than two successors to the original grantee.

The Assistant Collector declared the defendant to be an under-proprietor of the land in suit under the provisions of section 107H of the Oudh Rent Act. The Deputy Commissioner finding that although the *patta* could be presumed to be genuine, it did not identify the land mentioned therein with the land in suit, that the words of the *patta* as quoted above did not mean that the land was not to be resumed, that the entry in the *wajib-ul-arz* showed the condition on which the grant was held, that the grant was not, except for age, of any special nature but was held merely at the favour of the landlord, resumed the land under the provisions of section 107E (*a*). The Commissioner held that as the entries in the *wajib-ul-arz* had been attested only by landlords and not by *muafidars*, they were to be regarded simply as irrelevant statements of interested persons and, therefore, not binding on the *muafidar*, and reversing the order of the Deputy Commissioner restored that of the Assistant Collector.

The decision of the Commissioner was questioned in appeal before the Board of Revenue.

Maulvi *Wasi*, for the Appellant.

Babu *Ishwari Dayal*, for the Respondent.

JUDGMENT.

HOLMS, J. M.—Apart from the *patta* there seems sufficient evidence to support the lower Court's finding that the land has been held rent-free for fifty years and by two successors, and this point is not seriously contested by the appellant. The view which the Commissioner has taken of the effect of the *wajib-ul-arz* is in accordance with recent decisions of the Board of Revenue on the subject and the fact that the Muhammadan appellant has allowed the Hindu respondent to remain in possession so long is against the theory that the land was held rent-free at the pleasure of the grantor. Ground No. 7 must succeed. The respondent does not contest this. The Commissioner's order should be notified to this effect that Rs. 10, Pleader's fee, is given

for all the seven cases, and not Rs. 10 for each of the seven cases. Otherwise, the appeal is dismissed. Parties to pay their own costs of appeal as neither is wholly successful.

TWEEDY, S. M.—I concur.

Appeal partly allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1420 OF 1913.

November 19, 1914.

Present:—Mr. Justice Rattigan.

JOT SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AMIR CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 72—Hypothecation of animals—Offspring of animals—Accessions—Fructus.

The rights of a person in whose favour a hypothec is made of a chattel are limited strictly to the actual chattel hypothecated and do not extend beyond that. [p. 231, col. 1.]

Where, therefore, the plaintiffs purchased a number of goats, sheep and camels on behalf of themselves and the judgment-debtors and it was agreed that the parties were to be joint owners of the animals and their offspring, and the animals belonging to the judgment-debtors were to be deemed to be hypothecated to the plaintiffs as security for the re-payment of money advanced by plaintiffs for the purchase, but no provision was made for the hypothecation of such of the offspring as might fall to the share of the judgment-debtors:

Held, that the young of animals were not mere accessions to the latter but were *fructus* and could not, therefore, be made subject to the hypothecation. [p. 231, col. 1.]

Second appeal from the decree of the Divisional Judge, Shahpur, dated the 8th April 1913.

Mr. *Bhagat Ram Puri*, for the Appellants.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—On the 29th July 1898 a decree for Rs. 210, with costs, was obtained by Chimna Ram against Mian and Muhammad, and on the 16th August 1910 (after several previous applications for execution of the said decree, which proved infructuous) the sons of Chimna Ram (present defendants Nos. 1—3) succeeded in having two camels, said to be worth Rs. 200, attached. Thereupon the present plaintiffs objected that the camels were the joint property of themselves and the judgment-debtors (defendants Nos. 4 and 5), and had, moreover, been hypothecated to the objectors by agreement, dated 6th October 1902, and could not, therefore, be attached and sold, except subject to their rights. These objections having been disallowed, the objectors brought the present suit and claim therein a declaratory decree that the animals in question are not liable to be attached and sold.

From the facts, as found by the lower Courts, it appears that the plaintiffs purchased a number of goats, sheep and camels on behalf of themselves and the judgment-debtors and that it was agreed in October 1902 that these animals were to be the joint property of plaintiffs and judgment-debtors in equal shares, and that the animals belonging to the latter were to be deemed to be hypothecated to plaintiffs as security for the re-payment of the money advanced by plaintiffs for their purchase. The agreement further provided that the parties were to be joint owners of the offspring of the said animals, but no provision was made for the hypothecation of such offspring as might fall to the share of the judgment-debtors.

The two camels that have been attached are the offspring of the camels which were originally purchased and hypothecated as aforesaid.

The Divisional Judge has held that these two camels belong, under the terms of the agreement, to the parties jointly in equal shares; that one camel must, therefore, be regarded as the property of the plaintiffs and as such released from attachment; but that the other camel belongs to the judgment-debtors and is liable to be attached, inasmuch as the agreement of October 1902 made no provision for the hypothecation of the judgment-debtors' share in the offspring of the hypothecated animals. He has, accordingly, granted plaintiffs the decree prayed for as regards the one camel, but dimissed it as regards the other.

I am now asked to set aside this order on the ground that the Divisional Judge erred in law in holding that the camel belonging to the judgment-debtors was not subject to the hypothecation in favour of plaintiffs, the agreement being that the young of the animals hypothecated must

be considered as mere accessions to the former and as such subject to the terms of the agreement.

I cannot accept this contention.

Hypothecation is a mode of creating a security whereby not merely the ownership, but also the possession of the thing, remains with the owner. To that extent it has many advantages over a pledge which necessarily implies the transfer of possession of the thing to the pledgee, or pawnee, but it has the very great disadvantge of lending itself to fraud and of depriving creditors of their just rights, as it may be effected merely by agreement of parties without the knowledge of others. The Indian Contract Act makes no provision for hypothecs and it may be open to doubt whether they can be said to be recognised by the law of this country (see as to this Ghose on Mortgages, 3rd edition, pages 147-149).

The law of England recognises the contract but only in the form prescribed by the Bills of Sale Act and in the exceptional case of hypothecs of ships, by the Merchant Shipping Acts.

Assuming, however, that the contract is valid as against a creditor of the owner of the chattel, I have no doubt whatever that the rights of the person in whose favour the hypothec is made are limited strictly to the actual chattel hypothecated, and do not extend, in a case such as that before me to the offspring of the hypothecated animal.

Mr. Bhagat Ram Puri argues that the young of such animals are "accessions" and as such subject to the terms of the hypothec.

But here again I cannot agree with him. No doubt, upon the principle recognised in section 70 of the Transfer of Property Act, accessions to property mortgaged enure for the benefit of the mortgagee, and consequently (to quote from one of the illustrations to that section) if "*A* mortgages a certain plot of building land to *B*, and afterwards erects a house on the plot, for the purposes of his security, *B* is entitled to the house as well as the plot." But the young of animals are not mere accessions to the latter, but are *fructus*, and there appears to be no principle or justification for holding that the *fructus* of a thing, which, though made security for the payment of a debt, still remains in the ownership and possession of the owner, is to be regarded as an inseparable addition to the hypothecated chattel.

In so holding I am aware that I am deciding contrary to the rule recognised by the Roman Law whereby "whatever acceded to anything hypothecated fell under the *hypothec* and was added to the security of the creditor who had thus, *e.g.*, the same rights over the children of a female slave as he had over the slave herself" (see Hunter's Roman Law, page 445). But the Roman Law recognised the contract of hypothec to an extent which has not been accepted by any modern State except Spain (see Holland's Jurisprudence, 4th edition, pages 191-192), and speaking with the utmost diffidence, I cannot find any justification for holding that the offspring of an animal which has been hypothecated should be made subject to the hypothec. At its birth it becomes a saparate entity and is in no sense a mere accessory to the animal which gave it birth.

I know of no authority, nor was any cited before me, for the proposition for which Mr. Bhagat Ram Puri contends, while on the other hand, I am not without doubt whether a contract of hypothecation can be recognised at all under our system of law as valid against the claims of a third party who has no knowledge of that contract or whose claim was anterior in point of time to the contract. The Contract Act expressly deals with the subject of "Pledges", but is silent as regards hypothecs, and their Lordships of the Privy Council have expressly stated that the Act, so far as it goes, is exhaustive and imperative [*Mohori Bibee* v. *Dharmodas Ghose* (1)].

For the reasons given I dismiss this appeal with costs.

Appeal dismissed.

(1) 30 C. 539 at p. 548 (P. C.); 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114.

PENUMETA SUBBARAJU *v.* VEEGESENA SEETHARAMARAJU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1280 OF 1913.

November 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PENUMETA SUBBARAJU—DEFENDANT—APPELLANT

versus

VEEGESENA SEETHARAMARAJU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgagor and mortgagee—Rights of mortgagor over mortgaged property pending suit on mortgage—Right of lessee under mortgagor—Transfer of Property Act (IV of 1882), ss. 8, 36, 44, 52, 73, application of, to execution sales—Substitution, doctrine of.

Where a lease of the mortgaged lands was made by the mortgagor for one year from July 1907 to July 1908 and the plaintiff purchased in Court auction in November 1907 in execution of a mortgage-decree not only the lands but also the crops standing thereon and the sale was confirmed in December 1907 and the crops harvested in January 1908:

Held, that a decree for sale, and the Court auction-sale held in pursuance thereof, will not affect the rights of the defendant lessee to the beneficial enjoyment of the crops, and that the purchase of the crops by the plaintiff in the Court auction did not give the plaintiff a title to the crops but only to what took the place of the right to the crops which would have vested in the mortgagor judgment-debtor if he had not parted with such right. [p. 233, col. 2.]

Yearly leases and such other acts as are either necessary or the ordinary reasonable incidents of an *interim* beneficial enjoyment are not affected by Court auction-sale though they are made *pendente lite*.

A purchaser gets title not only to the property purchased but also to whatever has been lawfully substituted for the whole or part of the property sold to him. The larger right of the owner of a land to the profits and crops growing on that land includes the smaller right to the rent reserved to him in consideration of his having parted with the right to the crops themselves in favour of lessees. [p. 233, col. 2.]

Neither section 8 nor section 36 of the Transfer of Property Act applies to transfer of rights by execution sale. Section 36 of the Act about the daily accrual of rent applies only in the absence of a contract to the contrary. [p. 234, col. 1.]

Sections 44 and 73 of Act IV of 1882 lay down the principle of the substitution of properties and securities in favour of persons who, through no fault of their own, are deprived of the original rights and securities. [p. 234, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Kistna, in Appeal Suit No. 225 of 1911, (transferred from the file of the Court of the Subordinate Judge, Ellore), preferred against that of the District Munsif of Narasapur, in Original Suit No. 575 of 1908.

Mr. *P. Narayanamurthi*, for the Appellant.

Mr. *B. N. Sarma*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The 1st defendant is the appellant before us. He was the lessee under the defendants Nos. 7 and 8 for the year July 1907 to July 1908 of the plaint lands. The plaintiff purchased, in Court auction in November 1907 in execution of a mortgaged-ecree against the defendants Nos. 7 and 8 (passed so long ago in 1896 or 1899), the plaint lands. The plaintiff purchased not only the lands but also the crops standing thereon. The sale was confirmed in December 1907 under the old Civil Procedure Code. The crops were harvested in January 1908 by the 1st defendant. The rent reserved by the defendants Nos. 7 and 8 with the 1st defendant was 212 *bastas* of paddy, and its value is said in the lease-deed to be Rs. 1,272 at Rs. 6 per *basta* or bag. The 1st defendant paid Rs. 400 of the rent to the defendants No. 7 and 8 and carried away the crops in January 1908. The plaintiffs brought the suit for recovery of Rs. 1,272 (the value of the grain rent due to the defendants Nos. 7 and 8 by the 1st defendant), on the allegation that by the plaintiffs' purchase of the land and of the standing crops in November 1907 in Court auction, they (the plaintiffs) became entitled to the crops themselves or at least, they became entitled to recover the rents of Rs. 1,272, plaintiffs alleging further that the 1st defendant and the defendants Nos. 7 and 8 colluded together and cut and carried away the crops in January 1908 without paying even the rent of Rs. 1,272 to the plaintiffs. Plaintiffs also claim interest at Re. 1 per cent. per mensem from the 12th January 1908 till the date of suit (16th November 1908).

The lower Appellate Court held that the plaintiffs were entitled to at least the rent amounting to 212 bags of grain. It further held that though the lease-deed mentioned Rs. 6 per bag as the price, the real price was only Rs. 5 per bag and the price of the 212 bags was, therefore, Rs. 1,060 and not Rs. 1,272, as claimed in the plaint. It further found that as the defendants

Nos. 7 and 8 had paid Rs. 400 to the 1st defendant who was not entitled to receive it, the 1st defendant must be deemed to have had and received it for the plaintiff. It, therefore, gave a decree against the defendants Nos. 7 and 8 for the Rs. 400 received by them out of the rent and it gave a decree for the remaining Rs. 660 out of the Rs. 1,060 against the defendants Nos. 1 to 6. It disallowed the plaintiffs' claim for interest, on the ground that the plaintiffs' suit was one for unliquidated damages and not for rent or liquidated damages. The contentions in appeal are:

(*a*) That the plaintiffs having purchased only the standing crops and the 1st defendant under his lease-deed having become entitled to the crops as lessee, the plaintiffs purchased nothing. (I should add that this contention is not raised in any of the grounds of the memorandum of second appeal, but as a question of law it was allowed to be argued).

(*b*) That as the plaintiffs did not purchase the rights of the defendants Nos. 7 and 8 to the rent, they ought not to have been given a decree for the rent and their plaint ought not to have been allowed to be amended into a suit for the amount of the rent.

As regards the first contention, it raises the question whether when there has been a Court auction-sale in pursuance of a mortgage-decree, the mortgagor in possession could convey to a lessee the right to raise crops on the land and take them away so as to prevent the crops being validly sold in execution of the decree for sale already passed. In *Thakur Prasad* v. *Gaya Sahu* (1), it was held that "a lease of property made by a judgment-debtor against whom a mortgage-decree for sale had been made came within the purview of section 52 of the Transfer of Property Act," and that the lessee cannot set up any rights under the lease as against the purchaser in the Court auction-sale held in execution of the mortgage-decree. I think, however, that the proposition is stated too broadly in that judgment, as it ignores the ordinary incident of the beneficial enjoyment which a mortgagor who is allowed to remain in possession is entitled to have the benefit of. In *Gajapati Radhikapatta Mahadevi Garu* v. *Gajapati Radhamani Mahadevi Garu* (2), the learned Judges Muthuswami Iyer and Hutchins, JJ., stated that "yearly leases and such other acts as are either the necessary or the ordinary reasonable incidents of an interim beneficial enjoyment will not be affected though they were made *pendente lite*." In this case, I think that the lease in 1st defendant's favour having been only for one year, the decree for sale and the Court auction-sale held in pursuance thereof will not affect the rights of the 1st defendant-lessee to the beneficial enjoyment of the crops. The purchase of the crops, therefore, by the plaintiff in the Court auction did not give the plaintiff a title to the crops themselves, but only to what took the place of the right to the crops which would have vested in the mortgagor-judgment-debtor if he had not parted with such right. We are unable to accept the contention of Mr. P. Narayanamurthi (Vakil for the appellant) that because the plaintiff did not purchase the rent which the mortgagor reserved to himself in the place of the right to cultivate and harvest the crops, which right he parted with to the lessee, therefore the plaintiff could not obtain the right even to the rent. A purchaser gets title not only to the property purchased but also to whatever has been lawfully substituted for the whole or part of the property sold to him. The larger right of the owner of a land to the profits and crops growing on that land includes the smaller right to the rent reserved by him in consideration of his having parted with the right to the crops themselves in favour of lessees. A sale of such larger right conveys a title to the smaller right which has taken the place of the larger right.

The sale in Court auction was made of the larger right to the standing crops as the Court had no notice that a smaller right to rent had been substituted by the judgment-debtor. The right to the rent was a legal incident attached to the right in the property. The entire interests of the mortgagor in the land together with all

(1) 20 A. 349; A. W. N. (1898) 36.

(2) 7 M. 96 at p. 99.

the legal incidents were intended to be, and were in fact, sold. The contention based on section 8 of the Transfer of Property Act, namely, that the plaintiffs, in any case, are entitled only to the proportinate rent due after the confirmation of the sale (November 1907) till the end of the tenancy (July 1908) might be met by two answers. One answer is that neither section 8 nor section 36 of the Transfer of Property Act (the latter section providing that rent accrues from day to day) applies to transfer of rights by execution sale [see section 2, clause (*d*), of the Act and *Satyendra Nath Thakur* v. *Nilkantha Singha* (3)]. The second answer is that we have to look to what has been substituted for the grain profits purchased by the plaintiffs, and not what rent he would have been entitled to if the mortgagors had, *by a private sale, sold the lands alone* on date of the confirmation of the sale. Further, section 36 of Act IV of 1882 about the daily accrual of rent applies only "in the absence of a contract.....to the contrary." Here, Exhibit B. clearly says that the whole rent shall be payable 'on the Makarasankaranthi day," that is, the 10th January 1908 (and in default with interest from that date). When the contract shows that the whole rent accrues on that fixed date, it seems to be clearly a contract to the contrary of what is enacted in section 36, and it has been so decided in *Satyendra Nath Thakur* v. *Nilkantha Singha* (3) by Norris and Banerjee, JJ.

I think, therefore, that though the plaintiffs may not be entitled to get the value of the crops themselves harvested and taken away by the lessees, owing rather to the equities in favour of the lessees than to the absence in the plaintiffs of a legal title to the crops, the plaintiffs are entitled to be substituted for the mortgagors in respect of the right to recover the whole rent due by the lessees. The substitution of properties and securities (in favour of a person who, through no fault of his own, is deprived of the original properties and securities) is well known to the law. This principle is embodied in sections 44 and 73 of Act IV of 1882 and is referred to and illustrated by Mr. Justice Krishnaswami Iyer in *Venkatarama Iyer* v. *Esumsa Rowthen* (4). As the lessees had paid only Rs. 400 of the rent to the mortgagors, the decree for the balance of Rs. 660 passed in the plaintiffs' favour against the lessees was rightly passed. I would, therefore, dismiss the appeal of the lessee, (the 1st defendant) in Second Appeal No. 1280 of 1913 with costs.

NAPIER, J.—I entirely agree.

Appeal dismissed.

(3) 21 C. 383 at p. 386.

(4) 5 Ind. Cas. 92; 33 M. 429 at pp. 434, 435; 7 M. L. T. 143; 20 M. L. J. 330.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1171 OF 1912.

February 26, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Rossignol.

MAYYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

NIHALA AND OTHERS—PLAINTIFFS AND NIKKA SINGH—DEFENDANT—RESPONDENTS.

Alienation—Acquiescence—Branch acquiescing becoming extinct—Collaterals, right of—Abandonment—Name expunged from mutation register—Adverse possession—Suit for possession by collaterals, whether maintainable.

If a branch which acquiesces in an alienation finally disappears in the course of centuries, its collateral branches at the time of its disappearance, however remotely that contingency may occur, will not be barred by time from challenging the alienation. [p. 235, col. 2.]

Sundar v. *Salig Ram*, 9 Ind. Cas. 300; 34 P. L. R. 1911; 33 P. W. R. 1911; 26 P. R. 1911 (F. B.), followed.

In a suit by collaterals for possession of property left by an extinct branch of the family it appeared that one *K*, the father of the last male owner, unsuccessfully resisted in 1882 an application by the predecessor-in-title of the defendants for having his name expunged from the mutation register. The defendants continued in possession since then:

Held, that *K's* acceptance in 1882 of the adverse attitude taken by the defendants amounted to abandonment of his right and the defendants having been since then in adverse possession of the property as against all the world, the claim set up by the collaterals could not be maintained. [p. 235, col. 2.]

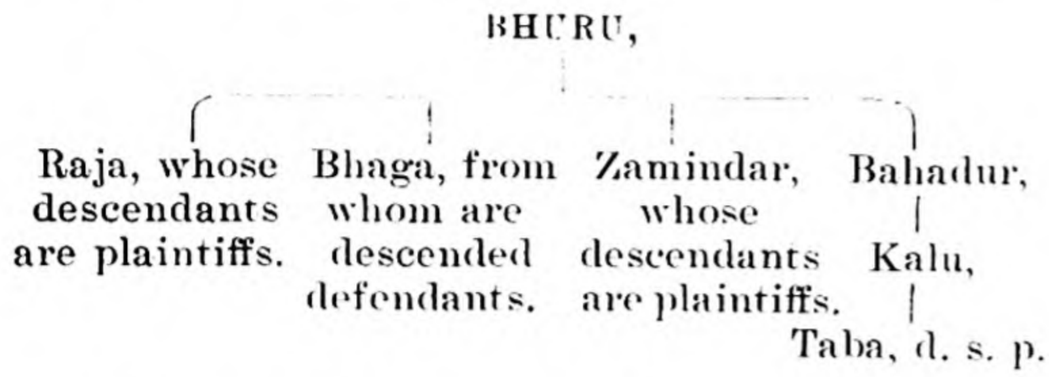
Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 15th June 1912, reversing that of the District Judge, Hoshiarpur, dated the 29th March 1912, dismissing the claim.

MAYYA v. NIHALA.

Mr. *Morrison*, Pandit *Rambhaj Datta* and Sheikh *Umar Bakhsh*, for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The facts of this case are very easily stated:



Bahadur's line is extinct owing to the death in May 1900 of Taba, without issue. His property is in dispute, being in the possession of defendants.

In 1882 Kalu stated that Mutsaddi, son of Bhaga, had given him a 1/5th share in his holding in 1852, by having had him recorded in that measure a co-sharer in the holding, but that as a fact Mutsaddi had never given him possession and he had subsisted by grazing animals.

The occasion for this assertion of his right by Kalu was Mutsaddi's application for the removal of Kalu's name from the record. On Kalu's admission that in fact he had never had possession, his name in spite of his objection was expunged.

Plaintiffs, whose holdings are separate *inter se* and also from that of defendants, claim their share in the property of Bahadur's branch.

The first Court dismissed the suit, holding that defendants had been in adverse possession to Kalu and his reversionary heirs since 1882; the Divisional Judge decreed the suit, holding that the principle enunciated in *Sundar* v. *Salig Ram* (1) and *Roda* v. *Harnam* (2) governed the case.

The sole question before us is whether the defendants' possession since 1882 has been adverse to the plaintiffs, and whether the principles of *Roda* v. *Harnam* (2), and *Sundar* v. *Salig Ram* (1) apply without modification to this case.

It is not clear how or when the plaintiff branches separated from the defendant branch, nor whether they hold equal areas, equivalent to one-fourth of the estate of Bhuru, the common ancestor. The ancestral quality of the land was admitted in the first Court, but not referred to before the Divisional Court and though it is questioned in ground 4 of the appeal to this Court, the matter has not been mentioned before us.

The main features of distinction between this case and *Sundar* v. *Salig Ram* (1) are (1) that here we have to deal with no alienation; (2) the act of abandonment was the act not of a widow but of a full owner.

However much we are impressed by the doctrine that custom is a concrete thing and not a branch of law to be extended by logical process and that a plaintiff must show by concrete examples that he is entitled to sue in a given set of circumstances, we are bound by earlier decisions of principle and we must accept the view enunciated in *Sundar* v. *Salig Ram* (1), that if a branch which acquiesces in an alienation finally disappears in the course of centuries, its collateral branches at the time of its disappearance, however remotely that contingency may occur, will not be barred by time from challenging the alienation.

We concur that this result follows from the acceptance of the principles set forth in *Roda* v. *Harnam* (2).

In this case, however, we hold that Kalu's acceptance in 1882 of the adverse attitude taken up by the defendants amounted to abandonment of his right. At that date, if not before, the defendants were holding not against Kalu only but against the whole world.

Just as a widow can accelerate the succession of reversioners by self-effacement, similarly in this case Kalu effaced himself and threw open the succession. Had the defendants been colluding with Kalu the plaintiffs could not have made any claim in 1882, but holding adversely as the defendants were to Kalu, the plaintiffs could have contended at that time that the succession was open to them by reason of Kalu's abandonment of his rights.

On the merits we are satisfied that the plaintiffs should not succeed in this suit and we hold that owing to Kalu's abandonment

(1) 9 Ind. Cas. 300; 26 P. R. 1911; 34 P. L. R. 1911; 33 P. W. R. 1911.
(2) 18 P. R. 1895.

BHAN PRATAB SAHI *v.* MANOHAR LAL.

of his rights, the defendants since 1882 have been in adverse possession.

We accordingly accept the appeal and reversing the lower Court's decree, dismiss the suit with costs throughout.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 78 OF 1914.

December 2, 1914.

Present:—Mr. Lindsay, J. C.

BHAN PRATAB SAHI—PLAINTIFF—APPELLANT

versus

MANOHAR LAL—DEFENDANT—RESPONDENT.

Lambardar, *definition of—Oudh Rent Act (XXII of 1886)*, *s.* 126 (1)—Lambardar, *duty and liability of.*

Speaking generally, the *lambardar* is the manager of the common lands entitled to collect the rents, settle tenants, eject tenants, procure enhancement of rents, and do all necessary acts relating to the management of the estate for the common benefit. [p. 237, col. 1.]

Gulzari Mal v. Jai Ram, 24 Ind. Cas 178; 12 A. L. J. 606; 36 A. 441, referred to.

The manager referred to in section 126 (1) is the *lambardar*. [p. 237, col. 2.]

It is the duty of the *lambardar* to take all steps to collect the rents from all persons who are liable to pay rents and, in cases of failure to obtain rents, to take steps to have the persons in default ejected. [p. 237, col. 2.]

Appeal from the decree of the District Judge, Fyzabad, dated the 2nd March 1914, upholding that of the Assistant Collector, Fyzabad, dated the 25th September 1913.

Babu *Bisheshwar Nath*, for the Appellant.

Babu *Basdeo Lal*, for the Respondent.

JUDGMENT.—The plaintiff-appellant sued the defendant-respondent in the Court of first instance for recovery of Rs. 805 odd, being profits for the years 1318-20 *Fasli* in respect of three villages situated in the Fyzabad District. The defendant is admittedly the *lambardar* for the whole three villages. In two of them he owns a 12 annas share and in the third he owns a 12 annas 6 pies share. The plaintiff in the case is the owner of the remaining shares in these villages. It appears that the defendant, Babu Manohar Lal, obtained a foreclosure decree by virtue of which he got possession as owner of the entire 16 annas of all these three villages. A suit was afterwards brought by one Jadunath Singh, with the result that it was held that the mortgage upon which the decree of foreclosure was obtained was not binding as to his share. This decree was a decree of their Lordships of the Privy Council and the result was that Manohar Lal was deprived of the share in the mortgaged property which belonged to Jadunath Singh. In the year 1910 Jadunath Singh's interest in these three villages was sold in execution of a decree and was purchased by the plaintiff. The villages in suit are joint. There has been no division of land amongst the sharers and the result of the plaintiff's purchase, therefore, was to constitute him tenant-in-common with Babu Manohar Lal in respect of these joint villages.

It would appear that after Jadunath's share in these villages was declared to be unaffected by the mortgage under which Babu Manohar Lal obtained foreclosure, Jadunath Singh and some of his relatives took possession of a certain area of land in the villages and cultivated it. While this state of affairs continued, Babu Manohar Lal who had been appointed *lambardar* of the whole of the villages in the year 1908 does not appear to have interfered in any way with Jadunath Singh's possession. He simply collected the rents of the remaining lands and treated them as representing the profits of the share to which he was entitled, that is to say, a 12 annas share in two of the villages and a 12 annas 6 pies share in the third. After Jadunath Singh's interest in the villages was sold in execution of a decree, Jadunath Singh appears to have remained in possession and in spite of the fact that his interest had gone, no attempt was made by the *lambardar* to interfere with Jadunath's possession in any way or to collect any rents from him. In his written statement of defence Babu Manohar Lal in paragraph 3 stated that he admitted that he was the *lambardar* of the entire villages, but he went on to say that he made collections only in respect of his own shares. In paragraphs 4 and 5 after referring to the fact that Jadunath Singh had retained possession of the land, he suggested that

if the plaintiff had any claim for profits in the villages, he had his remedy by bringing a suit against Jadunath Singh.

The defendant disclaimed all liability, because he was not in possession of the plaintiff's share and because he made no collections of rent of that share. The first Court dismissed the suit. The Assistant Collector seems to have been of opinion that the plaintiff was more to blame than the defendant. He held that Babu Manohar Lal had not realised any rent in excess of his share and that in consequence the plaintiff had no right to recover any profits from Manohar Lal. This judgment has been upheld in appeal by the learned District Judge of Fyzabad. The learned Judge states in his judgment that he entertains some doubts as to the correctness of the lower Court's findings, but on the whole in the exceptional circumstances of the case, he thought that the Assistant Collector had come to a right conclusion. It appears to me that neither of the Courts below seems to have realised the nature of the duties of *lambardar*. This point has lately been dealt with by the Allahabad High Court in a Full Bench ruling, which is reported as *Gulzari Mal* v. *Jai Ram* (1). According to the definition contained in the Land Revenue Act, a *lambardar* is defined to be "a co-sharer of a *mahal* appointed under this Act to represent all or any of the co-sharers in that *mahal*." Their Lordships of the Allahabad High Court referred to a judgment of the Board of Revenue in which a description has been given of the position of a *lambardar* in the following words :—"Speaking generally, the *lambardar* is the manager of the common lands, entitled to collect the rents, settle tenants, eject tenants, procure enhancement of rents, and do all necessary acts relating to the management of the estate for the common benefit." If we turn now to section 126, sub-section (1), of the Oudh Rent Act, we find that a sharer in a joint state or under-proprietary or other tenure in which a division of land has not been made among the sharers, shall not exercise any of the powers conferred by this Act in regard to the recovery of arrears of rent, enhancement of rent, ejectment of tenants, or distress, otherwise than through a manager authorised to collect the rents on behalf of all the sharers. It seems to me quite clear that the manager who is referred to in sub-section (1) must be the *lambardar*, and this being the state of the law, it is difficult to see what the plaintiff in the present case could have done in the circumstances. It is admitted that Babu Manohar Lal is the *lambardar* of the 16 annas of all three villages. The lower Courts seem to be under the impression that after the plaintiff here had purchased the share of Jadunath Singh in execution of decree, he was entitled to bring a suit to eject Jadunath Singh from the lands which he actually held in his possssion. But that cannot be so, if it is remembered that the village is undivided and that all the plaintiff here purchased was a certain fractional share of three villages in which the lands had not been divided. The result of the plaintiff's purchase is to make him with Babu Manohar Lal a co-sharer in every single plot of land in the villages in question. He could not, in these circumstances, have brought a suit to eject Jadunath Singh on the ground that the lands held by Jadunath Singh represented Jadunath Singh's share in the villages, for, as has already been stated, there never has been any division of lands. It also follows from what has been said that another result of the purchase made by the plaintiff is to give him a right to have his proportionate share of every rupee of profits which is collected by the *lambardar* The *lambardar* in a case like this cannot be permitted to disclaim his liability. It was his duty to take all steps to collect the rents from all persons who were liable to pay rents and, in cases of failure to obtain rents, it was his duty to take steps to have the persons in default ejected. It is said here that by reason of the sale in execution, Jadunath Singh has probably become an ex-proprietary tenant in respect of certain lands and that application ought to have been made to the Collector to assess rents upon the ex-proprietary tenure. That may be, but it appears to me that if this duty arose, it lay upon the *lambardar* and not upon the plaintiff in the present

(1) 24 Ind. Cas. 178; 36 A. 441; 12 A. L. J. 606.

case. It is quite clear to me that the decree of the Court below cannot be allowed to stand. To leave things as they are, would be to deprive the plaintiff of the rights to which he has succeeded by the purchase of Jadunath Singh's share. On the account, as proved by the evidence of the *patwari* in the Court of first instance, the plaintiff is clearly entitled to the relief he claims. I, therefore, allow this appeal, set aside the decree of the Court below and direct that the plaintiff-appellant's claim be decreed with costs in all the three Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 614 OF 1914.

March 4, 1915.

Present:—Mr. Justice Shadi Lal.

MUHAMMAD HUSSAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

QAMAR-UL-ZAMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata *as between defendants* inter se—*Subsequent suit by third party against all defendants, whether barred.*

A decision will operate as *res judicata* between defendants *inter se* only if there was an active controversy between them and a judgment was given defining their rights and obligations *inter se*. [p. 239, col. 1.]

In a suit for possession by partition of certain landed property it appeared that defendant No. 4 instituted on the 14th December 1909 a suit for partition of a house against his uncle the father of defendants Nos. 1 to 3 and his cousin, the present plaintiffs. The latter filed a separate written statement contending *inter alia* that his rights in the house were equal to those of the other defendant in the case. Subsequently he executed a power-of-attorney on 21st March 1910 in favour of his co-defendant authorising him to conduct the case on his behalf. Ultimately the plaintiff's claim to a share in the house was dismissed.

Held, that the present suit was not barred by *res judicata*. [p. 239, col. 1.]

Second appeal from the order of the Divisional Judge, Sialkot Division, dated the 13th December 1913, reversing that of the District Judge, Sialkot, dated the 31st July 1913, and remanding the case to his Court under Order XLI, rule 23.

Lala *Tirath Ram*, for the Appellants.

Messrs. *Santanam* and *Abdul Rashid*, for the Respondents.

JUDGMENT.—The facts of this case are set out in the judgment of the learned Divisional Judge and the only question of law which requires determination is, whether the plaintiff Qamar-ul-Zaman, is precluded by the previous decision in 1910 from claiming a share in the house called Bhaganwala. The learned Judge of the lower Appellate Court has arrived at the conclusion that that judgment does not operate as *res judicata* and after hearing Counsel on both sides and giving my careful consideration to the relevant facts and the law bearing on the subject, I am of opinion that the plea of *res judicata* has not been established.

It is necessary to state briefly the facts of the previous litigation upon which the defence of *res judicata* is based. It appears that Ghulam Nabi, *alias* Niaz Ahmad, defendant No. 4 in the present case, instituted on the 14th December 1909 a suit for partition of the property of Sher Muhammad against his uncle, Fateh Muhammad (father of defendants Nos. 1 to 3) and his cousin, Qamar-ul-Zaman, the present plaintiff. Fateh Muhammad in his written statement denied the right of the then plaintiff to share in the Bhaganwala house and claimed it as his exclusive property. Qamar-ul-Zaman filed a separate written statement in which he stated, *inter alia*, that his father and Fatteh Muhammad used to live jointly, that he did not know what property had been left by Sher Muhammad, that his rights were equal to those of Fateh Muhammad, and that the latter was not the sole owner of the above-mentioned house. After filing the pleas on the 17th of March 1910, Qamar-ul-Zaman, who was then quite a young man, did not take any further interest in the suit and executed on 21st of March 1910 a power of attorney in favour of Fateh Muhammad authorizing him to conduct the suit on his behalf. The Court ultimately passed on the 29th of July 1910 a decree for possession, but not for partition, of certain shares in the property, and dismissed the plaintiff's claim to a share in the Bhaganwala house.

PIAREY LAL v. BABBAN LAL.

Now it is a well-established principle of law that a decision would operate as *res judicata* between defendants *inter se*, if there was an active controversy between them and a judgment was given defining their rights and obligations *inter se* [Vide, *inter alia*, *Ramchandra Narayan* v. *Narayan Mahader* (1) and *Dhanna Singh* v. *Musammat Budhi* (2)]. In the present case, I am unable to hold that there was a genuine conflict of interests between Qamar-ul-Zaman and Fateh Muhammad. In addition to the circumstance that the latter acted as the agent of the former in the litigation, it has been pointed out by the learned Counsel for the respondents that Muhammad Hussain, a son of Fateh Muhammad, wrote on the 31st of January 1910 a letter to Qamar-ul-Zaman to the effect that Fateh Muhammad did not intend to deny the right of Qamar-ul-Zaman in the Bhaganwala house, and that both of them had equal rights in that house. The mere fact that one of the paragraphs in the written statement of Qamar-ul-Zaman denied the right of Fateh Muhammad to that house is, in the circumstances of the case, hardly sufficient to prove the existence of an active controversy which is a *sine qua non* for invoking the aid of the rule of *res judicata*.

Further it appears that, though the issue relating to the house was determined in favour of Fateh Muhammad, the decree passed in the case was not a partition decree which was capable of execution not only by the plaintiff but also by the defendants. I doubt very much whether Qamar-ul-Zaman could have preferred an appeal from that decree against Fateh Muhammad and asked the Appellate Court to reverse the finding on that issue: It has been laid down that if a judgment can operate as *res judicata* among defendants, then one defendant must have a right of appeal against another defendant, otherwise he would be without a remedy [Vide *Musammat Fakhar-un-Nissa* v. *Malik Rahim Bakhsh* (3), *Gamun* v. *Karim Khan* (4)].

(1) 11 B. 216.
(2) 16 Ind. Cas. 80; 103 P. R. 1912; 157 P. W. R. 1912; 188 P. L. R. 1912.
(3) 23 P. R. 1897.
(4) 33 P. R. 1908; 83 P. W. R 1908. 171 P. L. R. 1908.

For the aforesaid reasons I hold that the bar of *res judicata* has not been made out and that this appeal must fail. There is, however, one mistake in the order of the Divisional Judge which should be corrected. In the directions given by the learned Judge to the Court of first instance it is stated "that the plaintiff must be compensated out of the other partible property or in cash. *Per contra* he must pay defendants Rs. 138." It is, however, clear that the plaintiff is entitled to $\frac{1}{3}$rd of the house of Bhaganwala as it existed before it was re-built by the defendants Nos. 1 to 3 and it appears that the total value of the new house is Rs. 2,214 and that the value of the new material is Rs. 1,800. It, therefore, follows that the price of the old house was Rs. 414 and that the plaintiff is entitled to recover $\frac{1}{3}$rd of that amount, namely, Rs. 138 in lieu of his $\frac{1}{3}$rd share in the house. Or he can get $\frac{1}{3}$rd of the house as it exists at present on payment of $\frac{1}{3}$rd of Rs. 1,800 to the defendants. I presume this is what the learned Divisional Judge meant to say, but the order passed by him is clearly wrong. With this modification in the directions recorded for the guidance of the Court of first instance, I affirm the order of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 39 OF 1912-13 OF BARA BANKI DISTRICT.

July 25, 1914.

Present:—Mr. Holms, J. M.

PIAREY LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BABBAN LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Settlement papers, entries in, whether correct—Presumption.

VENKATARAMAN v. SUBRAMANIA IYER.

The entries in the present Settlement papers must be presumed to be correct until the contrary is proved.

Appeal from the decree of the Commissioner, Fyzabad, dated the 11th July 1913, upholding that of the Assistant Commissioner, Bara Banki, dated the 14th March 1913.

FACTS.—The defendants issued a notice of ejectment, and the latter contested it on the ground that they were not mere tenants but holding the land as rent-free grantees. The land was no doubt recorded as *muafi* at the time of the First Regular Settlement, but as that of an ordinary tenant at the time of the Second Regular Settlement. The statement of the *patwari* as taken in the case corroborated the correctness of the entry as appearing in the later Settlement Records, and there was no evidence to the contrary. From these circumstances the Assistant Commissioner concluded that at some time within the period elapsing between the two Settlements an arrangement to pay rent must have been arrived at between the landlord and the *muafidar*, and dismissed the plaintiffs' suit. The Commissioner held that the entries of the subsequent Settlement could not be presumed to be wrong simply because they were in conflict with those of the previous Settlement, inasmuch as if such presumption was to be made it would show that the attestation proceedings undergone at the time of the new Settlement were quite useless, and he, therefore, upheld the order of the Assistant Commissioner. The matter was, however, contested even up to the Board.

Babu *Gokul Prasad*, for the Appellants.

Mr. *Har Narain Das*, for the Respondents.

JUDGMENT.—As regards the first ground of appeal it has been found as a matter of fact that appellant does not now hold rent-free. Appellant now wishes to urge that he holds what was formerly a rent-free grant at a favourable rate of rent, and, therefore, under *Balgovind* v. *Raja Rampal Singh* (1), he is entitled to retain the land until the grant is resumed. This contention goes beyond his grounds of appeal, and I see no sufficient reason to remand the case for finding that the rent is favourable.

As regards the second ground, the documentary evidence has been properly interpreted, and what appellant really means is that the lower Court did not give the weight he wished to the evidence that was favourable to him.

Ground No. 3. The entries in the present Settlement papers must be presumed to be correct until the contrary is proved, which has not been done.

Appeal dismissed with costs.

Appeal dismissed.

(1) 4 O. C. 264.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2045 OF 1912.

January 22, 1915.

Present:—Sir John Edward Power Wallis, Kt. Chief Justice, and Mr. Justice Ayling.

VENKATARAMAN, MINOR BY GUARDIAN, S. V. KRISHNAMURTHI IYER—DEFENDANT No. 1—APPELLANT

versus

S. A. SUBRAMANIA IYER PLAINTIFF—AND OTHERS—DEFENDANTS Nos. 2 AND 3—RESPONDENTS.

Hindu Law—Adopted son, liability of, to maintain his adoptive mother—Agreement.

In the absence of any agreement to the contrary, an adopted son is personally bound to maintain his adoptive mother from his share of the family properties obtained on partition. [p. 241, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 776 of 1911, preferred against that of the Court of the District Munsif of Kumbakonam, in Original Suit No. 250 of 1910.

Mr. *V. Purushothama Iyer*, for the Appellant.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

JUDGMENT.—Under Exhibit B, dated 15th August 1899, three co-parceners including the plaintiff agreed to give the widow of a deceased co-parcener 120 *kalams* of paddy for her maintenance. She subsequently adopted a son, the present 1st defendant, and under the terms of an agreement, Exhibit A, between the co-parceners including the adopted boy, dated 5th September 1901, it was agreed that one of them, Aiyasami, should separate himself from the joint family and that the remaining co-parceners should continue to give the widow the 120 *kalams*

which they had been paying her out of the joint family property, Lastly these three co-parceners effected a partition, apparently without any express agreement as to who was to be liable for the payments to the widow. The widow subsequently sued the plaintiff under Exhibit B for the amount of her maintenance and he was held liable under Exhibit B. He then instituted the present suit to recover the whole amount from the 1st defendant, on the ground that he is liable to maintain his mother out of the properties which fell to him at partition. In the alternative he claimed contribution against the 1st defendant and the 2nd defendant the remaining co-parceners. It is not disputed that he was entitled in any event to recover the contribution, but it is contended that the lower Courts were wrong in holding that the 1st defendant was liable to the plaintiff for the whole amount. The Subordinate Judge found that Exhibit B merely fixed the amount payable for her maintenance and is binding on the 1st defendant who was subsequently adopted by her. In the absence of any agreement to the contrary the 1st defendant would have been liable to maintain his adoptive mother out of his share, and in the absence of any evidence of an agreement to the contrary at the time of partition, we think the Subordinate Judge was warranted in coming to the conclusion that the partition took place upon these terms that as between the co-parceners effecting the partition the 1st defendant was to be the person primarily liable. In this view we think he was right in holding the 1st defendant liable, and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 413 OF 1912.

July 20, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

SHANKER PROSAD JHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BABU LAL JHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Sonthal Parganas Regulation (III of 1872), ss. 14, 25A—Policy of Regulation—Record of Rights—Conclusive proof—Civil Court, jurisdiction of, to contest entries—Limitation—Limitation Act (IX of 1908), s. 29, scope of—Minor, position of, under the Regulation.

The policy of Regulation III of 1872 is to have a complete Record of Rights and interests in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters. [p. 242, col. 2.]

Under section 25A of the Regulation a suit to contest the Record of Rights will lie only if it is brought within three years of the date of the publication of Record of Rights and if only the rights of *zemindars* and other proprietors as between themselves are concerned. [p. 243, col. 1.]

Therefore a suit for partition brought three years after the date of publication of the Record of Rights is barred. [p. 243, col. 1.]

The Limitation Act (IX of 1908) though applicable to the Sonthal Parganas does not affect the three years' rule under section 25A of Regulation III of 1872 as section 29 of the Limitation Act saves all provisions of local laws as to limitation. [p. 243, col. 1.]

The Regulation III of 1872 does not make any exception in favour of minors and the minority provisions of the general Limitation Act have reference to the periods of limitation prescribed in that Act. [p. 243, col. 1.]

A notice under section 14 of the Regulation is to the people of the village irrespective of age or intelligence and as the law makes the Record of Rights conclusive proof of the rights and interests therein recorded, a party whose name is recorded therein has no onus to prove the service of the required notices. [p. 243, col. 2.]

Appeal against the decree of the Subordinate Judge, Sonthal Parganas, dated the 17th of June 1912.

Babus *Umakali Mukerjee* and *Mohini Mohan Chakraburty*, for the Appellants.

Babus *Mohendra Nath Roy*, *Dhirendra Lal Kastagir*, *Joges Chandra Bose*, *Surendra Nath Ghosal* and *Probodh Chandra Dutt*, for the Respondents.

JUDGMENT.—This is a partition suit brought by the plaintiffs against their uncles, defendants Nos. 1 and 2, and their descendants, who are defendants Nos. 3—10.

Joyram Dutt, the grandfather, died in 1295 leaving three sons Babulal, Surji and Dinabandhu. These three brothers remained joint up to about 1302, when they separated in mess, and the income of the family properties which remained joint used to be

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divided in three equal shares. In this state of things Surji died about 1308 leaving four sons, who are the plaintiffs. Of these, plaintiffs Nos. 1 and 2 have attained majority and the other plaintiffs are minors. So far the facts may be taken as established. The plaintiffs state that on the death of their father the family properties remained in charge of their uncles, defendants Nos. 1 and 2, who used to pay them small amounts for the bare necessities of life and were, therefore, liable to render accounts for the period subsequent to the death of their father. Barring the question of accountability which he denies, defendant No. 2, more or less supports the case of the plaintiffs. Defendants Nos. 1, 3 and 4 really oppose the suit. They say that property No. 2 being the *zemindari* interest in 5 annas 4 pies thereof, was acquired by defendant No. 1 with his own money in the name of his father and the *mokarari* of 10 annas 8 pies in his own name: that he has been recorded in the Settlement Records as the proprietor and *mokararidar* and the suit is barred by limitation under Regulation III of 1872 in respect of this property and properties Nos. 5 and 8. They say that defendant No. 1 had no objection to divide property No. 2 at the time of the partition, but the father of the plaintiff and defendant No. 2 gave up their shares and took the whole of the property No. 7 instead. They repudiate their accountability and claim contribution to some debts alleged to be due from the family.

The learned Subordinate Judge has held that the suit for properties Nos. 2, 5, 8 is barred by the provisions of Regulation III of 1872; he has decreed partition of the other properties and dismissed the claim for accounts: he has also made the plaintiffs liable to pay $\frac{1}{3}$rd share in certain debts. It is contended in appeal before us :-

(1) That the defendants, who plead the Regulation in bar of the suit, have not proved that the notices required by the Regulation were duly served and cannot, therefore, invoke the aid of the Regulation;

(2) that the notices required by the Regulation could not, even if served, affect the minors who could not in law be considered as cognizant of any proceedings taken;

(3) that the plaintiffs were minors when the Record of Rights was made and the defendant No. 1 who was then the *karta* of the family was recorded as such *karta*, and the Regulation does not bar the present suit;

(4) that the orchard in *Mouza* Rauga which was added at the instance of the defendants as joint property should have been included in the decree;

(5) that if the defendants' case as to the properties Nos. 2, 5, 8 was allowed, the share of the plaintiffs in property No. 7 should have been $\frac{1}{2}$ instead of $\frac{1}{3}$rd;

(6) that the defendants should have been held to be accountable since the death of the plaintiffs' father;

(7) that the debts incurred after partition should not have been thrown upon the plaintiffs;

(8) that the expenses of the *sradh* should not have been divided equally in the absence of a contract to bear the same in equal shares.

The first three questions raised by the appellants would have been of great force if it were not for the peculiar provisions of Regulation III of 1872. The policy of this Regulation was to have a complete Record of Rights and interests in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters. Section 5 lays down that from the date on which the commencement of a Settlement is notified to the date on which the Settlement is notified as completed, no suit will lie in the Civil Court in regard to any land or any interest in or arising out of lands, etc. Section 14 lays down that a general notice would be given to the people of the village so that all persons interested may bring forward their claims and the Settlement Officer would inquire into, settle and record all rights in or claims to the lands of a village even if no one appears to urge his claim. Section 11 is that except as provided in section 25A no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules; but the decisions and orders of the Settlement Courts under these rules regarding the interests and rights above mentioned shall have the force of a decree of Court. Section 25 lays down that after the expiry of six months from the date of the publication of the Record of Rights of any village such record shall be conclusive

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proof of the rights and customs recorded except rights mentioned in section 25A etc., and then section 25A says, "where only the rights of *zemindars* and other proprietors as between themselves are concerned, a suit may, unless it is barred by section 13 of the Civil Procedure Code, be brought in a Court established under the Bengal Civil Courts Act of 1887 to contest the record within three years of the date of the publication of the Record of Rights. But no such suit shall be brought in any Court after the expiration of three years from that date." This being the nature of the restrictions on the jurisdiction of the ordinary Civil Court, this suit so far as it is regarding the proprietary rights in property No. 2 is barred by limitation. It is true that the general Limitation Act is applicable to the Sonthal Parganas but section 29, Act IX of 1908 saves all provisions of local laws as to limitation and does not, therefore, affect the three years' rule under section 25A Regulation III of 1872. This Regulation does not make any exception in fa our of minors and the minority provisions of the general Limitation Act have reference to the periods of limitation prescribed in that Act. The Settlement Officer is supposed to investigate all sorts of claims whether preferred to him or not, although it seems to be against all principles of justice and equity that the claims of minors and others who are supposed not to know their interests should be finally settled in their absence and although it is impossible for any man, however intelligent and efficient he may be, to know of all kinds of claims that may be made by all kinds of men known or unknown, sane or insane, major or minor, the Settlement Officer is required to investigate, decide and record his decisions on such claims and the record is conclusive evidence. There is the law, however, and we have to administer it as we find it and leave it to the party aggrieived to bring his grievances to the notice of the local Government, which is the only authority that can mend matters.

It has been argued that the record may at best operate as a decree of a Civil Court under section 11 of the Regulation and, therefore, minors who are not parties cannot be bound. The analogy however must be subject to the restrictions under the Regulation, and we have seen that the Regulation makes no exception in favour of minors and the notice is to the people of the village irrespective of age or intelligence. As the law makes the Record of Rights conclusive proof of the rights and interests therein recorded and the record is in evidence in favour of defendant No. 1, he could hardly be called upon to prove the service of the required notices. In this view of the case the first three grounds fail. The claim for properties Nos. 5 and 8 also fails on the same grounds.

(4) The defendants pleaded that the orchard in *Mouza* Rouga had not been included in the claim and the suit was, therefore, defective and liable to dismissal. This property was accordingly added to the plaint and has been left out of the decree by mistake. This property will be considered as one of the properties to be divided into three equal parts, one part to be allotted to the plaintiffs.

(5) As the property No. 7 stands in the names of Surji and Dinabandhu and the *pattah* was given to them and as the contending defendants admit that they have no share in the same, it may be allotted half to the plaintiffs and half to Dinabandhu.

(6) Admittedly the parties had been dividing the profits of the family properties up to 1308. We do not think it is made out that the defendants did not go on making over plaintiffs' share. The plaintiffs say that they did not get the whole of the income in their share. We do not think that this is established.

(7) Upon the admitted facts the parties are not the members of a joint family and the defendants are found not to have been managers on behalf of the plaintiffs. If they paid any joint debts they may sue for contribution. That is a separate cause of action, and cannot be decreed as a counter-claim in a suit which is one for partition by metes and bounds of lands held in common but not as joint family property.

(8) As regards the expenses of the *sradh* there is no sufficient evidence of a contract by the plaintiffs to pay one-third share. They paid what they could and in the absence of such a contract, the defendants cannot force them to pay an equal share with themselves.

Taking into consideration the circumstances of the case and the success and failure of

their respective claims, we think that each party should bear his own costs in both Courts.

The decree of the Court below is accordingly modified.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 653 AND 654 OF 1913.

November 23, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

KURADA VENKATACHALAPATHI ROW—PLAINTIFF—APPELLANT IN BOTH

versus

IN S. A. No. 654 OF 1913

GUDIVADA PEDA VEERASWAMI AND OTHERS—DEFENDANTS—RESPONDENTS.

IN S. A. No. 653 OF 1913.

GUDIVADA SUBBANNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 278—Claim petition—Time given to produce evidence—No evidence produced—Order passed, not set aside within one year, whether final and conclusive.

A dismissal of a claim petition on account of the petitioner's failure to produce evidence on the date fixed for hearing of the petition is an order passed on investigation. Such order is final and conclusive, if not set aside within one year.

Rahim Bux v. Abdul Kader, 32 C. 537; *Koyyana Chittemma v. Doosy Gavaramma*, 29 M. 225; 16 M. L. J. 136 and *Sardhari Lal v. Ambika Pershad*, 15 C. 521; 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210, followed.

Second appeals against the decrees of the Court of the Subordinate Judge of Kistna at Masulipatam, in Appeal Suits Nos. 107 and 108 of 1912, preferred against those of the Court of the Additional District Munsif of Masulipatam, in Original Suits Nos. 575 and 574 of 1910.

Mr. *V. Ramesam*, for the Appellant.

Mr. *P. Nagabhushanam*, for the Respondents.

JUDGMENT.—The facts in the case of *Rahim Bux* v. *Abdul Kader* (1) are very similar to the facts of the present case.

The decisions in *Rahim Bax* v. *Abdul Kader* (1) and *Koyyana Chittemma* v. *Doosy Gavaramma* (2) have (if we may say so with respect) correctly followed the rule laid down by their Lordships of the Privy Council in *Sardhari Lal* v. *Ambika Pershad* (3) for arriving at a decision on the question whether an order passed on a claim petition filed under section 278 of the old Code of Civil Procedure (Order XXI, rule 58, of the new Code of Civil Procedure) was passed after investigation or not.

We are clear that the lower Courts have misconstrued the order, Exhibit E (1), as an order dismissing the 7th defendant's claim petition for default and we hold that a dismissal on account of the petitioner's failure to produce evidence on the date fixed for hearing of the petition is an order passed on investigation.

The 7th defendant having failed to have that order set aside within one year of its date, that order has become final against the 7th defendant and her sale-deed cannot be set up as against the plaintiff's claim.

The decree of the learned Subordinate Judge is set aside and the plaintiff will be given a decree for possession of the land sued for (marked A and A1 in the plaint in Original Suit No. 574 of 1910) and for mesne profits subsequent, to the date of suit till delivery, to be awarded by a supplemental decree to be passed by the District Munsif. The plaintiff is entitled to his costs against the contesting respondents in all the Courts in this suit. In the connected Second Appeal No. 653 of 1913, the lower Appellate Court's decree is set aside and the suit is remanded to that Court for the disposal of the Appeal No. 107 of 1912 on the file of that Court on the other questions arising in that suit (including the question of the share to which the plaintiff is entitled). The contesting respondents must pay the ptaintiff's costs in this second appeal. The costs in the lower Courts will abide.

Decree set aside.

(1) 32 C. 537.

(2) 29 M. 225; 16 M. L. J. 136.

(3) 15 C. 521; 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210.

EAST INDIAN RY. CO. *v.* CHANGA KHAN.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1120 OF 1912.

January 13, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

THE EAST INDIAN RAILWAY COMPANY—DEFENDANTS—APPELLANTS

versus

CHANGA KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Railways Act (IX of 1890), s. 75, Sch. II—Parcel containing silk of more than Rs. 100 not declared or insured—Railway Company, liability of, for loss—Silk, meaning of—Finding of fact—Second appeal—High Court, power of, to interfere—Practice.

After there has been a decision of fact in the two Courts of original and first appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. [p. 246, col. 1.]

Ramratan Sukal v. *Nandu*, 19 C. 249; 19 I. A. 1, referred to and followed.

Hiatunnissa Bibi v. *Kailash Chandra Saha*, 17 Ind. Cas. 224; 16 C. L. J. 259, followed.

The question whether silk in manufactured or unmanufactured state is to be treated as silk within the meaning of Schedule II of the Railways Act is a question of fact. [p. 247, col. 1.]

Where, therefore, a Court has adopted a fair test and where upon that test it has found that the article is silk within the meaning of section 75 of the Railways Act that is a clear finding of fact and the High Court cannot go behind it in second appeal. [p. 247, col. 2.]

Brunt v. *Midland Railway Co.*, 33 L. J. Ex. 187, 2 H. & C. 889; 10 Jur. (N. S.) 181; 9 L. T. 690; 12 W. R. 380, followed.

Where a parcel consigned to a Railway Company contains silk, in a manufactured or unmanufactured state and whether brought up or not brought up with other materials of the value of Rs. 100, the Railway Company are not responsible for anything contained in it on loss of it if the silk were not declared or insured under section 75 of the Railways Act. [p. 245, col. 2.]

Pundhlik Udaji Jadav v. *S. M. Railway Company*, 3 Ind. Cas. 964; 11 Bom. L. R. 827; 33 Bom. 703, followed.

Appeal from a decision of the Sub-Judge of Bankipur, dated the 15th February 1912, confirming that of the Munsif of Patna, dated the 30th November 1910.

Mr. *S. R. Das*, Counsel, and Mr. *G.B. Macnair* and Babu *Ambicapada Chowdhury*, for the Appellants

Mr. *Muhammad Mustafa Khan*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiffs against the East Indian Railway Company for the loss of a certain parcel consigned to the Company from conveyance from Bombay to Bankipore, the value of which is stated to be Rs. 516-5-7½ pies. After a prolonged correspondence about the claim the plaintiffs submitted to the defendants a detailed statement of the goods contained in the parcels, and it appears from that statement that fancy silk handkerchiefs of the value of Rs. 138-2 as had been lost with the parcels. The defendants thereupon denied their liability, relying on section 75 of the Railways Act, IX of 1890, and Schedule II thereto annexed. The Munsif and the Subordinate Judge in concurrence held that the defendants were not liable for the silk, inasmuch it had not been declared or insured. But they held that the plaintiffs can recover the value of the other goods contained in the parcel, which did not appear to have come within Schedule II of the Act.

The second appeal came before Mr. Justice Teunon sitting alone and he was of opinion, and rightly in our view, that the whole case of the plaintiffs must fail if scheduled goods of the value of over Rs. 100 were in the parcel, and for this reason, that section 75 of the present Act, differing in that respect from the former Act, says that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel, and not of the articles mentioned in the II Schedule. It is, therefore, clear that if this parcel contained silk in a manufactured or unmanufactured state and whether brought up or not brought up with other materials of the value of Rs. 100, the Railway Company are not responsible for anything contained in the parcel; and that was the sole ground upon which the Railway Company came before Mr. Justice Teunon in appeal. Mr. Justice Teunon, as we have seen, decided that point in favour of the Railway Company, and there we should have thought would have been an end of the matter, inasmuch as the plaintiffs did not file any cross-objection and did not say anything about the question of silk. But Mr. Justice Teunon appears to have thought that the Company could not recover anything unless there really was silk to the value of over Rs. 100 in the parcel and he, therefore, remanded the case to the lower Court for a fresh finding as to the particular items of silk handkerchiefs and their respective

values, directing that the Subordinate Judge in the first Court of appeal should come to a finding on the following issue, namely, what is the aggregate value of the handkerchiefs in which on the evidence adduced it may be found that the value of silk exceeds the value of the other materials?

The learned Subordinate Judge on remand expressed himself wholly unable on th evidence to decide this issue. But he said that he was satisfied with the statement in the plaint that the silk handkerchiefs were worth Rs. 91 and the other handkerchiefs which were not silk were worth Rs. 42 and odd, and this was a sufficient basis for making a new decree.

It is there that the principal question in this appeal arises. It is obvious even if the remand which was made was a competent remand, with which we shall deal presently, the Subordinate Judge could not make a new case for the plaintiffs. The finding of fact of the first two Courts before remand was at any rate conclusive that the plaintiffs had admitted to the Railway Company that they had consigned Rs. 138 worth of silk goods for them carry, and the only question that was remanded was, what was the proportion of silk in each kind of handkerchief so as to show whether the aggregate amounted to Rs. 100 or not? We are of opinion, relying on the decision in *Hiatunnessa Bibi* v. *Kailash Chandra Saha* (1), that the remand itself was incompetent and that we dealing with it as a Divisional Bench are bound to treat the case as coming before us on appeal from the Subordinate Judge who heard the first appeal. It is unnecessary to go into the considerations which induced the late Chief Justice and Mr. Justice Mitra to hold in a similar case that the remand was incompetent. It is clear as a matter of principle that after there has been a decision of fact in the two Courts of original and first appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final. These are the words of their Lordships of the Judicial Committee in the well-known case of *Ramratan Sukal* v. *Nandu* (2).

It was argued that Mr. Justice Teunon remanded the case on finding that the onus had been wrongly placed and that that was a point of law. But we find that he does not specifically find that there was any misplacing of the onus. He says the Courts below while placing upon the plaintiffs the whole burden of proof have proceeded, it appears, solely upon the description 'fancy silk' contained in the statement of claim, and he concludes by saying, even if the Courts below were right in throwing the whole burden on the plaintiffs in view of the expression of opinion to be found in the cases which we shall presently deal with, the finding at which they had arrived is not sufficient; and why is it not sufficient? because the possibility of equality in value has been overlooked and also the details of the value of each silk handkerchief have not been gone into. Now these points surely come within the dictum of their Lordships of the Judicial Committee as to the soundness of the findings of fact rather than as to the findings of fact themselves.

The learned Munsif found as a fact that from the list supplied by the plaintiffs to the defendants it appears that the lost box contained silk handkerchiefs worth more than Rs. 100. That *prima facie* clearly relieved the defendants from any burden. To avoid their liability to make a declaration and to insure the goods the plaintiffs stated that the handkerchiefs were not real silk but were known as such in the market, though they sold for no more than 5 or 6 pice each, while real silk handkerchiefs sold at Rs. 12 or 13 a dozen. They did not ask the Court to go into the question of whether there were so many at 15 annas and so many at higher price, so that the aggregate of the real silk would not amount to Rs. 100. They took the general statement that fancy silk meant sham silk. They then produced a witness with samples of handkerchiefs which they alleged were similar to the lost handkerchiefs, and upon this evidence and relying on the case of *Lakhmidas Hirachand* v. *Great Indian Peninsula*

(1) 17 Ind. Cas. 224; 16 C. L. J. 259

(2) 19 C. 249; 19 I. A. 1.

Railway Co., (3) and on the case of *Saminadha Mudali* v. *South Indian Railway Company* (4), they sought to argue that such handkerchiefs could not be considered as silk within the meaning of the Act. The learned Munsif then said, in deciding whether a particular article when brought up with other articles is to be regarded as silk or not within the meaning of the Railways Act, the proper test to apply according to these decisions was to ascertain whether the value of the silk was more than half of the whole article. He then gives his finding, "the evidence placed before me is not sufficient to show that the price of the silk contained in the handkerchiefs, if any, was less than half that of the whole article." It is argued that if we deal with this finding on the strictest mathematical principles, it is not the finding that he set himself to find namely, that there was more than half of the value in silk in the handkerchiefs. But having regard to what he sets out to be the necessary finding, it is obvious that he intends to find that there is a sufficient preponderance of silk in the handkerchiefs to bring them within the rulings he cites; and he fortifies his finding by saying that they go by the name of silk in the market and are sold as such; and this brings us to the consideration of the English case on which both the cases in India relied. It is the case of *Brunt* v. *Midland Railway Company* (5), where Baron Pollock clearly says, that the question whether silk in manufactured or unmanufactured state is to be treated as silk within the meaning of the English Act, the words in which are precisely similar to those in Schedule II of the Indian Act, is a question of fact which very properly might be left to a Jury. When it is left to a Judge, the Judge must decide where the line should be drawn, that is to say, some test must be taken by the Court as to whether the case came within the definition or not. The line shifted according to the circumstances; but the question which a Judge of fact has to answer is not where to draw the line, but whether the particular article before him is within the line; and he found as a fact that in this particular case that was before him the silk did come within the line. In the judgment by another Judge, Baron Pigott who also treats it as a simple question of fact it is stated that in that case the ingredients of silk amounted to more in proportion and value to any other article. As a matter of fact it was a question of 2 pence in 2 shillings so that it was very near the dividing line of half and half.

We do not, and indeed we cannot, bind all Courts to follow the exact test which was adopted by the Madras Court in one case and by the Bombay Court in another. Each case must depend upon its own circumstances. Where a Court has adopted a fair test and where upon that test it has found that the article is silk within the meaning of the section, that is in our opinion a clear finding of fact and the Court cannot go behind it in second appeal. The Subordinate Judge, though he has said less, has put the matter even more strongly. He says the plaintiffs have failed to prove that the handkerchiefs were not silk handkerchiefs or rather that they contained less silk than cotton. This is sufficient to bring the case within the schedule, and we are, therefore, of opinion that in second appeal we cannot go behind that finding.

Then comes the question whether the decree made in favour of the plaintiffs with regard to the other articles can stand. We have already indicated that we agree with the view taken by Mr. Justice Teunon that it cannot, and we are fortified in that opinion by the clear decision in the case of *Pundlik Udaji Jadhav* v. *S. M. Railway Company*, (6)

The result is that the appeal is decreed and the plaintiffs' suit is dismissed with costs in all Courts.

Appeal decreed.

(3) 4 B. H. C. R. 129.
(4) 6 M. 420.
(5) 33 L. J. Ex. 187; 2 H. & C. 889; 10 Jur. (N. S.) 181; 9 L. T. 690 12 W. R. 380.
(6) 3 Ind. Cas. 964; 11 Bom. L. R. 827; 33 B. 703.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 23 OF 1914.

November 3, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

PALOTT CHANDU—DEFENDANT No. 1—APPELLANT

versus

KOLATHUM KARAMMAL CHAPPILLA AND ANOTHER—PLAINTIFF AND DEFENDANTS Nos. 1, 2, 4—RESPONDENTS.

Mortgage—Redemption - Mortgage split up—Co-mortgagor, right of, to redeem his share and to take possession—Possession, nature of.

Where a mortgage has been split up by the acts of the mortgagors or mortgagees or both, a co-mortgagor is entitled to a decree for redemption of his undivided share and to be placed in possession of that share as a tenant-in-common with the other sharer or sharers.

Thillai Chetty v. *Ramanatha Ayyan*, 20 M. 295, *Rathna Mudali* v. *Perumal Reddy*, 17 Ind. Cas. 837; 12 M. L. T. 484; (1912) M. W. N. 1168; 23 M. L. J. 576, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tellicherry, in Appeal Suit No. 212 of 1912, preferred against that of the Court of the District Munsif of Tellicherry, in Original Suit No. 431 of 1911.

Mr. *V. Ryru Nambiar*, for the Appellant.

Messrs. *M. A. Candeth*, *K. Govinda Marar* and *A. Sivarama Menon*, for the Respondents.

JUDGMENT.—Following *Marakar Akath Kondarakayil Mamu* v. *Punjapatath Kuttu* (1) and *Thillai Chetty* v. *Ramanatha Ayyan* (2), we must hold that the plaintiff is not entitled to a decree for partition of the mortgaged property in this suit and for recovery of a defined $\frac{1}{3}$rd share to be ascertained in the partition proceedings sought to be initiated in the suit, as the 4th defendant (who owns the other 2/3rds share) objects to a partition in this suit. Though Mr. Justice Sundara Aiyar was inclined in *Rathna Mudali* v. *Perumal Reddy* (3) to doubt the correctness of the rulings in those cases, the principle of those rulings seems to have been adopted in the recent case in second Appeal 1172 of 1911, to which one of us was a party.

It has been, however, decided by the Division Bench in *Rathna Mudali* v. *Perumal Reddy* (3) that whether partition may or may not be allowed in a redemption suit without the consent of all the sharers, there was no objection to granting a decree for the redemption of the plaintiff's undivided share and for his being put in possession on redemption of that undivided share as a tenant in common with the other sharer or sharers, provided the mortgage has been split up by the acts of the mortgagors or mortgagees or both. In this case we are satisfied that it has been so split up by the sale of 2/3rds of the equity of redemption to the 4th defendant by two of the mortgagors and the fresh mortgage of 2/3rd share by them to the mortgagee.

In the result the lower Appellate Court's decree will be modified by omitting the words beginning from "the necessary division" in clause (1) of the decree and substituting therefor the words "by being placed in possession of that $\frac{1}{3}$rd share as a tenant in common with the person or persons entitled to possession of the other 2/3rds share;" and also by substituting the words "3rd defendant" for "4th defendant."

The parties will bear their respective costs in this second appeal. The time for payment to the 3rd defendant for redemption is extended till the expiry of two months from this day.

Decree modified.

(1) 6 M. 161.

(2) 20 M. 295.

(3) 17 Ind. Cas. 837; 12 M. L. T. 484; (1912) M. W. N. 1168; 23 M. L. J. 576.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 241 OF 1913.

May 21, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

MADAN GOPAL AND ANOTHER—PETITIONERS

versus

Musammat NARBADA—RESPONDENT.

Succession (Property Protection) Act (XIX of 1841), ss 3, 4, 5—Appointment of Curator, necessary conditions for—Procedure.

The necessary conditions subject to which a Curator is to be appointed are that:

(*i*) there must be an application and an examination as directed in section 3;

(*ii*) the Judge must be in a position to say upon such application and examination that danger is to be apprehended of misappropriation or

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waste of the property before the summary suit can be determined; and

(*iii*) the delay in obtaining security from the party in possession or its insufficiency must be likely to expose the party out of possession to considerable risk. [p. 249, col. 2.]

Papamma v. *Collector of Godavari*, 12 M. 341 at p. 345, followed.

Where, therefore, there was no clear finding that the danger of misappropriation was really to be apprehended and the petitioner was never asked to give security:

Held, that the District Judge had acted with material irregularity in passing an order for the appointment of a Curator. [p. 250, col. 1.]

Revision from the order of the District Judge, Ferozepore, dated the 8th February 1913.

Messrs. *C. Bevan Petman* and *Manohar Lal*, for the Petitioners.

Bawa *Sewa Ram Singh*, for the Respondent.

JUDGMENT.—This is an application for revision of an order of the District Judge of Ferozepore purporting to be passed under the provisions of Act XIX of 1841. The property in dispute in the case is that of Ram Narain who died on the 2nd of December 1911, and there is a dispute as to succession between the petitioners Seth Madan Gopal and Seth Sheopat Rai, first cousins of the deceased, on the one side, and *Musammat* Narbada, respondent, the posthumous daughter of Seth Ram Narain, on the other. After the death of Ram Narain the petitioners obtained possession of all the property, moveable and immoveable, of the deceased. They obtained the moveable property in consequence of an order of the Deputy Commissioner of the 12th of June 1912, and after a list thereof had been prepared by Rai Bahadur Tilok Chand, Sub-Divisional Officer, Fazilka.

The present application was made on behalf of *Musammat* Narbada under section 1 of Act XIX of 1841 on the 14th of November 1912. The District Judge after recording evidence *ex parte* issued a citation to petitioners under section 4 of the Act. They attended on the 3rd of February 1913 and put in written statements on that date and again on the 7th of February. On the 8th of February the order of which revision is sought was passed by the District Judge. By this order the District Judge directed that a Curator should be appointed under section 5 of the Act, but he deferred making a specific appointment until some subsequent date.

Mr. Petman on behalf of the petitioners referred us to *Tarak Chandra Goswami* v. *Satya Charan* (1), *Gorakh Nath* v. *Bishember Nath* (2), *Musammat Jagoji* v. *Manmohan Nath* (3), and *Papamma* v. *Collector of Godavari* (4), as authority for the proposition that the provisions of section 3 of Act XIX of 1841 must be strictly complied with.

We have carefully exmained the record and we find that the District Judge has complied with the provisions of section 3. He made the inquiry contemplated by that section and held in a detailed order that there were strong reasons for believing that the party in possession, *i. e.*, the petitioners, had no lawful title, and that the respondent was really entitled and was likely to be prejudiced if left to the ordinary remedy of a regular suit.

We, therefore, hold that there is no ground for interference on the ground that the provisions of section 3 of the Act have not been complied with.

In *Papamma* v. *Collector of Godavari* (4) the conditions subject to which a Curator is to be appointed are clearly laid down. They are as follows:—

"(1) There must be an application and an examination as directed in section 3;

"(2) the Judge must be in a position to say upon such application and examination that danger is to be apprehended of misappropriation or waste of the property before the summary suit can be determined; and

"(3) the delay in obtaining security from the party in possession or its insufficiency must be likely to expose the party out of possession to considerable risk."

Now as already stated the first condition has been complied with. As regards the second, the District Judge in his order says:—

"I find that misappropriation of income and other property by the respondents can very reasonably be apprehended."

This can hardly be said to be a clear finding that danger of misappropriation is really to be apprehended, and a reference to the record shows that there is not an iota of

(1) 15 Ind. Cas. 504.
(2) 66 P. R. 1882.
(3) 7 P. R. 1904; 37 P. L. R. 1904.
(4) 12 M. 341 at p. 345.

evidence to the effect that the petitioners are likely to misappropriate or waste any property. It is, therefore, difficult to see how the District Judge came to his conclusion in this respect.

The third condition is altogether absent. The question of security has been absolutely ignored by the District Judge. The petitioners, it appears, were never asked to give security. Mr. Petman says that they are ready to give security to any amount whenever it is demanded from them. The District Judge should certainly have asked them to give security and should not have passed an order for the appointment of a Curator unless they made a delay in furnishing the security or unless it were insufficient.

We, therefore, hold that the District Judge acted with material irregularity in passing his order of the 8th of February and we set it aside accordingly. The record will be returned to the lower Court in order that it may proceed according to law. There will be no order as to costs of this Court.

Revision allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 212 OF 1912.

July 21, 1913.

Present:—Mr. Hallifax, A. J. C.

PAIKU KALAR—PLAINTIFF—APPELLANT

versus

JAIRAM GANDLI—DEFENDANT—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), s. 94 (1), applicability of—Ejectment by one co-sharer—Limitation—Landlord, meaning of.

The special period of limitation prescribed by section 94 (1) of the Central Provinces Tenancy Act applies only to cases in which the ejectment is by the whole of the proprietary body or the *lambardar* representing it, and not to cases in which it is made by a fractional co-sharer in the village acting on his own account. [p. 252, col. 2.]

The term landlord is to be interpreted as meaning the whole body of landlords or some one empowered to act on their behalf. [p. 252, col. 2.]

Appeal from the decree of the District Judge, Chanda, dated 19th March 1912, confirming that of the Sub-Judge, Chanda, dated 30th June 1911.

Mr. *S. Y. Deshmukh*, for the Appellant.

Mr. *Atmaram Bhagwant*, for the Respondent.

JUDGMENT.—The only question for decision in this appeal is whether the special period of limitation prescribed by section 94 (1) of the Tenancy Act applies only to cases in which the ejectment was by the whole of the proprietary body (or the *lambardar* representing it), or also to cases in which it was made by a fractional co-sharer in the village acting on his own account. Paiku Kalar, the plaintiff, alleged that he was made an occupancy tenant of a certain field by Yesu or Yes Patel, the *lambardar* of the village, and was forcibly ejected on the 5th of June 1908 by the defendant, Jairam Gandli, a co-sharer. It appears that Yes Patel, the *lambardar*, holds a four-anna share, the defendant, Jairam, holds two annas, and the remaining ten-anna share is divided among three other persons. The tenant's suit to recover possession from Jairam Patel was filed on the 22nd of December 1910, so that it is barred by time unless it can be held that it is not governed in respect of limitation by section 94 of the Tenancy Act.

The learned Judge of the first Court, a Subordinate Judge who is also a Revenue Officer, dismissed the suit, holding that it was barred by time on the authority of *Dayaram* v. *Shaligram* (1) and *Debidin* v. *Hari* (2). In the former case, the learned Judge remarks, "Dayaram, a co-sharer, has been considered as landlord." What was decided in that case was that the landlord's remedy against a transferee of an ordinary tenant was not by civil suit, but by application to a Revenue Officer made within two years under section 71 of the Tenancy Act. Dayaram's appeal failed whether he was the sole landlord or a co-sharer, and that question was not examined, but the learned Judicial Commissioner remarked at the end of his judgment that "if he could retain possession at all, it might well be argued that it should only be joint possession (to the extent of his share in the *patti*) with the respondent, inasmuch as he is not the only landlord."

(1) 16 C. P. L. R. 135.
(2) 15 C. P. L. R. 125.

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It is obvious that the learned Judge has not seen the judgment in *Debidin* v. *Hari* (2), as he quotes the remarks made on it in page 466 of Dadabhoy's Tenancy Act, where it is spoken of as an unpublished ruling. Ismay, J. C., on a comparision of the draft of the Tenancy Act with the Act as passed, did say that "the obvious intention of the Legislature was that the shortened period of limitation should apply to all suits for recovery of possession brought by tenants, whether against their landlord or against a trespasser." But he expressly refrained from deciding whether the Legislature had given effect to that intention in the Act or not; because that decision was not necessary for the purposes of the case then before him. All that was laid down in that judgment is that section 94 (1) is not confined to suits by a tenant against the landlord himself, but extends to suits against an outsider, who, after the ouster, has taken a settlement from the landlord. Even that view of the law has been disapproved by this Court in *Sonsa Chamar* v. *Puran Singh* (3) and in *Dinabhandhu* v. *Dukhu Mirdha* (4), where it was held that section 94 (1) applied only when the tenant's ouster was effected by the landlord or by some one acting in concert with him or at his instance. That however, is not exactly the point for decision here.

The appeal to the Court of the District Judge was dismissed and the reasons are thus stated: "It has been held repeatedly that even a fractional landlord is a landlord for the purpose of ejectment of tenant. It has been held in the case of *Annada Sundari Chandalini* v. *Kebulram Changa* (5) that it is immaterial whether the ejectment has been caused by some co-sharers or by the entire proprietary body. In this case the rulings reported in 28 Calcutta page 127 and repeated in 4 Calcutta Weekly Notes page 801 have been followed, vide *Parameshwar Nomosudra* v. *Kali Mohun Nomosudra* (6), page 127 of the above". *Annada Sundari Chandalini* v. *Kebulram Changa* (5) is the only reported case in which this view has been definitely held, so that the use of the word "repeatedly" is scarcely justified. Nor can Prinsep and Stephen, JJ., who decided that case, be said to have followed the other two rulings mentioned. The learned Judges said: "The only reported case on this subject is that of *Parameshwar Nomosudra* v. *Kali Mohun Nomosudra* (6). It seems doubtful whether, from the nature of the case then before the learned Judges, this can be properly regarded as an authority on the subject inasmuch as it contained only an instruction to the lower Court how the case should be dealt with after remand; and the opinion so expressed professed to proceed moreover on the judgment of a Full Bench of this Court in the case of *Joolmutty Bewa* v. *Kali Prasanna Roy* (7) reported in a note in the same page. But the Judges constituting the Full Bench refused to consider the point referred to it and, therefore, as we understand the case, it cannot be accepted as an authority at all." The learned Judges then considered the matter as *res integra* and, referring to the provision of the Bengal Tenancy Act which corresponds exactly to section 94 (1) of the Central Provinces Tenancy Act, said: "This special limitation is no doubt restricted to suits between persons occupying the position of landlord and tenant, for it is in regard to such relations that the Act has been designed. It seems to us, having regard to this fact, that it is of no consequence whether the ejectment was by some co-sharers or by the entire body of landlords. In this view we think that the suit is barred."

In *Bhagchand* v. *Bijaram* (8), Ismay, J. C., held that one of two or more proprietors in an undivided *mahal* cannot take a valid mortgage of land held by a tenant, even to the extent of his own share in the *mahal*, without the consent of the co-proprietors. The co-sharer who took the mortgage was treated as an outsider who could not independently grant the consent of "the landlord" to the mortgage. Again in *Ramdayal* v. *Gulabia Bai* (9), dealing with a document purporting to be surrender of a tenant's holding for consideration to one of

(3) 16 C. P. L. R. 145.
(4) 1 N. L. R. 73.
(5) 7 C. W. N. 542.
(6) 28 C. 127; 4 C. W. N. 801.
(7) 28 C. 127 *note*; 4 C. W. N. 803 *note*.
(8) 11 C. P. L. R. 144.
(9) 4 N. L. R. 120.

several co-sharers in an undivided village, Stanyon, A. J. C., said: "The document of 17th July 1908 has been wrongly regarded as evidencing a *surrender*. In my opinion an express surrender by a tenant of his tenant right can only be effected by a contract between the tenant and his landlord. Where there are several co-owners constituting the landlord, one may, of course, act for all, with express or implied authority from the others, in taking a surrender from a tenant. But one of several co-sharers, dealing with a tenant for his own benefit, is neither 'the landlord', nor an agent of the proprietary body. It is the case of both parties that defendant obtained the transfer of the tenant right exclusively for himself, and in return for his own money; and plaintiff's case is that the transfer was without her consent. Exhibit D-1 is, therefore, a deed of sale."

It is quite clear from these rulings and from the definition of "landlord" in section 2 (6) of the Tenancy Act that one of two or more co-sharers in an undivided village acting independently cannot be regarded as "the landlord" in respect of a voluntary transfer of a tenant right to himself. Still less then can he claim to be the landlord when that transfer is involuntary on the part of the tenant. Finally the rulings in *Sonsa Chamar* v. *Puran Singh*(3) and *Dinabhandhu* v. *Dukhu Mirdha* (4) have, in reference to the point now in issue, been thus interpreted by Drake-Brockman, J. C., who was responsible for them, in the unreported case of *Govinda* v. *Awala* (10): "The sale to certain members of the proprietary body was embodied in a deed (Exhibit D-1) which in no way purports to be a surrender, nor would it as a surrender be valid, inasmuch as the ostensible vendees include neither all the proprietors nor one empowered to act for all" see *Sarju Prasad* v. *Murat Lal* (11). For a similar reason I do not think the plea of limitation now raised for the first time should succeed. In Bengal it has been held that the special period within which an occupancy *raiyat* can sue to recover possession of land from which he has been dispossessed by his landlord is two years, as laid down in Article 3, Schedule III, of the Bengal Tenancy Act, whether such dispossession be by a fractional landlord, the sole landlord or by the entire body of landlords. See *Parmeshwar Nomosudra* v. *Kali Mohun Nomosudra* (6), *Annada Sundari Chandalini* v. *Kebulram Changa* (5). But in *Brojo Kishore* v. *Saraswati Dassi* (12), Maclean, C. J., and Banerjee, J., held that unless the dispossession is by one of the landlords as such, the special period does not apply. I may add that in laying down the rule in *Sonsa* v. *Puran Singh* (3) and *Dinabandhu* v. *Dukhu Mirdha* (4). I did not intend the term landlord to be interpreted otherwise than as meaning the whole body of landlords or some one empowered to act on their behalf: see *Bhagchand* v. *Bijaram* (8); *Gopal* v. *Govind* (13)."

This suit is, therefore, not barred by time. The decree of the lower Appellate Court is accordingly set aside and the case is remanded to that Court for a fresh decision. A certificate for the refund of the amount paid as Court-fees in this Court will issue, and all other costs heretofore incurred will abide the result. The decision that the tenant's suit is not against his landlord as such but against him as a trespasser, appears to bar the jurisdiction of the Court in which the suit was instituted.

Appeal allowed.

(10) Second Appeal No. 389 of 1906.
(11) 14 C. P. L. R. 33 at p. 44.

(12) 6 C. W. N. 333.
(13) 13 C. P. L. R. 113.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 94 OF 1914.
December 21, 1914.
Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.
SANKARA VENKATARATNAM AND OTHERS—DEFENDANTS—APPELLANTS
versus
Sri Rajah VARADARAJA APPA RAO BAHADUR, ZAMINDAR GARU—PLAINTIFF—RESPONDENT.
Madras Estates Land Act (*I of* 1908), *ss.* 3 (7) (1),

SANKARA VENKATARATNAM *v.* VARADARAJA APPA RAO.

6, 45, 46, 153, 154, 163—*Lease of "old waste" for three years—Expiry of lease on date the Estates Land Act came into force—Lessee, tenancy of, nature of—Suit to eject such a lessee—Jurisdiction of Civil or Revenue Court—Transfer of Property Act (IV of 1882), s. 116—Lessee holding over—Nature of his right.*

Land once classed as "old waste" does not cease to be such on the date of its *last letting*, merely because it was preceded by another lease when the Act requires a tenant to do something to convert "old waste" into "*ryoti*" land and which the tenant has not done. [p. 253, col. 2; p. 256, col. 1.]

Per *Oldfield, J.*—Suits to eject tenants holding under such a lease lie in a Revenue Court. [p. 255, col. 2.]

A tenant holding over under a time-expired lease is a non-occupancy tenant, for he cannot acquire under section 6 of the Madras Estates Land Act an occupancy right in the land by being in possession on the date the Act came into force; that section being applicable only to "*ryoti* land" and not to "old waste." Nor can payment of rent, after the expiry of the lease, make him a tenant, for such payment cannot be said to be under the lease. [p. 255, cols. 1 & 2.]

Vadapallia Narasimham v. *Dronam Raju Setharama Murthy*, 18 M. L. J. 26; 3 M. L. T. 256; 31 M. 163, followed.

Ponnuswamy Padayaachi v. *Karupudayan*, 24 Ind. Cas. 217; 1 L. W. 218; 15 M. L. T. 299; 26 M. L. J. 285; *Chaganti Atchaparazu* v. *Kristna Yachandrulavaru*, 19 Ind. Cas. 225; (1913) M. W. N. 378; 13 M. L. T. 329; 24 M. L. J. 402, distinguished.

Though the proviso to section 153 of the Act (added by Act IV of 1909) makes the section inapplicable to "old waste", still the first portion of the section which prescribes the Courts in which the suits ought to be filed, remains unaffected: the proviso refers rather to the various clauses of that section enumerating the reasons for which a tenant may be ejected, and not to that portion of the section which points out the Courts in which such suits should be instituted. [p. 255, col. 2.]

A person continuing in possession under a time-expired lease is not a person coming into it "otherwise than by inheritance or legal transfer" within the meaning of section 163 of the Madras Estates Land Act. [p. 255, col. 1.]

Questions of jurisdiction, even if decided by a Subordinate Court, can be resuscitated in second appeal. [p. 254, col. 2.]

Babaji v. *Lakshmibai*, 9 B. 266, *Vydinatha* v. *Subaramanya*, 8 M. 235, followed.

A tenant of "old waste" continuing in possession after the expiry of the lease is not a "non-occupancy *ryot*" within the meaning of section 46 of the Madras Estates Land Act, and he cannot, by payment of 2½ times the rent acquire occupancy right therein, as that section applies to lands other than "old waste." [p. 255, col. 2.]

Per *Tyabji, J.*, (dissenting)—A suit to eject such a tenant will lie only in a Civil Court. [p. 259, col. 2.]

A lessee who holds over after the expiry of his lease, does not belong to any class of tenants dealt with by the Act. The provisions of the Act have reference to the relationship of landlord and tenant during the continuance of the tenancy, and not after its close. When once a tenancy is determined neither the person holding under the lease is a tenant nor the lessor, a landlord. A person cannot be said to be holding under a time-expired lease. [p. 256, col. 2.]

Where a suit has been instituted in a Revenue Court it is for the plaintiff to make out that the Civil Court has no jurisdiction. [p. 258, col. 1.]

The proper construction of section 153 is to make clauses (*a*) to (*d*) applicable to rights of parties during the continuance of the tenancy, and clause (*e*) to their relationship after that date; there is no reason why the addition should not apply to all the clauses. [p. 259, cols 1 & 2.]

The words "liability to be ejected" in the new proviso to section 153 of the Act make it clear that it applies both to substantive rights and to the forum in which the suit ought to be instituted, and the effect of the addition is to alter the forum and to take away the jurisdiction of Revenue Courts. [p. 259, col. 1.]

Second appeal against the decree of the District Court of Kristna at Masulipatam, in Appeal Suits Nos. 491 and 516 of 1912, preferred against those of the Court of the Head Assistant Collector of Bezwada Division, in Summary Suit No. 9 of 1910.

Messrs. *V. Ramadoss* and *N. S. Narasimhachari*, for the Appellants.

Mr. *P. Nagabushanam*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The suit was brought under the Estates Land Act by a landlord to eject a tenant, and the first point raised is whether the land should have been treated as "old waste" by the lower Courts. Defendants argue that it should not have been, on the ground that the period of not less than ten years referred to in section 3 (7) (1), must immediately precede the letting under which the tenant entered, and not (as is here the case) some other letting within twenty years before the passing of the Act. We agree with the learned District Judge that this is unsound. Nothing in the wording of the provision supports such a construction. Its adoption would entail the substitution for the words "at the time of letting" of some such expression as "immediately before the letting to the *ryot* in possession," for which there is no warrant. We can see neither reason nor convenience in favour of the view that the character of "old waste" can be lost in consequence of the interposition of a tenancy, during which nothing to impair that character is done by the tenant. We, therefore, proceed on the basis that the suit land is "old waste".

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It is then argued first that the plaintiff is not entitled to eject in consequence of the expiration of defendants' tenancy by efflux of time with reference to sections 153 and 157, on the sole ground that the facts being admitted, the expiration of a tenancy, like this, of less than five years duration is not one of the grounds referred to in the former and the reservation in the latter of "any contract to the contrary" debars plaintiff from relying on the reference to expiry of term in the addition to section 153 made by Act IV of 1909; this has been supported with reference to *Chaganti Atchaparazu* v. *Kristna Yachandrulavaru* (1). But that decision was doubted by one of the learned Judges responsible for *Ponnusamy Padayachi* v. *Karuppalayan* (2) and not relied on by the other. And on the merits it is not clear how the existence of "any contract to the contrary" can be material in this connection, when it is the expiration of a contract which is relied on, or how section 157 can be given this interpretation without depriving the addition to section 153 of effect. It is urged that it will still have effect with reference to section 153 (*a*). But, if that alone had been the intention, it would naturally have been carried out by the insertion of words extending the operation of the clause to leases granted before the commencement of the Act, and the general wording of the addition would have been avoided.

Section 9 is moreover relied on; and no doubt it is not qualified expressly by the addition to section 153, though the latter is of course one of the provisions of the Act referred to in it. It is then argued that the effect of sections 9, 153 (as amended) and 157 is at most to save an existing liability to ejectment in the case of lessees for less than five years independently of the Act, not to create a new one or sanction an existing one under it. But the question is then mainly one of jurisdiction, for defendants' arguments would entail only that the suit to enforce such independent liability would lie in the Civil, not the Revenue Court, not that it should be dismissed and that the plaint should be returned. That was the basis on which a similar contention was considered in the second case above cited, the circumstances being very similar to those before us and one learned Judge holding that the Civil Court was the proper tribunal. Two answers have been attempted to the argument. *First*, that the question, regarded as one of jurisdiction, is closed, because in this case the plaint was originally returned by the Court of first instance and the lower Appellate Court set aside the order of return on appeal, its decision being final under section 105 of the Code of Civil Procedure; *secondly*, that the Revenue Court has in fact jurisdiction, the decision in the case relied on being erroneous.

As regards the first of these answers it is sufficient that the question is one of jurisdiction and that the lower Appellate Court's order, not being one of remand or appealable and, if the objection on the merits is well founded, involving an error affecting the decision, can be attacked in second appeal. No other view could be taken consistently with the authorities, such as *Babaji* v. *Lakshmibai* (3) and *Vydinatha* v. *Subramanya* (4) in which an objection was allowed to the jurisdiction in second appeal, after it had been taken unsuccessfully in the Courts below, for it cannot be material that it was once sustained and afterwards disallowed.

Thus on the merits and with reference to the decision in *Ponnuswamy Padayachi* v. *Karuppudayan* (2) it is to be observed that the question of jurisdiction was dealt with on the basis referred to by one only of the learned Judges; and the correctness of his decision is, therefore, open to respectful consideration. It was that *ryots*, such as defendants, who remain in possession of old waste, but have paid no rent after the expiration of a lease for less than five years, are liable to ejectment by Civil Courts' decree under section 163 as trespassers, inasmuch as they have not been admitted as *ryots* by the landholder, or in effect that their original admission as lessees is immaterial, since there has been a break

(1) 19 Ind. Cas. 225; (1913) M. W. N. 378; 13 M. L. T. 329; 24 M. L. J. 402.

(2) 24 Ind. Cas. 217; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299.

(3) 9 B. 266.

(4) 8 M. 235.

in the continuity of their relation with the landholder, and a second admission is necessary to revive it and exclude them from the operation of the section. With all deference this is not involved by the provisions and authority referred to. The explanation to section 6 of the Act applies only to occupation of *ryoti* land other than old waste and deals only with the result of acceptance of payments made under section 45, and, therefore, does not alter any previous tenancy. Section 116 of the Transfer of Property Act merely recognises acceptance of rent as effecting a renewal of the previous lease, but does not specify that the tenant is "admitted" in virtue of it. *Vadapallai Narasimham* v. *Dronam Raju Setharamamurthy* (5) does not deal with the latter point. In fact the retention of possession after the expiry of any tenancy would afford an immediate cause of action for such a suit as that before us; and if section 163 is to be applied, the absence from it of any saving of the right of suit under section 153 (*e*) requires explanation. The former section occurs under the heading "eviction of tenants." But the only other case dealt with thereunder is that of a tenant of private land; and tenants of *ryoti* land have been dealt with (apparently exhaustively) under the heading "ejectment." The wording of section 163 is in itself against the view that it is applicable to cases in which the trespasser entered under a lease, since it applies only to "persons who occupy land otherwise than by inheritance or legal transfer" and the subsequent reference to section 45 bears this out. In the circumstances the conclusion that it deals with persons, such as defendants, who have entered "old waste" under a lease and have continued in possession cannot be accepted.

Section 163 failing, the question is whether in the absence of provisions in the Act for ejectment suits in the case of leases for less then five years granted before it, such suits must still be brought in the Civil Courts or whether they are covered by the amended section 153. The former alternative is inconsistent with the comprehensive character of the Act and its application of the revenue jurisdiction in other similar circumstances and is, it will be shown, negatived by the wording of section 153 itself. To the latter, the objection already stated that expiry of the lease is not specified in the section, except as a ground for ejectment unaffected by it, is relied on. This difficuty, however, disappears on a closer reading. The section deals exhaustively with ejectment of non-occupancy *ryots* as re ards two matters. *Firstly*, it prescribes the Collector's Court as the tribunal for all ejectment suits against them, whatever the ground of liablity to ejectment and whether the grounds to be enumerated correspond with those available before the Act or not; *secondly* it enumerates the grounds available and, in doing so, by the addition to it, maintains the ground of liability involved in the expiry of the term of a lease granted, before the Act was passed. The point is that the addition deals with liability to ejectment, not the tribunal which is to enforce it. The preceding provision for the Collector's jurisdiction is, therefore unaffected, and the result is, notwithstanding the enumeration of grounds of liability, to save that which would have arisen but for the Act on the expiry of leases granted before it and to make suits thereon cognizable by the Collector. The conclusion must, therefore, be that defendants are liable to ejectment and were sued in the Revenue Court rightly.

The remaining question raised by them is whether the suit for ejectment should have been proceeded with, when during its pendency they applied under section 46 for purchase of the occupancy-rights. No doubt persons entitled to apply under that section and persons liable to be sued under section 153 are described alike as non-occupancy *ryots*. But it is not possible to treat that description as covering, for the purpose of the former, those, who are covered by the latter and who are remaining in possession wrongfully after the landholder has taken steps to oust them. The explanation to sub-section (1) of section 6, added by Act IV of 1909, has been relied on as recognising the rights of the *ryots* actually in possession. But it is statedly restricted to the purpose of the sub-section, and the section as a whole applies only to land other than "old waste".

(5) 31 M. 163; 18 M. L. J. 26; 3 M L. T. 256.

This argument also, therefore, fails.

The second appeal should, therefore, be dismissed with costs.

TYABJI, J.—This appeal arises out of a suit for ejectment and damages for wrongful possession.

The facts found are that the land in question was not cultivated before 1901 (*Fasli* 1311.) It was then for the first time leased out for cultivation during *Faslis* 1311 to 1315 (1901-1905). Thereafter the defendant obtained a lease for the three years ending 30 June 1909. The plaint was filed on 3rd January 1910 for ejecting the defendant on the ground that he had refused to give possession though the lease had expired. The questions that arise in this appeal fall under two main heads of substantive and adjective law respectively:—

1. Whether the defendant has any right to remain in possession of the land in question: or is the plaintiff entitled to have him evicted ? and

2. if the defendant can be evicted at the instance of the plaintiff, whether the Court that has jurisdiction to give a decree in ejectment is the Revenue or the Civil Court?

As to the substantive rights of the parties the defendant contended that the land is not old waste within the Madras Estates Land Act, section 3 (7) (1), because though it remained uncultivated for such a period as is mentioned in the clause, yet that period did not immediately precede the letting to the defendant. The contention seems to me to be untenable. The wording of clause (2) removes any doubt that might have otherwise existed. I agree, therefore, that the land falls under the description of old waste. Next it is argued as a matter of substantive law that, though the land be old waste, the defendant is entitled to remain in possession, after the expiry of his lease, without the landholder's assent. This result, it is contended, is brought about by the provisions of the Act, which restrict the landholder's right over the land by specifying the grounds on which alone he may have a person who is in possession ejected; these specified grounds, it is said, do not include the expiry of a lease.

The sections that are relied on for this contention are sections 9, 46, 153 and 157.

It seems to me that the argument is unsound for several reasons.

The sections in question do not affect the landholder's right to eject generally but only his right to eject (1) occupancy *ryots* (2) non-occupancy *ryots* and (3) tenants of old waste. The sections do not affect the landholder's right to evict trespassers. Subject to what I am going to say with reference to the terms of section 153 (*e*), none of the three expressions can, it seems to me, include a person who was a tenant at sometime prior to the point of time with reference to which their rights have to be determined. The word '*ryot*' is defined in section 3 (15) by reference to there being a condition to pay rent. Can there be said to be any condition to pay rent between the landholder and a person whose lease had expired? After the expiration of the period during which the condition is agreed to be operative, the condition cannot be said to exist. The expression 'tenant' is well recognised as a term of law. A person who has been a tenant and who holds over is no doubt described in English Law as a tenant on sufference; but a tenancy on sufferance is in fact no tenancy at all; *Barry* v. *Goodman* (6). Mere holding over does not create tenancy in the absence of something to show that a new tenancy was implicitly created, some conduct from which it may be inferred that the landholder treated the person holding over as his tenant. Very little may, no doubt, be enough to convert a tenancy on sufference into an implied tenancy on terms similar to the expired lease. But that little is wanting here.

For the same reasons, it seems to me, that the defendant was not entitled to claim the benefit of section 46 after the expiry of his lease and after he was no more a non-occupency *ryot*, but was a person who having held land as a non-occupancy *ryot*, continued in possession after the expiration of the term during which he was entitled to hold as a non-occupancy *ryot*. The explanation to section 6 (1) applies to non-occupancy *ryots* of *ryoti* land other than old waste, and is not applicable here.

(6) (1837) 2 M. & W. 768; M. & H. 108; 6 L. J. Ex. 188.

It seems to me, therefore, that the sections are *prima facie*, and subject to what I am going to say, intended to govern the relations of a landholder and his tenants during the continuance of the tenancy (whether the land consists of old waste, or other *ryoti* land in an estate; and whether the tenancy arises under a conrtact or by operation of law). They do not seem to me primarily to govern the relations of the owner of old waste and a person who holds over, and between whom and the landholder there is no express or implied tenancy. To assume that sections 9, 46, 153 and 157 govern the relations between the parties now before us seems to me to beg the question. It is to assume that the defendant is a tenant when it has to be determined whether he can assert the rights of a tenant. This assumption seems to me to be connected with the suggestion rejected by Miller, J., in *Ponnuswamy Padayachi* v. *Karupudayan* (2), that though neither the defendant nor any third person has the right of occupancy in the land, yet the land-holder does not have that right: that the land-holder can only sue for ejectment on the basis that all persons other than himself have the right to the present possession of old waste on the same terms as a *ryot* has to the possession of *ryoti* land under section 6 (1). If this were the correct view, in the first place the distinction between old waste and *ryoti* land in an estate, made in the last sentence of section 3 (7) and in section 6 (1), would be destroyed: a person who has come in as a tenant of waste land would acquire rights similar to occupancy rights, merely by not giving up possession. In the second place, it seems to me that the assumption is oppossed to the second portion of section 116 of the Indian Evidence Act.

Moreover the land-holder's right to eject on the expiry of a lease a person who has not acquired occupancy rights is specifically recognised in the last sentence of section 153, which bears upon the questions both of substantive and adjective law mentioned at the commencement of my judgment, and I will deal with it in detail.

Section 153, as I have already said, deals with the liabilities of a non-occupancy *ryot* and it can have no relevance if what I have said about the meaning of the terms "tenant of old waste" and "non-occupancy *ryot*" is correct: a tenant of old waste being by section 157 placed in the same position (with reference to the matter now in question) as a non-occupancy *ryot*. But a certain amount of doubt is cast on the view I have expressed by the fact that in clause (*e*) of section 153 a person who has been admitted to occupation under a lease is apparently referred to as though even after the expiry of his lease he could be described as a "non-occupancy *ryot*." This inaccuracy of terms is avoided in the amending Act where the position of a *ryot* during the continuance of the tenancy is recognised as distinguishable from his possession after its expiration. I refer to the explanation to section 6 (1) and the addition to section 153 by the amending Act that a *quondum* occupancy *ryot* of *ryoti* land who holds over is, by the former provision, placed in the same position as an occupancy *ryot* during the continuance of his tenancy, but the latter provision lays down that a *quondum* non-occupancy *ryot* (if the lease were granted before the commencement of the Act) is not in the same position (with reference to section 153) as a non-occupancy *ryot* during the continuance of the tenancy, except where the non-occupancy *ryot* was admitted to possession under a registered lease of more than five years' duration in which case clause (*e*) is applicable. Still though the amending Act recognises the distinction between a tenant and one who holds over after having been a tenant, the inaccuracy of section 156 (*e*) with reference to the context in which it occurs is allowed to remain unamended.

Hence it seems to me desirable for the purpose of argument to assume that the expressions "non-occupancy *ryot*" and "tenant of old waste" in sections 153 and 157 refer to a tenant of old waste who holds over after the expiration of his lease, and to consider the effect of section 153 on this assumption.

Section 153 provides for two things: (1) the grounds on which alone a tenant (I shall use that term for shortness) may be ejected so that any right of ejectment on other grounds that might have existed prior to the Act are extinguished; (2) that the suit for ejectment can be brought only before the Collector.

The last sentence of the section lays down that nothing in that section (*i.e.* that

neither the restriction as to the grounds nor as to the Court) shall affect the liability of any person who is a non-occupancy *ryot* (or on the assumption I am making, who while he was a tenant was a non-occupancy *ryot* and is holding over) according to the provisions of this Act, to be ejected on the ground of expiry of the term of a lease granted before the commencement of this Act. It is true that the sentence does not lay down that there shall be a liability to be ejected on the ground of the expiry of such a lease. But it does lay down that in regard to such circumstance, the law outside the section shall prevail. It seems to me, therefore, that the substantive rights of the parties cannot be determined by reference to section 153.

This result is opposed to *Chaganti Atchaparazu* v. *Kristna Yachandrulaxaru* (1), which proceeds on the basis that it is the contract of tenancy which gives the land-holder the right to eject, and that such contract being controlled by section 157, a land-holder's right to eject is subject to sections 157 and 163. With great deference I cannot agree that it is the contract of tenancy which gives the land-holder the right to eject after the expiry of the lease. It is rather that the right to be in possession having been parted with for a definite period—the period mentioned in the lease—after the expiration of the period, there is no right in the tenant to be in possession, and the land-holder has the same rights in respect of the land as he had prior to the lease; those rights *ex hypothesi* include the right to put any person the land-holder likes into possession and were *exhypothesi* exercised in favour of the tenant at the time when his lease was given effect to; at any rate, the defendant who was put into possession by the land-holder is estopped from denying the land-holder's right to put him into possession.

The defendant, therefore, having no substantive right to continue in possession, he contends that the Civil Court alone has jurisdictior to evict him.

As the suit has been instituted in the Revenue Court it is for the plaintiff to make out that the Civil Court has no jurisdiction. He contends that the jurisdiction of the Civil Courts has been taken away by section 163. The last sentence of that section provides that the liability to be ejected shall not be affected by the section. Does it mean, therefore, that the Court in which the ejectment is to be brought shall be affected by the provision of the section? The contrary was assumed by Miller, J., (according to him the point was apparently conceded in argument) in *Ponnuswamy Palayachi* v. *Karuppudayan* (2) and Spencer, J., expressly decided that the Civil Courts had jurisdiction. I agree with Spencer, J.'s reasoning to this extent that when a person is in the first instance admitted as a *ryot* by the land-holder, it is implied that he is then recognised as a tenant that where the owner of the land agrees to recognise another as his tenant only for a definite period, the latter's status changes after the expiration of that period, and in the absence of some act on the part of the owner of the land showing a fresh recognition of tenancy, the previous recognition is of no avail in order that the holder over may be clothed afresh with the status of tenant; something less is necessary to be done than on the first recognition: what that requirement is, is indicated by such analogous provisions as the explanation to section 6 of the Madras Estates Land Act and section 116 of the Transfer of Property Act. When, however, section 163 has to be construed I feel difficulty in applying this analogy to any useful purpose; it can be useful only if it is recognised that there is a break in the legal personality of the tenant on the expiration of the term of the lease, a break in the legal effect of the first admission to possession, and that the admission of the tenant into possession will not avail the holder because the latter is a new legal person. On this point section 163 is so worded that we have no difinite clue to the intention of the Legislature. Other provisions of the Act make it clear that in regard to persons in possession of *ryoti* land not being old waste, there is no such break. The fact that a tenant of old waste is specifically omitted from those provisions may be an indication. But still the difficulty remains whether any renewal of admission is necessary—whether the admission to possession already obtained is to be taken to have comes to an end though it is not so stated. If, therefore, the jurisdiction of the Civil Court had to depend

upon section 163 I should feel great doubt. The question, however, is whether the Act has conferred any jurisdiction on the Revenue Court.

That question resolves itself into whether the expression "that the liability of the defendant to be ejected shall not be affected by section 153" means only that his substantive rights shall not be affected by the section, or whether it also means that the determination of the Court in which a suit for ejectment may be instituted shall also not be affected.

It seems to me that the context of the last sentence of section 153 implies that the expression "liability to be ejected" was intended to cover not only substantive rights but also the *forum* in which the rights have to be enforced.

I see great practical difficulty in reading the section either way. If it is read as I think it ought to be read, the result is that contrary to the general scope of the Act suits of such a nature as we are dealing with would have to be brought in a Civil Court; and possibly some reliefs arising out of the same transaction would have to be obtained in the Revenue Court, and others in the Civil Court. But if the section is read in the way my learned brother is inclined to read it, then the anomalies are even more serious. For in that case the Legislature specifies two cases in which alone the land-holder has the right to get back possession of land that *ex hypothesi* was in his possession and with the right to the possession of which he has agreed to part for only a definite period; these two cases are (1) where there was a registered lease for a term excee ling five years, (2) where the lease was granted before the commencement of the Act.

I cannot imagine that this was the intention of the Legislature; and as I have already said, this intention can be attributed to the Legislature only if the term "non-occupancy *ryot*" is read in section 153 in the extended sense similar to that referred to in the explanation to section 6 (1).

On the whole, therefore, it seems to me that section 153 must be construed as follows:—clauses (*a*) (*b*) (*c*) and (*d*) refer to the rights of parties during the continuance of a tenancy (as distinguished from mere holding over); (2) clause (*e*) introduces an extension of the section to one specific case of holding over; (3) the final sentence restricts the operation of clause (*e*) and prevents a person whose lease was granted before the commencement of the Act from contending that he falls under clause (*e*).

To two objections to my construction of the section, I have already referred: (1) the splitting up of the jurisdiction between the Civil and Revenue Courts; (2) the inaccuracy in the use of the expression "non-occupancy *ryot*" in reference to clause (*e*). I feel the force of these objections, but I think the difficulties in any other construction are still greater.

In the result, in my opinion, the Revenue Courts had no jurisdiction to give a decree in ejectment. In the circumstances of this case I should have been extremely sorry to have come to the conclusion that the decree of the District Judge should be set aside. But I find that the decree also awards rent by way of damages to the plaintiff. That portion of the decree has not been attacked in argument before us. In my opinion, therefore, the appeal ought to be allowed to this extent that the order for ejectment should be omitted from the decree; but in other respects the decree under appeal should stand and the appellant should pay the costs of the respondent throughout. The proper course (if my opinion as to the jurisdiction of the Court is correct) would have been to ask the plaintiff to file two plaints, one for a declaration and the other for damages, the former plaint would then have been returned by the Revenue Court for being presented to a Civil Court.

BY THE COURT.—The result is that the appeal is dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 165 OF 1914.

March 4, 1915.

Present:—Mr. Justice Hartnoll.

THE COLLECTOR OF RANGOON—APPELLANT

versus

CHANDRAMA—RESPONDENT.

Land Acquisition Act (I of 1894), s. 54 Civil Procedure Code (Act V of 1908), s. 109—Land acquisition—Award, appeal from—Award made by Judge on original side of Chief Court, whether appealable.

An award made under Part III of the Land Acquisition Act is neither a decree nor an order and section 14 of the Lower Burma Courts Act which provides for appeals from decrees and orders made by a single Judge exercising the original civil jurisdiction of the Chief Court does not apply in such cases.

Under section 54 of the Land Acquisition Act there is an appeal from an award made by a District Court, but not from an award made by a single Judge on the original side of the Chief Court as he exercises powers of a High Court.

Rangoon Botatoung Company Ltd. v. Collector of Rangoon, 16 Ind. Cas. 188; 39 I. A. 197 (P. C.); 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 40 C. 21; 6 L. B. R. 150; referred to.

Mr. *McDonnell*, for the Appellant.

Mr. *N. C. Sen*, for the Respondent.

JUDGMENT.—This is an appeal from an award made under Part III of the Land Acquisition Act, 1894, by a Judge exercising the original civil jurisdiction of this Court.

Like appeals have hitherto been accepted and dealt with in this Court, but the decision of their Lordships of the Privy Council in the *Rangoon Botatoung Company Ltd. v. Collector of Rangoon* (1) necessitates consideration whether any appeal lies in such a case.

Their Lordships refer to an award made under Part III of the Land Acquisition Act as "an award made in an arbitration as to the value of land taken for public purposes," and refer to the two Judges who dealt with the case in this Court as arbitrators. Their words imply that an award under the Act is not a decree. Even if an award were an order, an appeal might have lain under section 109 of the Code.

(1) 16 Ind. Cas. 188; 39 I. A. 197 (P. C.); 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833, 10 A. L. J. 271; 5 Bur. L. T. 205; 40 C. 21; 6 L. B. R. 150.

The award being neither a decree nor an order, section 14 of the Lower Burma Courts which provides for appeals from decrees and orders made by a single Judge exercising the original civil jurisdiction of the Court does not apply, and an appeal by virtue of that section is not admissible. Section 54 of the Land Acquisition Act enacts that subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act. This makes it clear that there is an appeal from an award made by a District Court, but a Judge exercising the original civil jurisdiction of this Court exercises powers of a High Court. There is no provisions giving an appeal in such a case.

Consequently this appeal must be dismissed. The Collector must pay the respondent's costs calculated on the value of the appeal.

Appeal dismissed.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS Nos. 366 TO 368 OF 1913

January 5, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

THE BANK OF BENGAL—COUNTER-PETITIONER—APPELLANT

versus

K. P. RAMANADHAN CHETTY—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 50 (2), applicability of—Nattukottai Chetties—Trade assets—Presumption—Private right in property, how claimed.

A Nattukottai Chetty can claim private rights in properties possessed by him, only by letting proof rebutting the ordinary presumption that such property is part of his trade assets. [p. 261, col. 1.]

Chidambaram Chetti v. Ramaswami Chettiar, 26 Ind. Cas. 911; 27 M. L. J. 631, followed.

Order XXI, rule 50 (2), of the Code of Civil Procedure applies only when the decree is executed against parties not impleaded in the suit as defendants. [p. 261, col. 1.]

Appeals against the orders of the Court of the Subordinate Judge of Ramnad at Madura, in Civil Miscellaneous Petitions Nos. 209 to

211 of 1913 respectively, in Execution Petitions Nos. 358, 372 and 357 of 1912 respectively.

Mr. *D. Chamier*, for the Appellant.

Mr. *P. S. Narayanaswamy Iyer*, for the Respondent.

JUDGMENT.—This Court has held in *Chidambaram Chetti* v. *Ramaswami Chettiar* (1) and again in *Chartered Bank of India Australia and China* v. *Vellaiappa Chetty* (2) that Nattukottai Chetties usually make no distinction between their family properties and trade assets and that Courts may, therefore, treat the property of members of such families as partnership property. It is open, of course, to parties to rebut this presumption by showing in particular cases that the property rights of individual members have been kept distinct from the common trade assets or that certain property has been conveyed away in trust for the benefit of individual beneficiaries. The learned Subordinate Judge has not gone into these questions. We must, therefore, reverse his order and remand the petitions to him for fresh disposal in the light of these remarks.

If the property attached in these cases is found to be partnership property it will not be necessary for the decree-holder to obtain leave before attaching it under Order XXI, rule 50 (1), of the Civil Procedure Code. We think that rule 50 (2) of this Order applies only to cases in which members of partnership who have not been impleaded as such are sought to be arrested in execution of a decree obtained against the firm.

A preliminary objection was raised in these cases that no appeal would lie, but it appears that the application, were made to the lower Court under section 47 of the Code of Civil Procedure and as such the orders passed on them would be appealable. Costs will abide the result.

Cases remanded.

(1) 26 Ind. Cas. 911; 27 M. L. J. 631.
(2) 27 Ind. Cas. 576; 27 M. L. J. 654.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 46 OF 1914.

January 12, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MATHURA PRASAD—APPLICANT—APPELLANT

versus

RAMCHARAN LAL—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 908), O. IX, r. 3—Decree ex parte *against some superseded by Appellate Court—Original Court, whether can set aside* ex parte *decree at instance of* ex parte *defendants—Jurisdiction—Valuation of appeal.*

Where a decree of the lower Court is superseded by a decree of the superior Court, the former cannot alter or annul its decree at the instance of the defendants against whom it had passed an *ex parte* decree [p. 262, col. 1.]

Where the valuation of the original suit is over Rs. 5,000 but the appellant is interested only to the extent of Rs. 200, he can value his appeal at Rs. 200. [p. 262, col. 1.]

First appeal from an order of the Additional Subordinate Judge of Cawnpore.

Mr. *Benode Behari*, for the Appellant.

Mr. *Baldev Ram Dave*, (for the Hon'ble Dr. *Sunder Lal*), for the Respondent.

JUDGMENT.—This is an appeal against an order of the Additional Subordinate Judge of Cawnpore, dismissing an application presented by the appellant to have a decree passed against him *ex parte* set aside, on the ground that he received no notice of the institution of the suit. It appears that the suit was one on a mortgage and that there were several defendants, including the present appellant. The case was decided by the Court of first instance on September 20th 1911. On November 30th, 1911, the present appellant presented his application to have the decree set aside as against him. When the application was called on for hearing, it was discovered that the file of the original suit had been sent to this Court in consequence of an appeal which had been filed by other defendants. The hearing of the application was put off from time to time, the Court apparently being of opinion that it was unnecessary or impossible to take up the application until after the appeal had been disposed of by this Court. The appeal was disposed of by this Court on February 24th, 1913, and after the record had been returned to the Court below the applicant's application was taken up. It was dismissed by the Subordinate Judge on the ground that he had no jurisdicition to alter or set aside the

decree passed by him, inasmuch as it had been confirmed by and become, as he says, merged in the decree passed by this Court. We have been referred to several decisions bearing on the question whether a Court of first instance has power to alter or set aside its decree after an appeal has been filed against that decree. There seems to be some difference of opinion on the question whether a lower Court can entertain an application for review or to set aside or alter its decree while an appeal against the decree is pending in a superior Court, but all the authorities seem to be agreed that when a decree has been passed by the superior Court, the lower Court cannot alter or amend its decree. In the present case as shown above the application of the applicant was made before the appeal was filed to this Court and it may be that even after the appeal was filed, the Subordinate Judge might have disposed of the application. But now that the decree of the lower Court has been superseded by the decree of this Court, we feel bound to hold that the Subordinate Judge has acted rightly in rejecting the application. It seems to us that the appellant ought to have insisted on having his application heard, and if the Subordinate Judge declined to take up the application, he should have applied to this Court for an order requiring the Subordinate Judge to take up the application, or he should have presented an original application to this Court to set aside the *ex parte* decree. As matters now stand nothing can be done; the appeal must be dismissed.

The respondent contends that the appeal has been undervalued. The valuation of the original suit was over Rs. 5,000, and a decree was passed in favour of the plaintiff for over Rs. 6,000, and it is contended that the proper valuation of this appeal is the amount of the decree passed on the mortgage. We are not prepared to accept this contention. The appellant is interested only in a small portion of the mortgaged property, which he says he purchased in execution of a decree passed before the mortgage in suit. The measure of his interest in the suit appears to us to be the value of the property which he held. He valued his appeal at Rs. 200, and there is nothing to show that this valuation is erroneous. The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 205 OF 1914.

October 27, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

KANJI MAL—DEFENDANT—APPELLANT

versus

PANNA LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (f)—Suit for rendition of accounts and winding-up of partnership—Preliminary decree—Appeal—Court-fees to be ad valorem.

An appeal from a preliminary decree in a suit for rendition of accounts and winding-up of a partnership must bear an *ad valorem* Court-fee on the amount at which the relief is valued in the plaint. [p. 262, col. 2, p. 263, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Delhi, dated the 1st December 1913, affirming that of the District Judge, Delhi, dated the 11th August 1913, decreeing claim.

Mr. *Santanam*, for the Appellant.

Mr. *Suraj Narain* and Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—The question of Court-fee in this case was reserved for decision by the Bench hearing the case. We have heard it argued now and have arrived at the opinion that the defendant-appellant must pay an *ad valorem* fee on the sum of Rs. 2,000, which was the value put by plaintiff on his suit in his plaint, and that the stamp of Rs. 10, on which the appeal has been filed, is insufficient. Mr. Santanam undertakes to pay in the necessary stamps as soon as they can be procured, and so we have heard the appeal argued on the merits. It is unnecessary to discuss the question of Court-fee at length. We need only point to such authorities as *Bhagat Ram* v. *Gokal Chand* (1) (an analogous case, though not entirely in point), *Balvant Ganesh* v. *Nana Chintamon* (2), *Faka Ram* v. *Ram Saran* (3) and *Ladhubhai Premchand* v. *Revichand Venichand* (4), and to say that we are disposed to agree with Mr. Suraj Narain that on the plain wording of section 7 (*iv*) (*f*), Court Fees Act, and Article 17 of the second Schedule of the same Act, the present case appears to fall under the

(1) 170 P. R. 1908.
(2) 18 B. 209.
(3) 13 P. R. 1901; 137 P. L. R. 1901.
(4) 6 B. 143.

former law rather than the latter. It seems to us that it can hardly be said that the value of such a suit as this cannot be "estimated" or that it is not covered by any other provision of the Act, *cf. Banwari Lal* v. *Sheo Sankar Misser* (5).

In a case like the present the new law of appeal very much circumscribes the scope allowed to a would-be appellant. The suit was for rendition of accounts and winding up of an alleged partnership entered into, so plaintiffs alleged, at Delhi. Defendants, Kanji Mal and his son, denied any partnership at Delhi, admitted a partnership entered into at Palwal (Gurgaon) between Umrao Singh, son of Panna Lal, plaintiff, and Kanji Mal, defendant, and contended that, therefore, the Delhi Court had no jurisdiction, the business of the partnership being carried on at Palwal and so forth and so on. The first Court ruled that the contract was entered into at Delhi, and gave a preliminary decree—pages 12 and 13, paper-book—which on appeal by defendant No. 1 aforesaid was affirmed. Costs in the first Court were to be adjusted at time of final decree, and the parties were to bear their own costs in the lower Appellate Court.

To ascertain the extension that can be accorded to this appeal, we must see what the lower Appellate Court's actual findings were. The suit was instituted on 29th March 1912, and issues were fixed on 7th June 1912, the case being thereafter adjourned for evidence to 10th July 1912. Up to the latter date plaintiff had, according to the record, never said that the terms of the partnership had been reduced to writing over the signature of defendant No. 1 and had never produced any document of this sort. On 10th July he put in Exhibit P 1, a page of his *bahi*, containing a sort of partnership deed, dated *Jeth Sudi* 1, *Sambat* 1963. If defendant No. 1 really did sign that document on that day, it must have been at Delhi, for plaintiff's shop is there and his books would naturally be there too. Defendant No. 1, when shown the document by the first Court, said the signature was his, but upon his Pleader interposing some remarks, asked to see the paper again and then denied the signature. Some oral evidence on behalf of plaintiff was given by way of proving the factum of writing and signing, and on the other hand the Government Handwriting Expert gave an opinion adverse to plaintiff. The learned Additional Divisional Judge added to all this that it was an "admitted fact" that one day before the above writing, defendant No. 1 at plaintiff's shop at Delhi took Rs. 4,002 in cash from plaintiff's shop on behalf of the firm "Sagar Mal-Kishori Lal," to which he belonged, that this lent probability to the defendant No. 1 being at Delhi the next day, and that the Additional Divisional Judge's own comparison of admitted signatures of defendant No. 1 with that in dispute in Exhibit P1 was favourable to plaintiff. Founding upon all this the lower Appellate Court held plainly that defendant No. 1 did sign Exhibit P1, one result of which was that the Delhi Courts had jurisdiction, and another that Exhibit P1 represents the terms of the partnership.

We asked Mr. Santanam to show how under the present law his client could, in second appeal, contest this finding of fact, and he was able to do little more than indicate the matter of the payment of Rs. 4,002, denying that his client had ever admitted receipt of that sum at Delhi and arguing that the lower Appellate Court had thus based its finding on a mistake as to what the record contained. He also contended that his client objected from the first to the admissibility of the document in view of Order XIII, rules 1 and 2, Civil Procedure Code, and we are inclined to think that he is right here; but this does not help much, for the document was, in the exercise of its discretion, admitted by the first Court, the admission was confirmed by the lower Appellate Court and it is not for this Court in second appeal to re-open the matter, especially as the document has been finally held to be genuine. It appears to us that Mr. Clifford was justified in using the phrase "admitted fact." Plaintiff had plainly put forward this alleged payment at Delhi as one of his proofs of the presence of defendant No. 1 there at that time, and the allegation was not specifically denied. Even in the grounds of appeal in the lower Appellate Court the matter is not mentioned, and we may be sure that an officer of the experience of Mr. Clifford

(5) 1 Ind. Cas. 670; 13 C. W. N. 815 at p. 819.

knew what he was writing about. On the whole, then, we do not think this appeal can come in under clause (c) of sub-section (1) of section 40 of the Courts Act, and this being so, we are constrained to hold that the appeal is not competent as it attacks a finding on a pure question of fact.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL SPECIAL SECOND APPEAL No. 125 OF 1913.

July 3, 1914.

Present:—Mr. Justice Twomey.

MA NYEIN—PLAINTIFF—APPELLANT

versus

P. L. A. K. R. KADERSAN CHETTY—DEFENDANT RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 54, 60—Registration—Restriction on redemption—Revenue Surveyor's register—Custom of reporting mortgages as sales.

Mortgages are frequently reported as sales in Revenue Surveyor's register in Burma. [p. 264, col. 2.]

Ma Dun v. *Lu O*, 2 Ind. Cas. 535; 5 L. B. R. 40, referred to.

Under section 54 of the Transfer of Property Act a mortgage or sale of a property of the value of one hundred rupees and upwards should be effected by registration. A stipulation restricting the period of redemption should be treated by the Courts as inoperative, according to the equitable principles embodied in section 60 of the Transfer of Property Act. [p. 265, col. 1.]

Mr. *Halkar*, for the Appellant.

Mr. *Sivaya*, for the Respondent.

JUDGMENT.—The plaintiff-appellant, Ma Nyein, mortgaged her land without possession to the defendant-respondent, a Chetty, for Rs. 1,000 bearing interest at 2 per cent. per mensem in 1902. She says that she paid only Rs. 80 towards the interest. In 1906 the balance of principal and interest amounted to about Rs. 2,000 and being unable to pay, she made over the land to the Chetty. No conveyance was executed. Ma Nyein reported the transaction to the Revenue Surveyor as an outright sale for Rs. 2,000 and signed the report in Register IX. She says that she told the Revenue Surveyor at the time that she was making over the land by way of usufructuary mortgage for Rs. 1,000. The Revenue Surveyor died before the suit. But Ma Nyein's statement as to the real intention of the parties is corroborated by two villagers, who say that they were present when the report was made to the Revenue Surveyor, and also by Kundaswamy, who was clerk to the defendant's firm at the time. The Divisional Court rightly hesitated to believe the evidence of the two villagers. But there is no reason for doubting the evidence of the Chetty's own clerk that the transaction was really intended to be only a usufructuary mortgage, though the Chetty himself denies that this was so. It is notorious, as remarked in *Ma Dun* v. *Lu O* (1), that mortgages are frequently reported as sales.

There is difference between the evidence of the Burmese witnesses and the clerk Kundaswamy as to the terms agreed upon for redemption, the latter saying that Ma Nyein was to redeem by payment of the principal Rs. 1,000 within a year, and the former that no period was fixed.

Ma Nyein did not attempt to redeem until 1912, six years after the delivery of the land and ten years after the original mortgage.

The Sub-Divisional Court held on the evidence that Ma Nyein reserved her right to redeem at any time and granted a decree, allowing her to redeem for Rs. 1,000. The Divisional Court has reversed that decree. The learned Judge found that Ma Nyein made over the land outright in 1906, but subject to an agreement that redemption would be allowed within a year. The Judgment then proceeds as follows :—

"They did not redeem within a year or even within six years and the property stood from 1906 onwards in the Revenue Records in the name of the appellant as owner.

"Technically of course he was not owner, since no registered deed was executed when the property was made over to him in 1906.

"He is, however, in rightful possession and since it seems to me clear that the original mortgage came to an end by the mortgagors' own act, when they transferred the land to appellant in satisfaction of the mortgage debt in 1906 or if not then, at any rate on the expiry of a year from that date, the respondents are not now entitled to recover possession either under the mortgage or otherwise, and the appellant is entitled to

(1) 2 Ind. Cas. 535; 5 L. B. R. 40.

retain possession even though his legal title be defective."

I think the learned Judge erred in regarding the Chetty as an owner with a mere technical defect in his title. To begin with, it may be pointed out that the transaction of 1906 could not operate either as a mortgage or a sale in the absence of a registered document as required by the Transfer of Property Act. It left the parties as they were, except that the mortgagee went into possession. The right of redemption remained unimpaired. The Divisional Judge's view that the original mortgage came to an end by the mortgagor's own act has nothing to support it. It did not come to an end when the mortgagee was placed in possession in 1906, *firstly*, because there was no fresh legal transaction at that time and *secondly*, because in any case the right of redemption was expressly retained. Nor did it come to an end on the expiry of a year from 1906, because even if there had been a fresh legal mortgage in 90 , the stipulation restricting the period of redemption to one year would be treated by the Courts as inoperative according to the equitable principle embodied in section 60 of the Transfer of Property Act (though that section has not been extended to rural areas). It would be hardly possible to regard such a stipulation as more than a mere threat introduced by way of penalty to enforce payment, and the Court would grant relief from it as a matter of equity.

For these reasons the decree of the Divisional Court must be set aside.

But the Sub-Divisional Court, in my opinion, should not have allowed redemption on payment of the principal and interest in 1906 when she made over the land.

If she had redeemed within a year from then, she might have done so for Rs. 1,000, but having failed to do so I think she is bound to pay the full amount of the original mortgage-debt, as it stood in 1906.

She cannot in equity rely on the arrangement of 1906 as reducing her debt by one half, while she is permitted to avoid it so far as it restricted her right of redemption.

Treating the Chetty as a mortgagee in possession from 1906, the strictly correct course would be to call on him for an account of the net income year by year from the mortgaged property and to take any excess over Rs. 240 a year—2 per cent. per mensem on Rs. 1,000 in reduction of the sum of Rs. 2,000 due in 1906 when he entered into possession. Similarly, any deficit would have to be added to the mortgage-debt of Rs. 2,000. But the Counsel for both parties agree that this course is unnecessary in the circumstances, and it may, therefore, be assumed for the purposes of this case that the income of the property while in the mortgagee's possession was no more and no less than sufficient to cover the annual interest of Rs. 240.

The decrees of the lower Courts are set aside. There will be a decree for redemption on payment of Rs. 2,000, less the amount of the plaintiff-appellant's costs in all Courts, within six months.

Decree set aside.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 72 OF 1914.

February 11, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BUDHU AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEWAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5 Appeal filed beyond time—Judicial discretion of Court—Negligence of Barrister in filing appeal, whether sufficient cause—Liability.

The neglect of the Legal Practitioner engaged is not to be deemed a sufficient reason for admitting an appeal or application after the time prescribed by law. [p. 266, cols. 1 & 2.]

Where an appeal was filed to the District Judge 37 days beyond time and no explanation was given of the delay except that instructions had been given in time to a Barrister together with Rs. 40 for the purposes of filing the appeal, but he failed to file, and the District Judge admitted the appeal:

Held, that the Judge had not exercised a judicial discretion in allowing the appeal to be filed after time. [p. 266, col. 1.]

Per *Richards, C. J.*—If it is shown that an Advocate who is a Barrister or other professional gentleman received and accepted instructions to file an appeal or make an application and the client lost his right to appeal or make the application as the result of the negligence of the Barrister or Practitioner to file the appeal or application within time, such Barrister or Vakil is liable to his client in a Court of Law. [p. 266 col. 2.]

Letters Patent Appeal from the decision of Mr. Justice Sunder Lal, reported in 25 Ind. Cas. 30.

Mr. *R. K. Sorabji*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—The facts connected with this appeal are fully reported [See *Dewan* v. *Buddhu* (1)]. It appears that a suit was brought before the Additional Subordinate Judge claiming damages for malicious prosecution. The suit was decreed in part on the 2nd of December 1912. Copies of the decree and judgment were delivered to the defendant on the 10th of December. The defendant had up to the 3rd of January 1913 to appeal to the District Judge. No appeal was filed until thirty-seven days after that date. An application was then made to admit the appeal though late. The appeal was admitted. The only facts that the learned District Judge had before him when admitting the appeal were set forth in an affidavit, in which it was stated that instructions had been given to Mr. Weston, a Barrister, together with a sum of Rs. 40 for the purpose of filing an appeal. No affidivit of Mr. Weston, was filed. No explanation was given why Mr. Weston did not file the appeal. Nor was it even alleged that the non-filing of the appeal to the District Judge was due to Mr. Weston's negligence. Under these circumstances the learned Judge of this Court considered that the District Judge had not exercised a judicial discretion when allowing the appeal to be filed after time. I do not think that we would be justified in setting aside the decree of this Court. Even if the non-filing of the appeal were due to the neglect of Mr. Weston, the Court could hardly lay down a general rule that the neglect of the legal practitioner engaged is always to be deemed a sufficient reason for admitting an appeal, or application, after the time prescribed by law.

It is suggested that if that appeal is not admitted, the client has no remedy because no suit lies against a Barrister for neglect. I do not at all agree to this suggestion. I do not wish to be taken as expressing any opinion as to whether or not Mr. Weston was negligent. It may have been that he got some special instructions from his client as to the filing of the appeal. But in my opinion if it was shown that an Advocate who is a Barrister or other professional gentleman received and accepted instructions to file an appeal or make an application and the client lost his right to appeal or make the application as the result of the negligence of the Barrister or practitioner to file the appeal or application within time, such Barrister or Vakil would be liable to his client in a Court of Law.

I would dismiss the appeal.

BANERJI, J.—I also am of opinion that the appeal should be dismissed. The learned Judge in the Court below did not subject the reason alleged for the delay of thirty-seven days in the filing of the appeal to such scrutiny as he was bound to do. He must, therefore, be taken not to have exercised a judicial discretion in admitting the appeal beyond time. On this ground alone I would hold that the learned Judge of this Court was justified in reversing the decision of the learned District Judge. I do not think it necessary to express any opinion on the other point touched upon by the learned Chief Justice in his judgment.

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1266 OF 1913.

November 12, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

SIVAPURAM VENKATESAM CHETTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

GONUGUNTLA SUBBIAH—PLAINTIFF—RESPONDENT.

Landlord and tenant - Land on which fruit trees stand—Evidence of possession—Enjoyment of usufruct of trees, if sufficient - Evidence.

The only way of proving possession and enjoymen of the land out of which no profit is derived other than the usufruct of the fruit trees which stand

(1) 25 Ind. Cas. 30; 12 A. L. J. 837.

thereon, is by proving the enjoyment of the trees, as in such cases the enjoyment of the usufruct cannot be separated from the enjoyment of the sites on which the trees stand.

Second appeal against the decree of the District Court of Kurnool, in Appeal Suit No. 157 of 1913, preferred against that of the Court of the District Munsif of Markapur, in Original Suit No. 95 of 1912.

FACTS.—Plaintiff sued to establish his right to and to recover possession of the suit site together with the tamarind trees thereon. The defendants denied plaintiff's title to the site and his enjoyment of the same. One of the issues raised in the case was as to the ownership of the site with the trees thereon. The District Munsif found that the suit site was not fit for cultivation, that excepting for the trees thereon, it was not useful to either party and that plaintiff had no title to the site and the trees thereon and did not acquire any by adverse possession, and dismissed the plaintiff's suit Onappeal the District, Judge while agreeing with the District Munisf that the site was not fit for cultivation and was useless except for the trees standing thereon, remitted for a finding the issue "whether plaintiff had been in enjoyment of the trees from 1898 when they began to yield, and if so, whether he had acquired a presumptive title by adverse possession." The Munsif submitted the finding that the plaintiff had been in possession and enjoyment of the trees from 1898 and that he had acquired a prescriptive title to them by adverse possession. The District Judge accepted that finding and modified the decree of the Court below by giving the plaintiff a decree for the recovery of the tamarind trees and the site. Against this decree the defendants preferred the above second appeal.

Mr. *A. S. Visvanatha Iyer*, for the Appellants: The finding of the Munsif that the site belonged to the defendants having been accepted by the District Judge, the ownership of the trees ought to have been held to have passed to the defendants, notwithstanding that they had been planted by the plaintiff. In the absence of a finding that title to the site had been acquired by adverse possession, the suit in respect thereof ought to have been dismissed.

Mr. *T. Prakasam*, for the Respondont, was not called upon.

JUDGMENT.—Possession and enjoyment of sites on which fruit trees stand can be proved only by the enjoyment of the fruit of the trees if (as is found in this case) no other profit can be obtained out of the sites on which the trees stand. In such cases, the enjoyment of the produce of the trees cannot be separated from the enjoyment of the bits of sites covered by the trees. In other words, the only way in which possession of such sites could be established is by proving enjoyment of the trees and the proof of such enjoyment of the trees is the same thing as proof of enjoyment of the sites of the trees.

We are, therefore, unable to seeanything in the contention that the plaintiff has not proved title by adverse possession to the sites of trees, though he might have proved adverse possession of the trees themselves.

The second appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3898 OF 1912.

February 4, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

PARUSHULLA SHAIKH—DEFENDANT—APPELLANT

versus

SITAL CHANDRA DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *ss.* 11, 18, 85—*Under*-raiyati *holding—Permanent sub-lease, right to grant—Transfer of Property Act (IV of* 1882), *applicability of, to tenancy.*

Section 85 of the Bengal Tenancy Act has no application to a sub-*raiyat* granting an under-lease. [p. 268, col. 1.]

Guru Das Das v. *Kali Das Changa*, 24 Ind. Cas. 287; 18 C. W. N. 882, referred to.

The Transfer of Property Act has no application to a tenancy under the Bengal Tenancy Act and the transfer contemplated in sections 11 and 18 of that Act are transfers out and out, and not partial transfers by way of sub-lease. [p. 268, col. 2.]

The Bengal Tenancy Act does not prohibit the grant of sub-leases by an under-*raiyat* and, therefore, such sub-leases are valid documents between the grantors and the grantees. [p. 268, col. 2.]

PARUSHULLA SHAIKH *v.* SITAL CHANDRA DAS.

Appeal against a decree of the Subordinate Judge of Khulna, dated 17th September 1912, modifying that of the Munsif, Khulna, dated 29th June 1911.

Babus *Jadu Nath Kanjilal*, for the Appellants.

Babu *Sarat Chandra Roy Choudhuri* and *Bhudhar Haldar*, for the Respondent.

JUDGMENT.—Defendant No. 1 and the predecessor-in-interest of defendants Nos. 6 and 7 owned an under-*raiyati* holding in equal shares. Defendant No. 1 granted a permanent sub-lease to the plaintiffs in respect of his half share on the 24th March 1908, and defendant No. 6 granted a permanent sub-lease of the other half to the same party on the 15th of August 1908. The plaintiffs had, therefore, a permanent sub-lease of the entire under-*raiyati* holding under the said lessors. The plaintiffs paid the *selami* and obtained possession. There was then a dispute and a case under section 145 of the Criminal Procedure Code was decided in favour of defendant No. 1 and defendant No. 2, in whose favour defendant No. 1 sold his interest in the under-*raiyati* holding. The plaintiffs, therefore, brought this suit for declaration of title and recovery of possession. The Court of first instance dismissed the suit holding that the permanent sub-leases of the plaintiffs were void under section 85 of the Bengal Tenancy Act. The lower Appellate Court has set aside the decree of the first Court and given a decree in respect of 9 annas of the property, holding that although the leases were invalid, the plaintiffs could prove their tenancy otherwise and had done so by proving the payment of *selami* and holding of possession.

Defendant No. 1 and his co-sharers were dealt with in the Courts below as occupancy *raiyats* and the appeal before us was originally argued on the same footing. On looking into the record, however, we found that the interest of defendant No. 1 and his co-sharers was that of under-*raiyats* and we have had the case re-argued on the basis of the said state of things. The argument based on section 85 of the Bengal Tenancy Act has no application to a sub-*raiyat* granting an under-lease and if authority were necessary for that proposition, we may refer to the case of *Guru Das Das* v. *Kali Das Changa* (1). It is contended, however, that there is no provision in the Bengal Tenancy Act which authorises an under-*raiyat* to create a further under-lease and, therefore, the plaintiffs have acquired no title. It is argued that section 11 provides for the transfer of permanent tenures and section 18 for the transfer of *raiyati* interest at fixed rent: there is no provision for the transfer of under-*raiyati* interests and it has been held that they are not transferable. See *Amirunnissa* v. *Jinnat Ali* (2). A transfer according to the Transfer of Property Act includes a lease and, therefore, the grant of a sub-lease by an under-*raiyat* is void. We think that this argument is fallacious; in the first place, because the Transfer of Property Act has no application and in the next place the transfer contemplated in sections 11 and 18 are transfers out and out and not partial transfers by way of sub-lease. There is no provision in the Bengal Tenancy Act which expressly authorises the grant of sub-leases. Even section 85 does not authorise a sub-lease, it only limits the period of the grant. There is no provision for the grant of leases by tenure-holders, but such leases are recognised by the Act in the definition of a tenure-holder. In the same way the grants of under-leases of any degree are recognised by the definition of the word "under-*raiyat*" as tenants holding immediately or mediately under a *raiyat*.

Then it is contended that when section 85 of the Bengal Tenancy Act allows the *raiyat* to grant a sub-lease for nine years only, the under-*raiyat* cannot be allowed to grant a permanent right. That may be so and the permanency granted may be limited to the existence of the right of the grantor; but there is no provision in the law which prohibits such grants, none that such grants shall not be registered, and the prohibition under section 85 cannot be expanded by analogy, *Guru Das Das* v. *Kali Das Changa*: (1). The sub-leases granted to the plaintiffs are, therefore, valid documents between the grantors and the grantees, and the defendant No. 1 having granted the lease cannot be allowed to derogate from the same; nor

(1) 24 Ind. Cas. 287; 18 C. W. N. 882.

(2) 27 Ind. Cas. 271; 20 C. L. J. 548; 19 C. W. N. 43.

can defendant No. 2, who derives his title from defendant No. 1, do so.

In this view of the case we think the plaintiffs are entitled to a decree and we dismiss the appeal and affirm the decree of the lower Appellate Court. The plaintiffs are entitled to costs against defendants Nos. 1 and 2.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2631 OF 1913.

November 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

KAJANA VENKOBA RAO—PLAINTIFF—APPELLANT

versus

SASTHA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras District Limits Act (I of 1865)—Madras Estates Land Act (I of 1908), ss. 192, 209 (1)—Civil Procedure Code (Act V of 1908), ss. 150, 158—General Clauses Act (X of 1897), s. 18—Revenue Division—Venue, transfer of, from one Revenue Division to another—Jurisdiction of new Court over suits pending in old division—Transfer, formal, of suit, if necessary.

Where, by a notification published by the Government in the Local Official Gazette under and by virtue of the powers vested in it by the Madras District Limits Act, I of 1865, the *venue* was changed by the transfer of the area from one Revenue Division to another:

Held, that on the publication of the notification in the Gazette, the Collector of the new Revenue Division acquired jurisdiction over all revenue suits then pending in respect of holdings situated in or connected with the area so transferred and that no formal transfer of the suits from the old to the new Court was necessary to give such jurisdiction. [p. 270, col. 1.]

Subbiah Naicker v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; 1 L. W. 251; 26 M. L. J. 189; (1914) M. W. N. 205; 37 M. 462, followed.

Second appeal against the decree of the District Court of Tinnevelly in Appeal Suit No. 429 of 1910, preferred against that of the Court of the Revenue Divisional Officer of Tuticorin in Summay Suit No. 22 of 1910.

FACTS.—While a suit was pending in the Court of one Revenue Division, the suit area was transferred from that Revenue Division to Tuticorin Revenue Division by a notification published in the Gazette by the Local Government acting under powers vested in it by the Madras District Limits Act, I of 1865. The Revenue Divisional Officer of Tuticorin then heard the case and disposed of it. The defendants appealed to the District Court against the decree and contended that the Tuticorin Court had no jurisdiction as the suit was not formally transferred to it. The District Judge upheld this contention and dismissed the suit. The plaintiff thereupon appealed to the High Court.

Mr. *S. Srinivasa Iyengar*, for the the Appellant:—No formal transfer of suit is necessary to give jurisdiction to the Tuticorin Court. The notification itself confers jurisdiction. See Madras Estates Land Act, sections 209 (1) and 192, General Clauses Act, section 18 and Code of Civil Procedure, sections 150 and 158. See also *Subbiah Naicker* v. *Ramanathan Chettiar* (1).

JUDGMENT.—Under Madras Act I of 1865, the MadrasExecutive Government was given power bythe Madras Legislature to alter the limits of existing districts, that is, existing Revenue Divisions and the Madras Estates Land Act, section 209 (1), read with other sections of the Act, gives jurisdiction in suits and proceedings taken under the Act to the Collector of the Revenue Division in which the holding or major portion of the holding in connection with which the suit is brought or the proceedings are taken, is situated. Under section 192 of the Madras Estates Land Act, read with section 18 of the General Clauses Act and section 158 of the Code of Civil Procedure, section 150 of the Code of Civil Procedure applies to suits and proceedings under the Madras Estates Land Act. This Court has held in *Subbiah Naicker* v. *Ramanathan Chettiar* (1) that the business of a Court which has ceased to have jurisdiction over a certain area is transferred (so far as that business relates to suits and proceedings connected with lands in that area) to the new Court to whose jurisdiction that area has been transferred.

For similar reasons, we hold that the Tuticorin Revenue Court acquired jurisdiction

(1) 22 Ind. Cas. 899; 26 M. L. J. 189; 1 L. W. 251; (1914) M. W. N. 205; 37 M. 462.

over the Revenue suit in question on the publication in the Gazette of the notification transferring the plaint area to it, and that no order of transfer by the High Court was necessary for it to acquire such jurisdiction. The decision of the learned District Judge is set aside and he is requested to re-admit to his file the appeal presented to his Court and dispose of it according to law. Costs will abide the result.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 91 OF 1914, CONNECTED WITH CIVIL REVISION No. 140 OF 1914.

January 26, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MAHABIR SAHU—OPPOSITE PARTY—APPELLANT

versus

BHIRGU RAI AND OTHERS—APPLICANTS—RESPONDENTS.

Civil Procedure Code Act V of 1908), O. XXI, r. 72 (3), O. XLIII, r. 1 (j), s. 104 (2) Order of Appellate Court setting aside sale in execution—Second appeal, whether maintainable—Revision—High Court's power to interfere with a wrong decision on point of law.

No appeal lies from an order of the Appellate Court setting aside a sale in execution. [p. 270, col. 2.]

Where an appeal is competent to a District Judge from an order passed by a Court of first instance, the High Court cannot interfere in revision with the appellate order of the Judge merely because he decided a question of limitation wrongly. [p. 271, col. 1.]

First appeal from an order passed by the District Judge of Azamgarh, dated the 7th of March 1914, together with an application in revision against the same order.

FACTS.—A judgment-debtor whose property had been sold away at auction, applied for setting aside the sale more than 30 days after it had taken place.

The Munsif rejected the application on the ground that it had been made more than 30 days after the sale. On appeal, the District Judge set aside the sale on the ground that the decree-holder had purchased the property in the name of his son without the Court's permission. He further held that as the application was under section 47, Civil Procedure Code, 30 days' limitation did not apply. The auction-purchaser appealed to the High Court against this order and also filed a revision petition.

Mr. *Lakshmi Narayan*, for the judgment-debtor, raised a preliminary objection that no appeal lay to the High Court. An appeal from an order under Order XXI, rules 72 or 92, lay to the Court below under Order XLIII, rule (j); but no second appeal was allowed by the Code against an order passed on appeal. He relied on *Bhagbut Lal v. Narku Roy* (1).

Mr. *Haribans Sahai*, for the Appellant, contended that the District Judge having wrongly assumed jurisdiction under section 47, Civil Procedure Code, a second appeal lay to the High Court. The sale having been confirmed, the Court below had no jurisdiction to entertain the application of the judgment-debtor. Moreover, under the present law 30 days' limitation is applicable and the application is clearly barred. If there is no appeal, the High Court may interfere in revision.

JUDGMENT.

APPEAL FROM ORDER No. 91 OF 1914.

This is an appeal by a purchaser of property at an execution sale. According to the finding of the lower Appellate Court the decree-holder, Ram Jas Shau, purchased the property in the name of his son, the present appellant. The judgment-debtors applied to have the sale set aside on various grounds, amongst others on the ground that the decree-holder had purchased the property in the name of his son without obtaining the permission of the Court. The Munsif rejected the application. On appeal the District Judge held that the purchase was really made by the decree holder himself and finding that the property fetched a very low price, he set aside the sale. As the order was clearly one passed under Order XXI, rule 72, clause (3), an appeal lay to the District Judge under Order XLIII, rule 1 (j), but a further appeal to this Court is clearly barred by section 104, sub-section 2, of the Code. This appeal, therefore, fails and is dismissed with costs.

CIVIL REVISION No. 140 OF 1914.

This application for revision was presented along with first appeal from Order No. 91 of 1914, which we have

(1) 21 C. 789.

disposed of to-day. We have held that the present applicant had no right of appeal to this Court against the order of the District Judge. The applicant anticipating this decision filed this application for revision of the same order. In support of this application it is contended that the District Judge had no jurisdiction to set aside the sale because before the application of the judgment-debtors to have the sale set aside was made the sale had been confirmed and because the application having been made more than thirty days after the date of the sale, was barred by limitation under Article 166 of the first Schedule to the Limitation Act. The learned District Judge does not in so many words say so, but it seems to us probable that he treated the case as being covered by section 18 of the Limitation Act, as the judgment-debtors in this application to have the sale set aside said that the decree-holder had purchased the property without the knowledge of the judgment-debtors. Whether this was the view of the learned Judge or not matters little. He may have been wrong in holding that the judgment-debtors application was within time; but we cannot interfere in revision with his order merely because he decided the question of limitation wrongly. It is quite clear that he had jurisdiction to entertain the appeal and dispose of the matter before him. This application fails and is dismissed with costs.

Appeal and application both dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1154 OF 1913.

December 16, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

DASI SWARNAM—DEFENDANT—APPELLANT

versus

DEIVANAYAGAM PILLAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Gift, deed of—Compulsory registration—Subsequent deed executed and registered by donor—Prior gift revoked.

A registration against the wishes of the donor will not render an instrument of gift effective. [p. 272, col. 1.]

Where, therefore, the deceased executed a deed of gift in favour of the defendant who got it registered after the donor's death, and subsequently executed and registered another deed of gift in favour of the plaintiffs' predecessor-in-title:

Held, that the gift in favour of the defendant was revoked by the donor and the prior deed, having been registered against her wishes, did not carry any title to the defendant. [p. 272, col. 1.]

Ramamirtha Ayyan v. *Gopala Ayyan*, 19 M. 433; 6 M. L. J. 207, followed.

Meiyyalu Nadan v. *Anjalay*, 25 M. 672; 12 M. L. J. 409, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Appeal Suit No. 385 of 1912, preferred against that of the Additional District Munsif of Tinnevelly, in Original Suit No. 275 of 1910.

FACTS.—A lady executed a deed of gift of certain immoveable properties belonging to her in favour of the appellant (defendant), but did not register it. She then executed another deed of gift of the same properties in favour of the respondents (plaintiffs) and got it registered. The appellant then presented her deed for compulsory registration and it was actually registered after the donor's death. The Courts below held that the gift in favour of the defendant had been revoked. She, therefore, preferred this second appeal.

Dr. *S. Swaminadhan*, for the Appellant:—As the gift in favour of the appellant was prior in date and as registration related back to the date of execution, it had priority over the one in favour of the respondents. The decision in *Ramamirtha Ayyan* v. *Gopala Ayyan* (1) is not good law. It has not been followed in *Meiyyalu Nadan* v. *Anjalay* (2). See also *Musammat Parbati* v. *Baijnath Pathak* (3) and *Khushaba* v. *Chandra Bhagabai* (4).

Mr. *S. E. Sankara Iyer*, for the Respondents, was not called upon.

JUDGMENT.—The appellant claims the property under a deed of gift in her favour executed on the 7th December. It was not registered during the life-time of the donor, who executed and registered another deed of gift of the same property in favour of the respondents' predecessor-in-title on the 15th December. The appellant presented her

(1) 19 M. 433; 6 M. L. J. 207.
(2) 25 M. 672; 12 M. L. J. 409.
(3) 16 Ind. Cas. 406; 35 A. 3; 10 A. L. J. 300.
(4) 32 B. 441; 11 Bom. L. R. 536.

deed for registration three days before the donor's death and she stated in her petition that the donor was unwilling to register it. It was registered after the donor's death. The gift in favour of the appellant was undoubtedly revoked by the donor and the registration was against her wishes. There is, therefore, no valid gift if the decision in *Ramamirtha Ayyan* v. *Gopala Ayyan* (1) is right. The appellant's Counsel contends on the authority of *Meiyyalu Nadan* v. *Anjalay* (2), *Musammat Parbati* v. *Baij Nath Pathak* (3), *Khushaba* v. *Chandra Bhagabai* (4), that that decision should not be followed. The later Madras decision only holds that if the document is registered after the donor's death by the legal representative or with his consent, it is not invalid by reason of the registration having taken place after the donor's death. There is no inconsistency between this and the case in 19 Madras, which holds that registration against the wishes of the donor will not render an instrument of gift effective. The decision in 19 Madras does not, in our opinion, apply to a case in which the registration was not against the wishes of the donor. We are not prepared to differ from this decision.

It was also argued that the gift in favour of the respondents' predecessor-in-title is void, as it was executed by the donor under undue influence. It is found as a fact that this was not so.

The second appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 53 OF 1915.

February 9, 1915.

Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.

Saith INDRAJ—PLAINTIFF—APPELLANT

versus

BROTHER CLEMENT, MISSIONARY IN-CHARGE, R. C., AGRA—DEFENDANT—RESPONDENT.

Pre-emption—Custom—Co-sharer, prior right of, to purchase—Offer of sale—Co-sharer refusing to give more than a specified sum—Conduct—Vendor, right of, to sell to strangers—Fair opportunity of purchase—Bona fides of vendor.

Where in pursuance of the custom of pre-emption providing that a co-sharer wishing to sell must first offer the property to his co-sharers, the vendor offered the property to the plaintiff his co-sharer, who offered only Rs. 160 and refused to give more, and then sold the property to the vendee for Rs. 235:

Held, that under the circumstances the conduct of the plaintiff amounted to a refusal to purchase the property when it was offered to him. [p. 272, col. 2.]

Semble—In a case where the custom of pre-emption exists the vendor must act *bona fide*, and the pre-emptor must have a fair opportunity of purchasing the property. [p. 273, col. 1.]

Second appeal from the decision of the District Judge of Meerut, dated the 22nd September 1914.

Dr. *S. N. Sen*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The alleged custom is that the co-sharer wishing to sell must first offer the property to his co-sharers. In the present case the Court below has found that the vendor, wishing to sell, first offered the property to the plaintiff and that the plaintiff offered ony Rs. 160 and "*refused to give more.*" The vendor then went to the vendee and sold the property for Rs. 235. The Court below has found under these circumstances that the plaintiff refused to purchase the property and on that ground dismissed the suit. If this finding is justified it concludes the appeal. It seems to us that the Court below was not only justified but was perfectly right in holding that the conduct of the plaintiff amounted to a refusal to purchase the property when it was offered to him.

The vendor was entitled to assume that the plaintiff would not give Rs. 235 when he had refused to give more than Rs. 160.

Reliance is placed upon the case of *Kanhai Lal* v. *Kalka Prasad* (1). In that case no doubt the Court held that the vendor was bound when he had concluded a definite arrangement with a stranger to offer the property to the person entitled to pre-empt, although he had previously refused to purchase. It does not appear very clearly from the report what was the custom found to exist. We think it can hardly be contended that where the custom is that the first offer must be made to the co-sharers the vendor must, after offering the property to the co-sharers, find a stranger

(1) 27 A. 670; A. W. N. (1905) 149; 2 A. L. J. 390.

willing to buy, conclude a bargain with him, and then return to his co-sharers and offer the property to them. Surely in a case like the present the vendor has complied with the custom, if he has informed the pre-emptor of his desire to sell and ascertained from him either that he does not wish to buy or the price beyond which he is not willing to go. It would almost seem that a custom which required the vendor to do more than this would be an unreasonable custom. Of course the vendor must give clear information of his intention to sell and we are very far from saying that if the pre-emptor expressed his willingness to purchase at a specific price the vendor would be justified in selling the property for practically the same price to a stranger without first informing the pre-emptor. In other words, the vendor must act *bona fide* and the pre-emptor must have a fair opportunity of purchasing the property. Under the circumstances of the present case we think the view taken by the Court below was correct, and dismiss the appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2265 OF 1913.

April 14, 1914.

Present:—Mr. Justice Johnstone.

GODHA RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DEVI DAS—PLAINTIFF—RESPONDENT.

Malicious prosecution—False information to Police, whether commencement of prosecution—Suit for damages, whether maintainable—Quantum *of damages—Second appeal.*

A prosecution cannot be said to commence on presentation of a complaint nor upon the giving of a piece of information to the Police. But the mere fact that a prosecution may not have commenced does not conclude the matter against the plaintiff in a suit for damages for malicious prosecution. [p. 276,col. 1.]

In a suit for damages for malicious prosecution the plaintiff's allegations were that by a trick on the part of the defendants he took over a parcels, in which, among other things there was some opium the existence of which was not known to him, that the defendants informed a Police constable that plaintiff was in unlawful possession of opium and, so got him arrested and that for three days the Police kept plaintiff with them and made investigations and then found he was innocent. It appeared that no process was issued by a Magistrate in the case and the plaintiff was not formally put under arrest or detained in the lock-up:

Held, (1) that the plaintiff had suffered definite and tangible injury in consequence of the defendants' wrongful and wilful act and was, therefore, entitled to damages; [p. 276, col. 1.]

(2) that the Court may on second appeal go into the matter of the *quantum* of damages. [p. 276, col. 1 & 2.]

Ahmed Bhai v. *Framji Edulji*, 28 B. 226; 5 Bom. L. R. 940, dissented from.

Golap Jan v. *Bhola Nath Khetry*, 11 Ind. Cas. 311; 15 C. W. N. 917;38 C. 880; *Gaya Prasad* v. *Bhagat Singh*, 30 A. 525 (P. C.); 12 C. W. N. 1017; 35 I. A. 189, followed.

De Rozario v. *Gulab Chand Anundjee*, 6 Ind. Cas. 877; 37 C. 358, distinguished.

Sheikh Meeran Sahib v. *Ratnavelu Mudaly*, 21 Ind. Cas. 703; 25 M. L. J. 1; 37 M. 181, *Yates* v. *The Queen*, 14 Q.B.D. 648 at p. 661; 54 L.J.Q.B. 258; 52 L. T. 305; 33 W. R. 482; 49 J. P. 436, *Clarke* v. *Postan*, (1834) 6 Car. & P. 423; 40 R. R. 811, *Narasinga Row* v. *Muthaya Pillai*, 26 M. 362; 12 M. L. J. 389, referred to.

Second appeal from the decree of the Divisional Judge, Shahpur Division, at Sargodha, dated the 12th August 1913, varying that of the Subordinate Judge, Sargodha, dated the 20th March 1912, decreeing plaintiff's claim in part.

Rai Bahadur Pandit *Sheo Narain* and Mr. *Miran Bakhsh*, for the Appellants.

Messrs. *Pestonji Dadabhai* and *Bhagat Ram Puri*, for the Respondent.

JUDGMENT.—In this case plaintiff Devi Das sued Godha Ram and his two sons, Ram Lal (major) and Ishar Das (minor), for Rs. 1,500 damages, plaintiff's allegations in brief being that by a trick on the part of defendants plaintiff took over a parcel in which, among other things, was some opium; that plaintiff was not aware of the presence of the opium in the parcel; that at Miani Railway Station Godha Ram informed the Police constable Mauj Ali that plaintiff was in unlawful possession of opium and so got him arrested; and that for three days the Police kept plaintiff with them and made investigations and then found he was innocent. No process was issued by a Magistrate in the case and plaintiff does not appear ever to have been formally in arrest or detained in the lock-up.

The first Court passed a decree for Rs. 500 with full costs against Godha Ram alone, absolving both sons as being mere tools in his hands. Plaintiff and Godha Ram both appealed, the appeal of the latter being dismissed with costs while plaintiff's appeal was allowed to this extent that the major son, Ram Lal, was

held liable along with his father. In that appeal defendants had to pay plaintiff's costs.

Plaintiff has appealed here (No. 2266 of 1913) for his full claim (Rs. 1,500), while Godha Ram (with whom Ram Lal was joined later, Mr. Pestonji before me intimating he had no objection) in his appeal -No. 2265 of 1913—asks for complete absolution. The latter appeal is most conveniently taken up first.

In it Mr. Sheo Narain's point is that, accepting the findings of fact, as he is compelled to do, no case for damages has been made out because no process or warrant was issued by any Magistrate against plaintiff, nor was plaintiff ever arrested. Mr. Sheo Narain would have it that nothing more happened than that his client Godha Ram gave certain information to the constable leaving him to take such action as he might think right, that the constable intimated to plaintiff that he had been told he was in possession of opium and took over the parcel and told plaintiff the matter must be investigated, inviting plaintiff to go with him and remain present; and that plaintiff in his own interests remained with the Police and cleared himself of the suspicion attaching to him. And in support of the view given, Mr. Sheo Narain quoted *De Rozario* v. *Gulab Chand Anundjee* (1) (and the Bombay ruling cited therein), *Golap Jan* v. *Bhola Nath Khetry* (2) and *Sheikh Meeran Sahib* v. *Ratnavelu Mudaly* (3).

The case in *De Rozario* v. *Gulab Chand Anundjee* (1) was tried by a single Judge (Mr. Justice Fletcher) on the original side of the Court. A complaint had been made to a Magistrate and a search warrant asked, for but the Magistrate deferred issue of process and sent the case to the Police under section 202, Criminal Procedure Code, for inquiry and report; and before anything further was done, the complainant wrote to the Police Inspector saying he did not want to proceed and did not want search made. The proceedings, therefore, stopped and the complaint was dismissed. The learned Judge on these facts held that accused's plaint asking for damages from the complainant on the score of alleged false and malicious complaint disclosed no cause of action. The ruling *Yates* v. *The Queen* (4) was followed, and not *Ahmed Bhai* v. *Framji Edulji* (5) and *Clarke* v. *Postan* (6), which were in conflict with it.

The ruling in 38 Calcutta (2) was on an appeal. It was held that, where a complaint had been laid before a Magistrate by the defendant against the plaintiff for criminal breach of trust, and the Magistrate had referred the matter to the Police under section 202, Criminal Procedure Code, for inquiry and report and finally dismissed the complaint under section 203 without issuing process, the prosecution had not commenced and no suit for "malicious prosecution" was maintainable. Therefore the judgment proceeds thus:

"But if the conditions requisite to a suit for malicious prosecution have not been established, does the plaint disclose facts otherwise entitling him (plaintiff) to relief? It has been suggested before us that the facts are such as disclose injury and loss and, therefore, relief should be awarded.

"There are, it is true, certain wrongs akin to malicious prosecution *which entitle the person aggrieved to sue**, as for instance, malicious abuse of the process of the Court, malicious arrest, malicious search, and malicious execution. But none of them are applicable to the facts of this case.

"What then is the plaintiff's grievance? There was no interference with his property, he did not become an accused; and his freedom was not directly in jeopardy. The utmost that he can aver is that he was defamed.

"Now apart from certain qualifying conditions defamation is a good cause of action; but even if the complaint to the Magistrate was defamatory still the complainant was entitled to protection from suit, and this protection was the absolute privilege accorded in the public interests to those who make statements to the Courts in the course of, and in relation to, judicial proceedings.

(1) 6 Ind. Cas. 877; 37 C. 358.
(2) 11 Ind. Cas. 311; 38 C. 880; 15 C. W. N. 917.
(3) 21 Ind. Cas. 703; 25 M. L. J. 1; 37 M. 181.
(4) 14 Q. B. D. 648 at p. 661; 54 L. J. Q. B. 258; 52 L. T. 305; 33 W. R. 482; 49 J. P. 436.
(5) 28 B. 226; 5 Bom. L. R. 940
(6) (1834) 6 Car. & P. 423; 40 R. R. 811.

* My italics.

(Sd.) *D. C. Johnstone, Judge.*

I therefore, hold that the plaint does not disclose facts entitling the plaintiff to relief."

In the Madras Law Journal case (3) a similar result was arrived at, the facts being that defendant lodged a complaint accusing plaintiff of defamation, that the Magistrate issued a notice to plaintiff informing him that preliminary inquiry under section 202, Criminal Precedure Code, was to be had, that inquiry was made and both parties were heard, and that the complaint was then dismissed. The *ratio decidendi* was that, notwithstanding issue of aforesaid notice, prosecution had not begun, and that the proceedings that did take place could not be attributed to the defendant so as to render him responsible for any damage caused thereby to the plaintiff.

Mr. Pestonji, for plaintiff, relies upon *Ahmedbhai* v. *Framji Edulji* (5), already mentioned, certain remarks in *Golap Jan* v. *Bhola Nath Khetry* (2) and *Gaya Prasad* v. *Bhagat Singh* (7). In the Bombay case it was laid down simply that a prosecution "commences when a complaint is made, and that it is not necessary, in order to maintain an action for malicious prosecution, that the charge was acted upon by the Magistrate."

The Privy Council case in 30 Allahabad (7) seems to me a useful guide in such cases as the present, if it be carefully analysed and understood. The ruling in *Narasinga Row* v. *Muthaya Pillai* (8) having been cited on behalf of the defendant in a case of damages for malicious prosecution, their Lordships first addressed themselves to the question, who is the "prosecutor" in criminal trials in India. The Madras High Court had laid it down that the only person who can be sued in an action for malicious prosecution is the person who prosecutes and went on to say:—

"In this case, though the first defendant may have instituted criminal proceedings before the Police, he certainly did not prosecute the plaintiff. He merely gave information to the Police, and the Police, after investigation, appear to have thought fit to prosecute the plaintiff. The first defendant is not responsible for their act and no action lies against him for malicious prosecution."

Commenting on this *dictum* their Lordships of the Privy Council remark that the principle laid down was sound enough if properly understood, but was not of universal application. The Police in India, they say, have special powers of investigation and the judgment* proceeds thus:—

"*If, therefore, a complainant does not go beyond giving what he believes to be correct information to the Police*, and the Police without further interference on his part (except giving such *honest assistance* as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. *But if the charge is false to the knowledge of the complainant*, if he misleads the Police by bringing suborned witnesses to support it, if he influences the Police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him."

In the Privy Council case plaintiff was actually tried for rioting and acquitted on the ground that the charge was false.

No Punjab case has been cited and none is known to me. Consideration of the authorities mentioned above leads me to the following reflections. *Dicta* of English Judges in cases under the Criminal Law of England are no guide for us in India, where the Police have peculiar and well-defined powers under the Criminal Procedure Code; *cf.* remarks of Sir Lawrence Jenkins, C. J., in 38 Calcutta 880 at page 887, last paragraph. The case decided by Mr. Justice Fletcher [*De Rozario* v. *Gulab Chand Anundjee* (1)] has little or no application here: before any steps had been taken except an order of the Magistrate for preliminary inquiry by the Police, defendant himself stopped the proceedings, and, therefore, clearly no injury of any kind had been done to the plaintiff. In *Golap Jan* v. *Bhola Nath Khetry* (2) the principles laid down are—

(*a*) Until summons or warrant is issued on a complaint, directing the accused to appear and stand his trial, there is no "prosecution."

(*b*) Where no "prosecution" has commenced, no suit for damages for malicious prosecution will lie.

(7) 30 A. 525 (P. C.); 12 C. W. N. 1017; 35 I. A. 189.

(8) 26 M. 362; 12 M. L. J. 389.

*The ilatics are mine.

(*Sd.*) *D. C. Johnstone, Judge.*

MALLAH v. BEHARI.

(c) Even if no suit on account of malicious prosecution lies, an aggrieved person may sue for damages for certain wrongs, *such as malicious arrest* and so forth.

(d) Such a person has an action at law if there has been interference with his property, if he became "an accused" or *if his freedom was directly in jeopardy.*

(e) A defendant, in such circumstances as those disclosed in the case, is "privileged" in regard to a suit for damages for defamation.

In deference to the weight of authority on the opposite side I am constrained to dissent from the Bombay *dictum* that "prosecution" begins upon presentation of a complaint; and I certainly cannot agree that "prosecution" begins upon the giving of a piece of information to the Police. But on the strength of the principles (c) and (d) stated above and of the Privy Council ruling, and especially the *dicta* in italics quoted from it, I am inclined to hold that the mere fact that a "prosecution" may not have commenced, does not conclude the matter against plaintiff. There may be "privilege" in connection with defamation, as the Calcutta Court holds; but there is no such thing in connection with injury done to the plaintiff by a person wilfully making to the Police what he knows to be a *false* statement with the obvious intention of causing the Police to take action against the plaintiff. No doubt in the Privy Council case the defendant had done a good deal more than make a wilful false statement; but in my opinion the principle indicated still stands. Here, in consequence of defendants' wrongful and wilful act plaintiff suffered annoyance and perturbation of mind in a public place, was virtually obliged to accompany the Police to the *thana*, and to remain at their service for some days, away from his home and from his own business and private affairs, and so suffered definite and tangible injury; and I can see no good reason for holding that the law cannot compensate him for all this at the expense of the wrong-doer. I, therefore, dismiss Godha Ram and Ram Lal's appeal No. 2265 of 1913 with costs.

As to plaintiff's appeal I overrule Mr. Sheo Narain's objections that the *quantum* of damages is not a matter for second appeal. On the merits I am of opinion that Rs. 500 is not sufficient compensation in the circumstances and I raise the amount to Rs. 1,000. I accept plaintiff's appeal with costs in full.

Appeal No. 2265 dismissed;
Appeal No. 2266 accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 117 OF 1914.

February 10, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MALLAH—DEFENDANT—APPELLANT

versus

BEHARI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Adverse possession—Joint tenancy—Co-sharer, adverse possession of—Possession of one co-sharer—Presumption—Ouster—Burden of proof.

In a suit for possession by one co-sharer against another the plaintiff is entitled in the first instance to rely on the presumption that the possession of the defendant was on behalf of the plaintiff. It lies upon the defendant to prove that he set up an adverse title to the plaintiff's share to the knowledge of the plaintiff for more than 12 years before the suit. [p. 277, col. 1.]

The fact that the plaintiff did not receive profits for many years alone does not raise a presumption of his ouster. [p. 277, col. 1.]

Gangadhar v. Parash Ram, 29 B. 300; 7 Bom. L. R. 252, distinguished.

First appeal from an order of the First Additional District Judge of Aligarh, dated the 29th April 1914.

Mr. *Mohan Lal Sandal*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the First Additional Judge of Aligarh remanding for trial on the merits a suit which had been dismissed as barred by limitation by the Munsif of Bulandshahr. The plaintiffs and the defendant were co-sharers in an occupancy holding. The plaintiffs brought this suit for recovery of Rs. 189-6-0 on account of profits of their share for the years 1318 to 1321 *Fasli*, on the allegation that the defendant had wrongfully taken possession of the entire holding and refused to give the plaintiffs any portion of the profits. The Munsif found that the plaintiffs had failed to prove possession or

enjoyment of profits within 12 years of the suit. On appeal the Additional Judge held that as the plaintiffs and the defendant had been admittedly joint occupancy tenants of the land, it was for the defendant to prove that he had ousted the plaintiffs from their share. In appeal it is contended that this view of the law is erroneous. In *Ahmad Raza Khan* v. *Ram Lal* (1), decided on the 16th of December 1914, we held that in a case of this kind the plaintiffs are entitled in the first instance to rely on the presumption that possession was held by the defendant on behalf of the plaintiffs, and that it lay upon the defendant to prove that he had set up an adverse title to the plaintiffs' share to the knowledge of the plaintiffs for more than 12 years before suit. In the present case the defendant failed to prove this. It is urged that our decision in the case cited recognises that there may be cases of exceptional nature in which ouster may be presumed, and we are referred to the case of *Gangadhar* v. *Parash Ram* (2) on this point. We are asked to presume that the defendant ousted the plaintiffs from their share more than 12 years before this suit. In the Bombay case the lower Appellate Court had held in effect on the facts that there had been an ouster, and the High Court said that it was impossible for them to hold that there was no evidence of such ouster. They, therefore, dismissed the appeal. But in the present case the Additional Judge has declined to presume that there was an ouster of the plaintiffs, and we are not prepared to hold as a matter of law that ouster should be presumed in the present case. All that is known is that for many years the plaintiffs did not receive the profits of their share. In our opinion the view taken by the Additional Judge was correct. We dismiss this appeal with costs.

Appeal dismissed.

(1) 26 Ind. Cas. 922; 13 A. L. J. 204.
(2) 29 B. 300; 7 Bom. L. R. 252.

S. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 208 OF 1914.

November 18, 1914.

Present: Mr. Justice Sadasiva Aiyar.

In re KAKARAPALLI POTHURAJU—APPELLANT—DEFENDANT.

Madras Estates Land Act (I of 1908), s. 6—Sub-lessee of a kudivaram *tenant, if acquires occupancy rights by virtue of statutory provision.*

Under section 6 of the Madras Estates Land Act I of 1908, the sub-lessee of a *kudivaram* tenant does not acquire occupancy right in the holding, even though he was granted a *patta* direct by the *zemindar*.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in Appeal Suit No. 64 of 1913, preferred against that of the Court of the District Munsif of Cocanada, in Original Suit No. 493 of 1910.

FACTS.—The suit was for the recovery of possession of certain lands on the strength of a sale-deed. The 2nd defendant, who was in possession as the sub-lessee of the vendor (the 1st defendant), contended that he had acquired occupancy right in the land by virtue of section 6 of the Madras Estates Land Act (I of 1908) and was, therefore, not liable to be ejected. The lower Courts decreed the suit. The 2nd defendant thereupon preferred this second appeal.

Mr. T. Prakasam, for the Appellant:—The 2nd defendant having been in possession on the date the Madras Estates Land Act came into force, he acquired occupancy rights in his holding by virtue of section 6 of the said Act. He is, therefore, not liable to be evicted.

JUDGMENT.—On the finding that the 2nd defendant held possession of the plaint half share as sub-lessee under the *kudivaram* tenant (the 1st defendant, who is the plaintiff's vendor), 2nd defendant's possession at the time of the passing of the Estates Land Act must be treated as the possession of the 1st defendant himself. Such possession in 2nd defendant cannot give the 2nd defendant independent *kudivaram* right in the land even if the *zamindar* gave *patta* direct to the 2nd defendant.

The provisions of section 6 will act in favour of the 1st defendant if the 1st defendant is at all under the necessity to invoke its provisions in support of his title.

The second appeal is dismissed.

Appeal dismissed.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 1002 OF 1914.

February 17, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

RANG LAL KUAR AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

KISHORI LAL AND OTHERS—DECREE-HOLDERS RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 21 (2)—Mortgage of occupancy holding before passing of Act—Decree for possession—Execution.

Where a decree for possession of an occupancy holding was passed in 1912 in favour of the mortgagee on foot of a usufructuary mortgage executed prior to the passing of the Agra Tenancy Act, 1901, the Court was bound to execute the decree and the mortgagee decree-holder was entitled to possession under it.

Babu Lal v. Ram Kali, 3 A. L. J. 40; A. W. N. (1906) 28; *Harbans Rai v. Seiniwas Rao Kalin*, 12 Ind. Cas. 631; 8 A. L. J. 1301, referred to.

Second appeal from the decision of the District Judge of Ghazipur.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Damodar Das*, for the Respondents.

JUDGMENT.—This is a second appeal by the judgment-debtors. An occupancy holding was usufructuarily mortgaged on January 25th, 1900, to one Dwarka Prasad whose interest has now devolved upon the present decree-holders, Kishori Lal, etc. Possession was not given to the mortgagee, who brought a suit in which he sought in the alternative either to recover his money or get possession of the property. On June 6th, 1912, a decree for possession was awarded to the mortgagee as such. An objection was taken in the course of the suit by the defendants that the transfer was illegal and that the plaintiffs were not entitled to possession. The Court decided in favour of the mortgagee, holding that mortgage was valid and that the plaintiffs as such were entitled to possession and accordingly it gave a decree for possession. Having obtained the decree execution was sought and again the judgment-debtors came forward and pleaded that possession could not be given to the decree-holders in execution of the decree by reason of section 20 of the Tenancy Act. The Subordinate Judge allowed this plea and dismissed the application. The lower Appellate Court has set aside the decision of the first Court and has ordered possession to be delivered to the decree-holders in execution of the decree. The judgment-debtors come here in second appeal and it is urged that whatever may have been decreed, still clause 2 of section 21 says clearly that the interest of an occupancy tenant is not transferable in execution of a decree of the Civil Court and, therefore, the Civil Court's decree cannot be executed. In view of the decision of this Court in the case of *Babu Lal* v. *Ram Kali* (1) and in *Harbans Rai* v. *Sriniwas Rao Kalin*(2), the plea has absolutely no force at all. It has been decided as between the parties finally in the course of this suit that the plaintiffs are entitled to possession. The decree has been obtained. Under the rulings of this Court the mortgage, which was made before the present Tenancy Act came into force, was a good one and the mortgagee was, therefore, entitled to enforce his decree. Over and above this the executing Court cannot go behind the decree. That decree states that the plaintiff shall be put into possession and the Court is bound to execute it. There is no force in the appeal. We dismiss it with costs.

Appeal dismissed.

(1) 3 A. L. J. 40; A. W. N. (1906) 28.
(2) 12 Ind. Cas. 631; 8 A. L. J. 1301.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 179 OF 1912.

January 12, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

ALAGU CHETTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

PALANIAPPA CHETTIAR AND OTHERS—RESPONDENTS—PLAINTIFFS.

Hindu Law—Custom—Athangudi Chetties *or* Yezhoor Nagarathars *of Madura District*—Patnibhaga—Mooppu—Mooppu Muri.

One of the tests to be applied for ascertaining the existence of a valid custom is to see whether the right claimed was ever contested and whether the persons who, but for such custom, would, under the general law, be entitled to certain property, abandoned the contest and suffered themselves to be excluded, thus accepting it consciously as having the force of law. [p. 279, col. 1.]

ALAGU CHETTY *v.* PALANIAPPA CHETTIAR.

Rama Nand v. *Surgiani*, 16 A. 221; A. W. N. (1894) 47 and *Mirabivi* v. *Vellayanna*, 8 M. 464, followed.

Temmakal v. *Subbammal*, 2 M. H. C. R. 47, referred to.

Where there is no proof that people living in a particular area voluntarily adopted a method of division of property which is contrary to Hindu Law applicable to their caste, it is unreasonable to recognise the existence of such a custom and impose it upon all the persons of the caste resident in the area, whether or not they have entered into special agreements. [p. 280, col. 2.]

In a suit to obtain a partition of family properties, the plaintiffs set up the existence of a custom among the *Athangudi Chetties* or *Yezhoor Nagarathars* of the Madura District, to which community the parties belonged, by which the division was effected *per stirpes* according to the number of wives having sons (or according to *patnibhaga*) and not *per capita* among all the sons (or according to *putrabhaga*). They also set up another custom according to which a member of the community who wished to marry a second wife during the life-time of the first, could only do so after reporting the matter to the *nagarathars* or headmen of the village and executing an agreement, styled *mooppu muri*, binding himself to set apart a certain sum of money or extent of immoveable property or both (which provision was known as *mooppu*) as and for the maintenance of his discarded wife, which *mooppu* became her separate and absolute property, descendible to her own sons:

Held, that the custom as regards *patnibhaga* was not proved but as regards the provision for *mooppu* was made out. [p. 281, cols. 1 & 2.]

Appeal against the decree of the Court of the Subordinate Judge of Madura, in Original Suit No. 44 of 1910.

FACTS.—The suit was for partition of family properties. The plaintiffs set up the custom of dividing property by *patnibhaga* and of providing *mooppu* for a discarded wife, which descended to her heirs. The Subordinate Judge held the custom proved and decreed the plaintiffs' claim. The defendants appealed to the High Court.

Messrs. *T. Rangachariar* and *K. V. Krishnaswami Iyer*, for the Appellants:—The custom of *patnibhaga* set up by the plaintiffs has not been proved. Such a custom does not exist in Southern India. The only instance of its existence is found in *Temmakal* v *Subbammal* (1). In the Sadar Decisions of 1849, p. 27, it is declared as opposed to law. Further, the evidence let in does not show that the custom alleged was ever contested and finally accepted. See *Rama Nand* v. *Surgiani* (2) and *Mirabivi* v. *Vellayanna* (3). It is conspicuously absent in Exhibit I, which is a very important document.

Messrs. *K. Srinivasa Iyengar*, *K. N. Aiya*, *T. M. Krishnaswami Iyer* and *C. Krishnama Chariar*, for the Respondents:—There is nothing unreasonable or illegal in the custom, which is amply proved by the evidence in the case. Exhibit C would be binding upon the parties.

JUDGMENT.

SPENCER, J.—The first question is whether the plaintiffs have proved a custom claimed to exist among the community of certain Chetties known as *Athangudi* Chetties or *Ezhoor Nagarathars*, living in seven villages of the Madura District, of dividing family property among sons according to their mothers instead of dividing among all the sons of one father equally. This kind of division is called *patnibhaga*, as distinct from the general rule in Hindu Law of *putrabhaga* and is stated by Mr. Mayne to be prevalent in certain localities in Oudh.

In this Presidency there is no authority for its existence, save in an exceptional instance among *Sudras* in *Temmakal* v. *Subbammal* (1), where there was a reference on the subject to arbitration. In the Sadar Decisions of 1849, page 27, it was declared to be opposed to law and not deserving to be recognised in this part of India. Being a departure from the ordinary rules of Hindu Law and being disputed by the defendants the alleged custom requires strict proof before the Courts will accept it.

To apply the test applied in *Rama Nand* v. *Surgiani* (2), there is no evidence in this case that the right claimed was ever contested and that persons, who, but for such custom, would have been entitled under the general law to certain property, abandoned the contest and suffered themselves to be excluded. The plaintiffs have let in a certain amount of oral and documentary evidence which shows that if a man of this community, who has a wife alive, wishes to marry again, it is usual for him to report the matter to the *nagarathars* or headmen of his village and

(1) 2 M. H. C. R. 47.
(2) 16 A. 221; A. W. N. (1894) 47.
(3) 8 M. 464.

n their presence to bind himself by a written agreement, called *mooppu muri*, to set apart a certain extent of immoveable property, called *mooppu*, for the maintenance of the senior wife and to covenant that if there are sons born by both wives the remainder of the property is to be divided equally in two shares, one share to go to the sons by the first wife and one share to the sons by the second wife. When partition takes place afterwards, this *mooppu* is appropriated by the senior wife's sons as *jeshtabhagam* or elder family's share in addition to the share that they get by division. It is clear from the evidence of P. W. No. 2 and D. W. No. 3 that the object of this practice is to pacify the first wife and her relations, who would not otherwise give their consent to the second marriage. There is no evidence that in Chetty families who do not enter into any such arrangements, division of property among male children *per stirpes* is observed rather than division *per capita*. This being so, the alleged custom is wanting in what was declared in *Mirabivi* v. *Vellayanna* (3) to be the characteristic of a genuine custom, *viz.*, that it is consciously accepted as having the force of law. In fact, in two documents produced on the defendants' side, Exhibits II and III, the ordinary rule of *putrabhaga* is mentioned as being followed among the Chetties of one of these seven villages. The learned Subordinate Judge has noticed that these two documents contain features inconsistent with the ordinary Hindu Law in the shape of adoptions to females, but it is noticeable that they also provide that the adopted son, while succeeding to his adoptive mother's *stridhanam*, shall not lose his right to an equal share of his father's ancestral and self-acquired properties.

Exhibit I is an important document, as it lays down rules of conduct in considerable detail for all the Chetty castemen in the seven villages and is signed by representatives of each village. Among so many detailed regulations for the guidance of the people in matters relating to the social life of the community, such as adoption, marriage and death of members, the document is significantly silent as to this alleged custom of dividing property among sons according to their mothers. But it provides for the settlement of caste disputes by the assembled *nagarathars* without having recourse to the Courts of Law. Then these words occur: "Should any one wish to take a second wife during the life-time of his first wife, he shall do so after informing the *nagarathars* of his village and after making sufficient provision for maintenance of his first wife. Any violation of this rule shall be communicated by the *nagarathars* of this particular village to the *nagarathars* of all the seven villages who shall all assemble at Navianipatti, and the party shall abide by their decision."

This is an indication that all the agreements, which have been filed as Exhibits A to M in this case, are probably the outcome of decisions of the headmen upon cases referred to them by husbands desirous of taking second or third wives during the life-time of their first wife and are not spontaneous expressions of a general usage having the force of law. This view recieves confirmation from the evidence of P. W. No. 3 and D. W. No. 3 who speak of the *nagarathars* arbitrating.

Proof is forthcoming only in two instances where documents have been produced, *viz.*, Exhibits G and L, that such agreements have been acted upon by partitition among an unequal number of sons of different mothers, and these two documents contain no allusion to caste usage as being the origin of the agreement, but both refer distinctly to the presence of the *nagarathars* as a determining factor. There is oral evidence of two other similar partitions in the statements of plaintiffs' witnesses Nos. 4 and 9. While P. W. No. 14 and D. W. No. 3 have stated that they are unaware of any instances of division according to the number of sons in a family, P. W. No. 13 has confessed that he is unaware of any instance of division according to the number of wives.

When there is no proof that people in the said villages voluntarily adopt a method of division of property which is contrary to the Hindu Law applicable to their caste, it would be unreasonable to recognise the existence of such an exceptional custom and to impose it upon all persons of the *Vaisya* caste dwelling within that area, whether they have or have not entered into special agreements. Moreover, the custom, which

the plaintiffs have attempted to prove in this case, is something different from the custom said to be prevalent in isolated parts of Northern India, of division according to mothers or *patnibhaga*. That would embrace the children of different mothers when the father takes a second wife after the death of his first wife. Here there is no evidence that in such a case the sons take unequal shares.

As regards the particular agreement, Exhibit C, with which this suit is concerned as a disposition of property during the father's life-time, it would bind the persons who were parties to it. If there had been any sons alive at the date of its execution, their father's power to deal with the property in which they had interest would be subject to the usual restrictions. The plaintiff, however, and the other sons, who are defendants Nos. 2 to 4 and No. 24, had not been born at the time, and the plaintiff's mother, the 2nd plaintiff, in whose favour it was executed has since died. The present suit was brought to obtain a partition of family property, not for specific performance of the terms of this agreement, and as an agreement relating to immoveable property which is unregistered, Exhibit C has no legal efficacy.

I consider for the above reasons that division according to the number of wives having sons has not been established as a custom and cannot be enforced in this case.

The next question is whether the plaintiffs have established by evidence the existence of a custom in their caste of providing *mooppu* for a wife when her husband marries again during her life-time, *mooppu* being a definite sum of money or a definite extent of land or both allotted to her out of the share that the husband would be entitled to get at a partition of the family property.

There is a large body of evidence both oral and documentary in support of this custom. The documents produced both by plaintiffs and defendants, with the exception of Exhibits IV and VI, refer to the existence of *mooppu* while all the plaintiffs' witnesses speak of the practice and some of those examined for the defendants allude to it, although the defence witnesses Nos.1, 3 and 5 prefer to speak of the agreements to give *mooppu* as maintenance agreements.

Unlike the alleged custom of division according to mothers, which I have already discussed, there is nothing contrary to Hindu Law in an arrangement whereby the head of a family sets apart a piece of land or a sum of money for the maintenance of his discarded wife, or in the rule that the land or money so gifted to the wife devolves upon her heirs as *stridhanam* rather than upon his heirs.

I think, therefore, that the Sub-Judge's finding on this point should be upheld and the declaration that plaintiff is entitled to recover Rs. 600 from the 1st defendant as *mooppu*, Rs. 500 being cash and Rs. 100 the value of lands appropriated by the 18th defendant at division, should be confirmed.

I would, therefore, modify the Sub-Judge's decision on issues Nos. 1, 3 and 10 by altering the declaration that 1st plaintiff is entitled to a one-third share of the family properties belonging to the 1st defendant into a declaration that he is entitled to a one-sixth share, and I would let the declaration as to plaintiffs' right to recover Rs. 600 for *mooppu* stand.

In passing a final decree, the lower Court will allot the 1st plaintiff a one-sixth share of the joint family properties and will make him liable for one sixth of the family debts, if any. Costs will be provided in the final decree. Parties are entitled to give and receive proportionate costs so far as each side has succeeded in this Court.

The objection memorandum is dismissed with costs.

SANKARAN NAIR, J.—I agree.

Decree modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1218 OF 1912.

December 12, 1913.

Present:—Mr. Justice Johnstone.

NANAK SINGH—APPELLANT

versus

EMPEROR—RESPONDENT.

Companies Act (VI of 1882), *ss.* 151, 173, 177 (b) (i) —*Jurisdiction of Court to revise order* suo motu,

MOHFUZ ALI *v.* BIRJI NAND KERAT.

The application against a contributory for payment of call money filed by a Liquidator of a Company, which was being voluntarily wound up, was dismissed by the District Judge, who, however, subsequently *suo motu* revised his order and under section 61 of the Companies Act directed the contributory to pay up the sum due by him. The appeal against the order was dismissed and the contention of the appellant that the District Judge had no power *suo motu* to revise his order was disallowed:

Held, on second appeal, that the contention was valid, for section 151 of the Companies Act did not apply to the case of a Company which was being voluntarily wound up.

Second appeal from the order of the Divisional Judge, Rawalpindi, dated the 14th July 1912, confirming that of the District Judge, Rawalpindi, dated 29th May 1912.

Mr. *Sewa Ram Singh*, for the Appellant.

JUDGMENT.—On 13th March 1912, the District Judge of Rawalpindi had before him a petition by B. Rachpal Singh, the Liquidator of the Punjab Relief Fund, Limited, against Munshi Nanak Singh, a contributory, under sections 147, 151 and 182 of the Indian Companies Act, 1882, the prayer being that Nanak Singh should be compelled to pay up the unpaid portion of his shares. The petition was rejected on that day, on the ground that there was a sum of Rs. 2,000 at credit of the Company in the Bank and only liability of Rs. 1,000 and, therefore, with advertence to section 61 of the Act, there was no occasion for the call on Nanak Singh; the liquidation, it should be noted, was voluntary and not compulsory—see application of 9th March 1912, which was based on resolutions of the Company dated 12th and 28th January 1912, respectively.

On 13th May 1912, B. Rachpal Singh was removed from liquidatorship and then on 24th May, before another Liquidator had been appointed, the District Judge, moved apparently by no responsible persons, had Rachpal Singh and Nanak Singh before him and reversed his order of 13th March aforesaid and under section 61 of the Act directed the latter to pay up the sum of Rs. 450—the ground taken being that it was admitted by Nanak Singh that the Company had many more liabilities than the Rs. 1,000 aforesaid and that the Directors had already paid in a considerable amount of money representing the ultimate unpaid price of their shares.

On appeal by Nanak Singh the learned Divisional Judge held that the District Judge had power to alter his previous order *suo motu*, quoting section 151 of the Act as authority. He also overruled another contention put forward by Nanak Singh, to the effect that necessity for the call had not arisen. The grounds for this contention and the reasons for overruling it need not be stated as I am against the lower Appellate Court on the matter of District Judge's powers.

Section 61 of the Act merely lays it down that members of the Company are liable to pay up the amount of their shares, and has nothing to do with procedure powers to make calls. Section 151 on which the Divisional Judge relies, occurs in the part of the Act relating to compulsory liquidation through the Court and, in my opinion, it does not apply to voluntary liquidations, the provisions of law relating to which are to be found in sections 173 *et seq* of the Act. The proper procedure appears at once on perusal of section 177 (*b*) and (*i*) and section 182, and it seems clear to me that the District Judge, in the absence of application *ad hoc* by a Liquidator had no power to review his former order, the original application had been disposed of and the District Judge could order a call only on being moved by a Liquidator. Now he was not so moved on 24th May 1912, on which date there was no Liquidator in existence. I, therefore, allow this appeal and set aside the order of the lower Appellate Court and the review order of the District Judge and restore the District Judge's order of 13th March 1912.

No costs.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 101 OF 1915.

January 28, 1915.

Present:—Mr. Justice Rossignol.

MOHFUZ ALI—JUDGMENT-DEBTOR—PETITIONER

versus

BIRJI NAND KERAT, REPRESENTATIVE OF DIGAMBRA CHARJ, DECEASED—DECREE-HOLDER—RESPONDENT.

Specific Relief Act (I of 1877), s. 9—Appeal against order passed in execution not competent—Execution of decree—Limitation—Time spent in revision applied for

MOHFUZ ALI *v.* BIRJI NAND KERAT.

by judgment-debtor, whether to be allowed in extending period of limitation for execution—Revision—Civil cases—Second appeal treated as revision.

The plaintiff obtained a decree under section 9 of the Specific Relief Act. He applied for execution of the decree but allowed his application to be consigned to the Record Room probably influenced by the pendency in the Chief Court of a petition for revision filed by the defendant against the decree. After the application was rejected, the plaintiff applied again for execution of the decree. The period of limitation for execution had expired but the application was granted allowing the period during which application for revision against the decree was pending in the Chief Court. The defendant's appeal against the order allowing execution was dismissed:

Held, (1) that having regard to provisions of section 9 of the Specific Relief Act the order passed in execution was not appealable; [p. 284, col. 1.]

(2) that the period spent in revision proceedings in the Chief Court could not be allowed in extending the period of limitation for execution. [p. 283, col. 2.]

Revision is competent when a ruling has been misapplied owing to imperfect understanding of its circumstances. [p. 283, col. 2.]

Petition for revision of an order of the Additional Divisional Judge, Delhi, dated the 22nd December 1913, affirming that of the District Judge, Delhi, dated the 25th November 1913, holding the application for execution of decree within time and ordering issue of warrant for possession.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Petitioner.

Rai Bahadur Pandit *Sheo Narain* and Mr. *D. C. Ralli*, for the Respondent.

JUDGMENT.—The appellant in this appeal prays this Court to hold (1) that an appeal lay from the order of the District Judge to the Divisional Judge, (2) that if no such appeal lay, this Court can and should revise the order of the first Court.

The facts are that on 30th August 1909, the respondent obtained a decree under section 9 of the Specifie Relief Act against the appellant.

On 1st October 1909, the plaintiff applied for execution, but instead of pressing for his relief he allowed it to be consigned to the Record Room. He was probably influenced by the pendency in this Court of a petition in revision filed by the defendant on 30th August 1909, which was dismissed in July 1913.

Thereupon, plaintiff-respondent presented a fresh petition and the first Court held it to be within time by reckoning out the period spent in the revision to this Court.

On the merits, I have no difficulty in holding that this period cannot be counted out, for the proceedings in this Court were in the nature of a revision and not of an appeal.

Only petitions under section 70 (1) (*b*) when admitted rank as an appeal; those under section 70 (1) (*a*), as was the petition in the case in question, do not. Respondent's Counsel feels this difficulty; but contends that the second petition for execution was not a fresh petition, but a petition for revival of the proceedings suspended in 1909.

I do not think he is entitled to advance this plea for the first time in this Court, for it was not a point decided against him in the lower Courts. Moreover it is incorrect in fact for the petition of 1909 was not ordered to remain in suspense. There was no prayer that it should remain in suspense. On the contrary it was stated that execution would be sued out later.

Further, the second petition did not purport to be anything but a fresh application, and not an application to revive a suspended proceeding.

Mul Chand v. *Muhammad* (1) is authority for holding that revision is open when a ruling has been misapplied owing to imperfect understanding of its circumstances. The lower Court in applying *Vir Bhan* v. *Ramji Das* (2) has not appreciated the fact that it was a further appeal.

The question whether an appeal lay to the Divisional Judge has been the subject of much argument, appellant contending that the general presumption is in favour of an appeal, that execution is not the suit and that all provisions in restriction of appeal must be strictly construed in favour of the appeal.

Section 9 of the Specific Relief Act runs :—

"No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed."

There is a Madras ruling, *Thomas Souza* v. *Gulam Moidin Beari* (3) that no

(1) 2 Ind. Cas. 76; 45 P. R. 1909; 66 P. L. R. 1909; 68 P. W. R. 1909.

(2) 1 Ind. Cas. 441; 8 P. R. 1909; 33 P. L. R. 1909; 20 P. W. R. 1909.

(3) 26 M. 438; 13 M. L. J. 214.

appeal lies from an order in execution of a decree issued under this section, but appellant contends that since the date of that decision section 647 of the old Code has been amended.

I do not think that the amendment has effected any alteration in the law. Proceedings in execution are still proceedings in the suit, but it is argued that though they are proceedings in the suit they are not the suit, and Counsel's contention is that the suit proper commences with the plaint and terminates with the decree.

But, although the word 'suit' has in same decisions been employed antithetically to proceedings in execution, I have no conviction that this is not a mere looseness of expression. There is no definition of 'suit' in the Code, and the expression 'to sue out execution' is quite a consecrated phrase, whilst in general parlance the execution stage would be included in the term law suit.

Neither in authority nor in etymology can I find any sanction for this limited meaning of 'suit', but in any case if execution proceedings are proceedings in the suit, they must be part of the suit and, therefore, the orders passed in them are orders passed in the suit.

In the result, I see no good reason for differing from the learned Divisional Judge's conclusion that no appeal lay, but treating this as a petition in revision from the order of the District Judge, I hold that the application for execution was not within time and reversing the order for the carrying out of the execution, I dismiss the application as time-barred.

As petitioner has succeeded on one point and failed on the other, I leave parties to bear their own costs throughout.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1691 OF 1913.

February 2, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

RAMASAMI MOOPAN—PLAINTIFF—APPELLANT

versus

SRINIVASA IYENGAR—DEFENDANT No. 2—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 46, 54—Attachment of mortgagee's interest—Proper procedure.

In a suit for declaration that plaintiff was the full owner of certain properties, it appeared that plaintiff was the transferee-in-interest of the original owner who had mortgaged them to one *S*. The mortgagee's interest passed to his son *C* and the defendant got it attached before judgment on 14th August 1904. *C* in September 1910 sub-mortgaged it to *K* whom the plaintiff redeemed in September 1911. The attachment was effected under section 274 of the old Code corresponding to Order XXI, rule 54, of the new Code and was duly confirmed and the property brought to sale. It was contended that the payment having been made after the attachment was void:

Held, that the attachment ought to have been made under section 268 of the old Code (Order XXI, rule 46 of the new Code) and not having been so made, it did not affect the plaintiff's right as no notice of the attachment was served upon him. [p. 286, col. 2.]

Difference between the two modes of attachment under sections 268 and 274 explained. [p. 285, col. 1.]

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Tanjore, in Appeal Suit No. 474 of 1912, preferred against that of the Court of the District Munsif of Trivadi, in Original Suit No. 6 of 1912.

Mr. *S. Muthiah Mudaliar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

JUDGMENT—The question involved in this appeal is whether the plaintiff is entitled to claim that he has a subsisting usufructuary mortgage on the properties referred to in the plaint, or whether the 2nd defendant can claim that he has acquired not only the equity of redemption, but also the mortgagee's interest. The decision of this question depends upon whether the mortgagee's interest in the property was validly attached and sold in execution or whether the attachment was invalid. After the alleged attachment of the mortgagee's interest upon which the defendant relies, the plaintiff paid off the mortgage amount

and purported to redeem the property. The plaintiff claims that the redemption was valid as the attachment was invalid; and the defendant claims that the alleged redemption was void under section 64 of the new Code of Civil Procedure, as the property had been attached prior to the alleged redemption.

The learned Pleader for the defendant relied upon the terms of section 64 of the new Code of Civil Procedure and invited us to hold that inasmuch as the section does not state that the attachment referred to therein must be a valid attachment, it is immaterial whether or not it is valid; that the payments therein referred to must be held to be void as soon as an attachment is purported to be made, irrespective of the validity of the attachment. We are unable to accede to this argument as stated. It is unnecessary in the present case to consider whether the section cannot operate if there is any irregularity whatsoever in the attachment. It may be that some irregularities may not vitiate the attachment for the puposes of section 64 of the new Code of Civil Procedure. But in the present case the alleged cause of invalidity cannot be described as a mere irregularity as between the parties now before us. The attachment must be held to be either entirely void or entirely valid.

The contention of the plaintiff is that the interest of the usufructuary mortgagee was attached as though it was immoveable property under section 274 of the old Code of Civil Procedure, 1882, (Order XXI, rule 54, of the present Code); and that it ought really to have been attached as a debt under section 268 of the old Code of Civil Procedure (Order XXI, rule 46, of the present Code). The substantial difference between the two modes of attachment (so far as at present material) is that under section 268 the mortgagor would have received a written order of the Court prohibiting him from making the payment to the mortgagee; and under section 274 he received no such order, nor any notice of the attachment. The mortgagor, therefore, can reasonably claim that the payment which he has made in ignorance of the attachment cannot be held to be void, if he was entitled to proceed on the basis that there was no attachment of the mortgagee's interest, because if there had been an attachment in the form in which the law entitled him to expect it to be made, he would have been prohibited from making the payment, and he was not so prohibited.

The question may, therefore, be considered in the following form: Is the mortgagor entitled to receive notice of any attachment of his usufructuary mortgagee's interest? And in the absence of such notice, is he entitled to redeem the mortgage by paying off the amount due or will any payments he makes be invalid as against an attaching creditor of the mortgagee?

It is admitted that in the case of a simple mortgagee (as distinguished from a usufructuary mortgagee) the proper mode of attachment is that applicable to a debt (section 268 of the old Code of Civil Procedure, now Order XXI, rule 46, of the new Code of Civil Procedure), but it is urged that the case is different when the mortgage is usufructuary. Some support is given to this argument by the decision in *Manilal Ranchhod* v. *Motibhai Hemabhai*(1); on the other hand *Chullile Peetikayil Nammad* v. *Othenam Nambiar* (2) (to which one of us was a party) is relied upon by the plaintiff. In our opinion there is no conflict in the *ratio decidendi* of each of these cases: *Manilal Ranchhod* v. *Motibhai Hemabhai* (1) proceeded on the assumption that on the true construction of the deed then before the Court there was no debt which the mortgagee was entitled to recover at the time of the attachment; and consequently a person who claimed to have acquired from the mortgagee a right which the mortgagee himself did not possess, could not claim to be put in possession of property as collateral security for a debt which did not exist. When in accordance with the document the mortgagee cannot claim to recover any debt from the mortgagor nor the mortgagor, claim to make any payment to the mortgagee it would seem that the attachment of the rights arising under such a document cannot take the form contained in Order XXI, rule 46, of the Code of Civil Procedure, (section 268 of the old Code of Civil Procedure); for that form consists of

(1) 10 Ind. Cas. 812; 35 B. 288; 13 Bom. L. R. 233.
(2) 26 Ind. Cas. 508; 27 M. L. J. 239.

HARKISHEN LAL v. SARASWATI RAM.

prohibitions from making and receiving payments; it would be meaningless to prohibit persons from making and receiving payments when their relationship is such that no payments are contemplated. On the other hand the decision in *Chullile Peetikayil Nammad* v. *Othenam Nambiar* (2) proceeds on the basis that when there is a debt payable by the mortgagor, the fact that the mortgagee is in possession of the land does not the less make it a debt, nor is the mode of attachment of such debt affected by the collateral security for such debt, even though that security may take the form of possession of the property.

We have, therefore, to determine in this case, *first*, whether there was any debt which ought to have been attached as such; and *secondly*, whether on failure of any such attachment, the payment on which the plaintiff relies can be considered to have transferred the mortgagee's rights to him.

The mortgage in question was no doubt usufructuary. It, however, provided for redemption on 12th April 1898: and the mortgagor promised to the mortgagee: "we shall pay to you the principal of the mortgage amount and we shall redeem the said lands clear of *Sirkar teerwai*. Further after discharging (the loan) as above, we shall get back the mortgage-deeds and other documents 8, in number, which we have obtained and given to you. Should we fail to pay you the principal of the usufructuary mortgage amount on the said due date, we shall, on your demanding it of us within the 1st of the month of *Chittrai* in any year, pay you the said amount and redeem the mortgage." At the time of the attachment, therefore, *viz.*, on 14th August 1904, the mortgagor had already become bound to re-pay the mortgage-debt, and had in any case a right to pay it and to demand possession of the mortgaged property. Hence it is clear that there was such a right to receive payment if it was offered as could have been attached and if the attached creditor desired that the payment should be made to him, he should have obtained an order of the Court prohibiting the mortgagor from making the payment to the mortgagee: section 268 of the old Code of Civil Procedure.

Secondly, the learned Pleader for the appellant forcibly pointed out in argument if the attachment be taken to be that of the mortgagee's collateral security by way of being in possession of immoveable property till his debt is paid, then assuming that the attachment was valid the attaching creditor acquired merely that precarious interest in immoveable property by attaching under section 274 of the old Code of Civil Procedure; and the defendant cannot claim to have any right to be in possession of the property (for that is all the right that he can claim) as security for a debt which has now been paid off.

It was contended for the defendant that there could not be said to be a debt capable of being attached, as the mortgagee's personal rights had become barred at the date of the attachment. But assuming that at the date of the attachment the mortgagee could not have obtained any relief on his mortgage-deed except possession of the property, it does not affect the mortgagor's right to pay off the mortgagee and to obtain possession of the property, nor the corresponding right of the mortgagee to receive payment prior to giving up possession. These reciprocal rights were not barred by limitation and the attachment could not affect them. The appeal will, therefore, be allowed. The suit will be remanded to the Court of first instance for disposal on the the other issues. Costs will abide the result.

Appeal accepted.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 245 OF 1915.

February 22, 1915.

Present:—Sir Alfred Kensington, Kt., Chief Judge, and Mr. Justice Rattigan.

HARKISHEN LAL—DEFENDANT—APPELLANT

versus

SARASWATI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Companies Act (VI of 1882), ss. 162, 163, 169—Order for examination, when to be made—Discretion of Court—Appeal.

HARKISHEN LAL *v.* SARASWATI RAM.

Before granting an application under sections 162 and 163 of the Companies Act, 1882, for the discovery and inspection of the books and papers of a Company and for the examination of certain of its Directors, the Court ought to be satisfied that the inquiry is just and beneficial for the purposes of the winding-up, and not merely intended to harass and annoy the Directors and Manager. [p. 287, col. 2.]

An appeal lies against an order made for the examination of Directors, where the order impugned is vexatious or oppressive so far as the appellant is concerned and when it is not necessary or beneficial for the purposes of the winding-up. [p. 289, col. 2.]

It is in the discretion of the Court conducting the winding-up to determine whether it will exercise the powers vested in it by sections 162 and 163 of the Act, but the discretion must be exercised judicially and not without consideration. [p. 290, col. 1.]

Miscellaneous first appeal from an order of the Additional Judge, Lahore, dated the 5th January 1915, directing that the Directors and the Manager of the People's Bank be examined under sections 162 and 163 of the Companies Act VI, of 1882.

Messrs. *E. W. Parker* and *C. H. Oertel*, for the Appellant.

Mr. *Herbert*, for the Official Liquidators of the People's Bank, for the Respondents.

JUDGMENT.—The People's Bank of India, Limited, an extensive financial undertaking with branches in various parts of India, is being wound-up under the orders of the District Judge, Lahore, and Mr. G. E. Meugens and Mr. E. D. Dignasse, well-known Chartered Accountants of high reputation, have been appointed Official Liquidators and for some time past have been engaged in the difficult task of winding-up the Company's affairs.

On the 27th April 1914, one Kishen Chand, a Sub-Inspector of Police, presented a petition to the District Judge, stating that he had deposited the sum of Rs. 2,650 in the late Bank and praying that action might be taken against the Directors and Manager under section 214 of the Indian Companies Act, VI of 1882. On the 2nd June 1914 the said petitioner applied to the Court for discovery and inspection of certain books and documents and for the examination of Mr. Harkishen Lal, late Director, Pandit Rup Narain, late Manger, and one of the two Official Liquidators. There is nothing on the record to indicate what has happened to these two petitions, but we are led to understand that they were withdrawn.

On the 25th April 1914 Mr. Saraswati Ram, Pleader of Jullundur, presented an application to the District Judge, stating that he had deposited the sum of Rs. 3,500 in the Jullundur branch of the late Bank and praying that action under section 214 of the Act might be taken against the Directors and Manager. On the 22nd May 1914 objection on various grounds was taken by Mr. Harkishen Lal and Bhai Gurdit Singh, late Directors, to the petition and the District Judge by order, dated the 22nd May, directed the petitioner to file an affidavit in support of his application. In the course of this order the learned Judge remarked: "It is clear that the petitioners desire a roving commission to examine the Directors on their management of the Bank. This may make it easier for them to discover any mismanagement which has taken place, but at the same time it appears to me to be radically unjust to the Directors. They come into Court without any distinct charge being framed against them and are totally unprepared to meet the allegations there made."

On the 26th May Mr. Petman on behalf of Mr. Saraswati Ram stated that he did not intend to press the petition under section 214 and elected to proceed with the petition, dated the 24th of May, in which his client prayed the Court to take action under sections 162 and 163 of the Act with a view to discovery and inspection of the books and papers of the Bank, and the examination of Mr. Harkishen Lal, Pandit Rup Narain and one of the Official Liquidators. This petition is supported by a lengthy affidavit which will be found at pages 47 to 55 of the record. An amended copy of this application was filed on the 13th June 1914, and on the 16th of July the District Judge, Mr. Amir Ali, passed an order which commends itself to us as eminently proper in the circumstances. He points out in the course of this order that the examination of a person under sections 162 and 163 of the Act is as a general rule entrusted to the Official Liquidator and that before calling upon either the petitioners or the Directors to attend for the purposes of the examination prayed for, and in order to discover whether the inquiry was likely to lead to some benefit to the creditors and was not merely intended

to harass and annoy the Directors and Manager, he considered it necessary to call for a detailed report from the Official Liquidators concerning the allegations made in the petitioner's affidavits and counter-affidavits.

This order would have been proper under any circumstances, but in the present case was further justified by the letter, dated the 11th July 1914, which Mr. Meugens, one of the Official Liquidators, had addressed to the District Judge.

On the 11th November 1914 the Official Liquidators, in compliance with the District Judge's order of the 16th July, filed a very comprehensive report (see pages 133-160 of the record) in which they discussed in detail the various allegations made by Mr. Saraswati Ram and Lala Kishen Chand against the Directors and Manager of the late Bank and the counter-affidavits of Mr. Harkishen Lal, and while expressing their readiness to assist in any way in their power in a straightforward inquiry, strongly protested against the manner in which their time, which was of value to depositors and share-holders, was being wasted by reason of the unsatisfactory manner in which proceedings were being conducted. They also suggested that persons who had no real interest in the beneficial winding up of the Bank were behind these proceedings. On the 2nd January 1915 the various parties and their Counsel appeared before the District Judge and according to Mr. Forbe's order of that date, Mr. Petman appeared in support of the application under sections 162 and 163 only, while Mr. Jai Gopal appeared on behalf of Mr. Saraswati Ram to support his application under section 214. On the 5th January the District Judge passed the order now under appeal and held that this was a fit and proper case in which all the Directors should be examined and the conduct of the examination made over to petitioner's Counsel inasmuch as the Official Liquidators did not wish to conduct it. The learned Judge thereafter fixed the 8th of February and the following days for the examination and directed Counsel to file a list of documents with the Liquidators which they wished to produce.

From the last-mentioned order of the District Judge Mr. Harkishen Lal and Mr. Umar Bakhsh, two of the Directors, have, under section 169 of the Act, filed separate appeals in this Court, Mr. Oertel appearing on behalf of Mr. Harkishen Lal and Mr. Parker on behalf of Mr. Umar Bakhsh; Mr. Herbert appears for the respondent Official Liquidators and the respondent Mr. Saraswati Ram was not present though duly served with notice of the hearing. At the commencement of the proceedings Mr. Petman informed us that he and Mr. Jai Gopal, who appeared for Mr. Saraswati Ram in the District Judge's Court, had received instructions from their client only a few minutes before the hearing of the case and that they were not in a position to accept a brief tendered so late. Mr. Petman admitted that his client had had ample notice of the hearing and that apparently he alone was to blame for not having placed his Counsel in a position to appear for him at the hearing.

The first point which we have to decide is whether the appellants (who are two of the persons whom it is proposed to examine) have any *locus standi* to prefer the appeals, which purport to be made under section 169 of the Indian Companies Act, 1882.

This section is in terms similar to the first part of section 124 of the English Companies Act (25 and 26, Vict. C. 29), and in the well known *Silkstone and Dodsworth Coal and Iron Co., In re; Whitworth's* case (1) the Court of Appeal in England held that it was not competent to a person whose examination had been ordered by the Court conducting the winding-up proceedings to appeal from the order [*cf.* also *In re Gold Company* (2)]. On the other hand, in *Metropolitan Bank, In re, Heiron's* case (3) such a person was allowed to appeal and his appeal was accepted, on the ground that the powers conferred by sections 115 and 138 of the English Act of 1862 (corresponding to sections 162 and 182 of the Indian Act of 1882) are "very inquisitorial and the more inquisitorial they are, the more the Court is bound to take care that they are not used for the purpose of vexation and oppression," and to see that the proposed

(1) 19 Ch. D. 118; 51 L. J. Ch. 71; 45 L. T. 449; 30 W. R. 33.

(2) 12 Ch. D. 77; 48 L. J. Ch. 650; 40 L. T. 865; 27 W. R 757.

(3) 15 Ch. D. 139; 49 L. J. Ch. 661; 43 L. T. 299.

examination of the appellant will be "just and beneficial for the purposes of the winding-up." In a still later case [*In re North Australian Territory Company* (4)] the Court of Appeal (Cotton, Bowen and Fry, L. JJ.) threw doubts upon the correctness of the absolute rule laid down in *Silkstone and Dodsworth Coal & Iron Co., In re*; *Whitworth's* case (1) and the *Gold Company's* case (2). In this case Bowen, L. J., remarked, with reference to section 115 of the English Act: "In the first place, it must be observed that this is an extraordinary section. It is an extraordinary power, it is a power of an inquisitorial kind which enables the Court to direct to be examined not merely before itself, but before the examiner to be appointed by the Court, some third person who is no party to a litigation. That is an inquisitorial power, which may work with great severity against third persons, and it seems to me obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice when it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information. Having regard to those characteristics of this section which I have touched upon, I certainly should be loth to conclude that the witness—if I may call him a witness—the examinee, the person who is to be examined and against whom or upon whom the order has been served—has not a *locus standi* to complain that that order is oppressive or hard upon him."

If, then, even in England where the Court which conducts winding-up proceedings is presided over by a Judge who has an intimate knowledge of the intricacies of Company Law, the "examinee" is competent to appeal from an order passed under section 115 of the English Act, *a fortiori* should such an appeal be allowed in this country from orders passed under section 162 or section 163 of Act VI of 1882, as it is no disparagement to District and Additional Judges to assert that they cannot as yet justly claim a very profound or extensive acquaintance with the principles of that difficult branch of law which relates to the winding-up of the Companies.

(4) (1890) 45 Ch. D. 87; 59 L. J. Ch. 654; 63 L. T. 77; 38W. R. 561; 2 Meg. 239.

We hold, accordingly, that the examinee (to use the convenient expression of Lord Justice Bowen) has a *locus standi* to appeal under section 169 of the Act.

The next question relates to the grounds upon which such an appeal can be preferred. The cases cited above are authorities for holding that an appeal lies if the appellant can show that the order impugned is vexatious or oppressive so far as he is concerned and that it is not "just or beneficial for the purposes of the winding-up." In the case before us, the two appellants urge that action has been taken against them merely in order to harass and oppress them, and that the petitioner upon whose application the order was passed, is the puppet of influential persons who have no interest in the winding-up and are actuated by feelings of animosity against the Directors. The Official Liquidators in their report of the 11th November 1914 make the same suggestion.

These allegations may or may not be well-founded, but we are not prepared to hold that action under sections 162 and 163 of the Act should not be taken merely because the result would be to cause annoyance or harassment to the examinee. That is not the test for deciding whether such an order should be passed. The question and the (sole question) for the Court is whether the order is called for in the interests of the Company's contributories and creditors, or either of them; or, in other words, whether it will prove "just or beneficial" for the purposes of the winding-up. If in the opinion of the Court, formed upon reasonable grounds, it will prove just or beneficial for those purposes, the order should be made irrespective of the annoyance or inconvenience to the examinee which may be caused thereby; if, on the other hand, the Court is satisfied, upon reasonable grounds, that such an order is not (at all events at that stage) likely to prove "beneficial" for the purposes of the winding-up, it should refuse "to put in motion the mechinery of justice." In *In re Imperial Continental Water Corporation* (5) Cotton, L. J., observed, with reference to the provisions of section 115 of the

(5) 33 Ch. D 314; 56 L. J. Ch. 189; 55 L. T. 47.

English Act of 1862: "*Prima facie* the powers of this section are to be exercised for the purposes of the winding-up and for the benefit of those who are interested in the winding-up." Lindley, L. J., was of the same opinion. "This section," he says, "is one of a group with which we are all familiar, sections 100, 115, 165 and 168, which authorise proceedings against Directors. The object of them all is to enable the Company, through its Liquidator, with a view to the benefit of the creditors or contributories, or both of them, to ascertain what has been going on, and what has been done with the assets of the Company." To a similar purport are the remarks of Lopes, L. J.: "The 115th section of the Companies Act, 1862, gives large and extensive powers to the Court in respect of certain matters, but these powers, as I understand it, are given with a view to the more beneficial winding-up of the Company;" [*cf.* also the ruling of the Bombay High Court upon the analogous section of the Indian Insolvency Act (11 & 12 Vict. C. 21, section 86) reported as *In re Alladinbhoy Hubibhoy* (6)]. It is, no doubt, for the Court which is conducting the winding-up to decide whether or not it will exercise those powers, and with the exercise of its discretionary power, a Court of Appeal will obviously be reluctant to interfere. But this discretionary power must be exercised judiciously and not without due consideration. In the case before us we feel compelled to interfere, not in the interests of the appellants, but because we are satisfied that the Additional Judge did not pay sufficient regard to matters which should have been primarily considered by him and that his order, if carried out, will delay and impede the winding-up and prove detrimental to the interests of the general body of the Company's creditors and contributories. This is the opinion deliberately expressed by the Official Liquidators, of whom one (Mr. Dignasse) appeared before us at the hearing of the appeals and in answer to questions put to him by us, stated that he and his colleague were entirely opposed to the action which the Additional Judge proposed to take as, in their opinion, it would result in no good, would seriously hinder them in their work of liquidation, and in all probability would prove injurious to the persons interested in the winding-up. The Official Liquidators are expert accountants of standing and so far as the record discloses, no sort of imputation has been made against either their *bona fides* or their competency, nor is there any suggestion that they are not working wholeheartedly for the benefit of the vast number of creditors of the Company whose interests are practically in their hands.

In these circumstances it is impossible for us to allow one or two creditors, for reasons peculiar to themselves, to jeopardize the successful issue of the liquidation proceedings, and it is upon this ground, and upon this ground alone, that we accept these appeals and set aside the order passed by the Additional Judge on the 5th January last. The learned Judge has not, we think, paid that regard to the objections of the Official Liquidators which was their due, as coming from experts who apparently are acting impartially, honestly and competently in the discharge of their very arduous duties.

As respondent is responsible for these proceedings, we direct that he pay the costs of each appellant, and we fix Pleader's fee in each appeal at Rs. 100.

Appeal accepted.

MADRAS HIGH COURT.

APPEAL SUIT No. 148 OF 1910.

April 2, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

KALIBA MAVULVIJA MUHAMMAD USAIN KADIR ABTTAN SAHIB AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SARAN BIVI SAILA AMMAL AND OTHERS—DEFENDANTS RESPONDENTS.

Limitation Act (IX of 1908), s. 14, Sch. I, Art. 120—Religious endowment—Advances made by trustee—Suit for recovery—Charge in favour of trustee of charitable trust.

The plaintiff was appointed by the District Judge as trustee of a mosque during the minority of

(6) 11 B. 61.

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the defendants. The first defendant on attaining majority on 27th February 1900 sued to recover possession and obtained a decree on 26th April 1902, but the plaintiff did not surrender possession till February 1905. The plaintiff sued for recovery of the sums advanced by him to the trust and not recovered before he gave up possession:

Held, (1) that the suit was governed by Article 120 and not by Article 132 of the Limitation Act; [p. 292, col. 1, p. 295, col. 2.]

(2) that limitation began to run from the date of the dispossession, as till then no right accrued to the trustee to bring a suit to enforce his claim against the trust properties; [p. 293, col. 1.]

(3) that the plaintiff was entitled to his out of pocket expenses for the purposes of the trust till 20th April 1902 when his right to continue in possession was negatived by a Court of law; [p. 297, col. 1.]

(4) that the time spent by the plaintiff in defending the previous suit could not be deducted under section 14 of the Limitation Act as his claim was not founded upon the same cause of action. [p. 292, col. 2, p. 295, col. 2.]

Per *Sadasiva Aiyar, J.*—The charge created in favour of a trustee of a religious or charitable trust enables him to take the sums he has expended on behalf of the trust only from the rents and profits of the trust estate (except in very exceptional cases) and cannot entitle him to put an end to the trust itself by bringing the *corpus* of the religious or charitable trust properties to sale. [p. 295, col. 1.]

Appeal from the decree of the Subordinate Judge, Tinnevelly, in Original Suit No. 8 of 1908.

Mr. *K. Srinivasa Aiyangar*, for Mr. *L. A. Govindaraghava Aiyar*, for the Appellants.

Mr. *T. V. Seshagiri Aiyar*, for the Respondents.

JUDGMENT.

MILLER, J.—The question we have to decide is one of limitation and it is not quite simple. The 1st appellant was in 1893 appointed by the District Judge as trustee or manager of an endowed mosque during the minority of the defendants, an expression which has been in a former suit held to imply the termination of his trusteeship on the date on which the eldest of the defendants attained the age of majority. That date was the 27th February 1900. The 1st defendant thereafter sued to recover possession from the appellant and obtained a decree on the 26th of April 1902, and it is conceded that, though the appellant did not actually surrender possession before 1905, we may take the date of the decree as the latest date on which he can be held to have had a right to retain possession.

The appellant's contention is that he has a period of limitation of 12 years under Article 132, or at the least a period of six years under Article 120 of the first Schedule of the Limitation Act, within which to bring his suit for the recovery of sums advanced by him to the trust of which he was trustee and not recovered by him before he lost possession. The merits of his claim have not so far been investigated and we may assume, without deciding, that some of the advances were made before February 1900, and that among those advances were some which the trustee might properly recover from the trust property. Advances made after February 1900 may possibly also be recoverable, if made for proper purposes, and I do not wish to decide more than that the expenses of the suit of 1901, in which the plaintiff unsuccessfully resisted the 1st defendant's claim to be trustee, cannot be allowed as a proper charge on the trust property.

For the respondents the contention before us is that Article 120 is the appropriate Article as held by the Privy Council in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1), a similar case, and the starting point is the 27th February 1900, the date on which the minority of the 1st defendant terminated and with it the trusteeship of the 1st appellant. The Subordinate Judge has suggested the application of other articles not now relied on by either side and has held that, if Article 120 be applicable, the contention now advanced on behalf of the respondents must prevail.

I may here observe that the appellants do not now rely on the acknowledgment, Exhibit F, nor on the agreement, Exhibit G. Exhibit F, it is conceded, did not bind all the defendants, and, as the 4th defendant was a minor at the date of the trial and the agreement, Exhibit G, was not sanctioned by the Court, it was open to the parties to resile from it.

The only question, therefore, is the question of limitation. The Trusts Act does not apply to the case, but the Privy Council have held in the case of a public trust that

(1) 5 Ind. Cas. 404; 37 C. 229; 37 I. A. 27; 20 M. L. J. 171; 7 M. L. T. 63; 14 C. W. N. 261 (P. C.); 7 A. L. J. 125; 11 C. L. J. 220; 12 Bom. L. R. 257

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the trustee has a first charge on the property for the purpose of reimbursing himself for advances properly made. It is argued, therefore, that a suit to enforce payment of the money charged would be governed by Article 132, and taking the date of the advance as the date on which the money is due, the charge could be enforced in the present case in respect of all proper advances made within 12 years of the 24th January 1908.

But the difficulty in applying Article 132 in this way is that there would be no one to be sued when the money became due. There is no beneficiary who could be sued by the trustee in possession, and the trustee could not sue himself. "Due" must, therefore, mean payable by some one else to the trustee, if Article 132 is to be applied, and limitation would start from the time when the trustee ceased to be able to pay himself. But this interpretation of "due" is open to the objection that the money advanced is recoverable by the trustee as soon as he can get it, and he cannot, properly speaking, recover it before it is "due."

I doubt, therefore, whether Article 132 can properly be applied to a case where a man lends money out of his own pocket to himself as trustee of a religious institution on the security of the trust property, and I think it safer to follow their Lordships of the Privy Council in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1) and to hold that the appropriate article is Article 120.

Applying that article we have to determine the date on which the right to sue accrued. Was it the 27th February 1900 when the 1st defendant attained majority, or was it at the earliest the 26th April 1902 when the Court, refusing to accede to the 1st plaintiff's contentions (as defendant in that suit) that he was entitled to be trustee until the youngest child of the founder ceased to be a minor and that in any event he was entitled to remain in possession till he was paid, decreed the 1st defendant's claim (as plaintiff in that suit) to eject him at once.

Before discussing this question, I may deal with a contention that in any event the time occupied by the 1st plaintiff in defending his suit of 1901 must be excluded under section 14 of the Limitation Act. I do not think that section is applicable here. The 1st plaintiff as defendant in that suit claimed a right to remain in possession till he was reimbursed; he did not ask for a decree against the then plaintiffs for the money alleged to be due to him. That seems clear from the abstract of the defence set out in Exhibit I (the judgment). That being so, his present claim is not founded upon the same cause of action; had he then claimed a decree against the plaintiffs for the money by way of counter-claim, there might be something in the contention, as he might, it is possible, have been held to be prosecuting the claim which he is now prosecuting [vide *Maharajah Jugutendur Bunwaree* v. *Din Dyal Chatterjee* (2)], but his defence in the suit of 1901 cannot be treated as acounter-suit when all he wanted was the dismissal of the plaintiff's suit in ejection as premature.

Moreover the Court did not dismiss his claim for want of jurisdiction to entertain it: it decided that it was unfounded, holding that he had no right to remain in possession till paid: and it told him that a suit for the money might be successful as a suit for a general account of management. The claim made was a claim to remain in possession and that rightly or wrongly was disallowed as a matter of law, and not for want of jurisdiction to entertain it or other like cause.

The answer to the question raised on Article 120 is made to depend, as the case was argued, on the further question whether an ex-trustee remaining in possession can sue his successor in respect of advances made to the trust. There is no beneficiary whom he could sue in the case, and unless he can sue his successor, there can be no right of suit, and, therefore, limitation cannot start running.

The only suit which appears possible is a suit for a declaration that the property is charged with the amount of the expenses, and the cause of action for such a suit might arise, it is suggested, on the date when the trustee's possession is threatened, in this case, not later than some date in 1901, when the Suit No. 22 of 1901 was instituted by the 1st defendant.

(2) 1 W. R. 310.

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But such a suit would appear to be incompetent so long as the trustee was in a position to collect the rents and pay himself without a suit and without obstruction or threatened obstruction. His possession was in jeopardy in the suit, but his right to a charge on the property for expenses properly incurred was not denied and there was no threat to prevent him from collecting the rents and appropriating them so long as he remained in possession. When turned out he would have a cause of action for expenses then unpaid, but not so far as I can see, before that.

The mere fact that there was in existence a person interested to deny his title to remain trustee would not give him a right to sue for a declaration: that person was not interested to deny his right to re-pay himself his proper expenses out of the property so long as he was in possession of it, and apparently did not deny that right but claimed that some unauthorised collection had been made and, I suppose, appropriated by the trustee, though that does not appear in the abstract of the plaint given in Exhibit I.

Consequently, I think, though not without hesitation, that right to sue did not accrue to the plaintiff before the 26th of April 1902, (it may well be that it did not accrue till 1905), and the suit is not barred and must be remanded for disposal. Costs will abide the event.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. The 1st plaintiff was the *de jure* and *de facto* trustee of the plaint mosque from April 1893 to the end of February 1900, a period of six years and ten months. The 2nd plaintiff is the 1st plaintiff's agent. Then the 1st defendant attained majority and became *de jure* trustee, but the 1st plaintiff continued to be *de facto* trustee, refusing to give up possession of the trust properties to the 1st defendant under a claim that, till the 1st defendant's two sisters and one brother also attained majority, the 1st plaintiff was entitled to continue as trustee. The defendants had to bring Original Suit No. 22 of 1901 to eject the 1st plaintiff. That suit was decreed in the original Court in the end of April 1902. The 1st plaintiff still refused to deliver up possession to the defendants, but in execution of the final decree on appeal in that suit, the defendants got possession in February 1905. The plaintiffs have brought this suit for recovery of Rs. 8,000 out of the Rs. 10,000 and odd alleged to have been spent by them till February 1905 for the benefit of the trust. The period covered may be divided thus:—

(*a*) Between April 1893 and February 1900, when the 1st plaintiff ceased to be lawful trustee, (*b*) between February 1901 and April 1902 when the 1st plaintiff was declared by a Court of Justice not to be entitled to remain as trustee any longer and (*c*) between April 1902 and February 1905, when the 1st plaintiff was ejected from possession of the trust properties. The plaintiffs claim recovery of the amount of Rs. 8,000, costs and interest, "out of the income of the said mosque on the liability of the property of the said mosque and out of the income of the said property." The suit was brought in January 1908, more than 14 years after the 1st plaintiff became trustee, and more than seven years after the 1st plaintiff ceased to be lawful trustee, but within six years of the 1st plaintiff having been declared by a Court of Law to have ceased to be trustee (April 1902) and within three years of his dispossession by the defendants of the trust properties (February 1905).

The learned Subordinate Judge who tried this suit in the original Court dismissed it as barred by limitation. He considered that Article 61, Article 85 or Article 120 of the Limitation Act would apply and that applying any of these articles, the suit was barred. I might state at once that Article 85 has no application, as there have been "no mutual, open and current accounts" and "no reciprocal demands" between the plaintiffs and the trust. If Article 61 applies, the period of limitation is only three years from the time when the 1st plaintiff spent moneys on behalf of the trust. If so, the plaintiffs' claim is barred except in respect of moneys within three years before suit, that is, between the 24th January 1905 and 9th February 1905, and we might take it that this is a negligible sum, even if it is not zero. On this question of the applicability of Article 61 also, I might at once state that if this suit was an ordinary suit to obtain a single decree for money, it would be no doubt

barred by Article 61, but the prayer of the plaint is for the recovery of the plaint amount "out of the income of the (plaint) mosque on the liability of the property of the said mosque and out of the income of the said property." To such a suit, Article 61 cannot apply. If Article 120 had to be applied, the lower Court thought that the starting point for computing the period of limitation could not be later than February 1900 when the 1st plaintiff's right as trustee came to an end, and, as the suit was brought in 1908, the suit was, on that view also, barred.

The plaintiffs' contenions are: –

(*a*) That Article 132 of the Limitation Act providing for a period of 12 years applies to this case, as the plaintiffs claim a charge on the trust properties:

(*b*) that the 1st plaintiff is entitled to such a charge, because he spent moneys as a trustee who, according to law, can claim such a charge:

(*c*) that even if he was not a trustee *de jure* for a portion of the period during which he spent the moneys, as a *de facto* trustee he was entitled to a charge on the trust properties just as if he was a *de jure* trustee;

(*d*) that the 1st plaintiff did not know that he was not entitled to be trustee till the 21st November 1904, when the High Court finally decided against him, and hence he was entitled to a charge for what he spent till that date;

(*e*) that he was at least entitled to a charge for what he spent till the 26th April 1902, when the original Court which decided Orignal Suit No. 22 of 1901 pronounced its decision, because, till that date at least, he *bona fide* believed that he was trustee;

(*f*) that at the lowest, he was entitled to a charge for what he spent before the 27th February 1900, when the first defendant attained majority;

(*g*) that even if Article 120 of the Limitation Act applied, limitation should be calculated from February 1905, when the 1st plaintiff lost possession, as the 1st plaintiff could not be expected to sue himself while he was in possession of the trust properties;

(*h*) that limitation could not, in any event, be calculated from before 26th April 1902, when Orignal Suit No. 22 of 1901 was decided;

(*i*) that the acknowledgment (Exhibit F) by the 2nd defendant in 1907 of the plaintiffs' right to reimbursement saves limitation;

(*j*) that the *razinamah* entered into by the defendants during the course of the litigation entitled the plaintiffs to a decree for Rs. 8,000 and the lower Court should not have gone into the question of limitation at all;

(*k*) that the time spent in defending the Suit No. 22 of 1901 and in the conduct of the appeal in that case, should be deducted in plaintiffs' favour under section 14 of the Limitation Act.

The answers of the respondents to these contentions are:—(*a*-1) Article 132 does not apply to a trustee claiming a charge on properties belonging to a charitable or religious trust. The charge of a trustee is not like an ordinary charge which entitled a man to bring the charged property unconditionally to sale. It is a charge which enables him to take the amount he has spent for the trust out of the rents and profits of the trust property or through raising moneys by the creation of a similar charge to his own.

Article 120 alone applies to a trustee's suit against the *cestui que trust* to enforce such charge [see *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1)].

The 1st plaintiff's claim for what he spent for the trust before the 24th January 1902 is barred.

(*b*-1) The 1st plaintiff could not be held to have spent moneys as trustee, except before the 27th February 1900, and could not claim even this limited charge as trustee for what he spent afterwards.

(*b*-2) He did not spend for the trust the amounts he alleges to have spent before that date.

(*c*-1) A *de facto* trustee is not entitled to claim a charge like a *de jure* trustee and hence Article 61 alone applied.

(*d*-1) and (*e*-1) The 1st plaintiff knew on the 27th February 1908 that he was not entitled to be trustee any longer and had no *bona fides* thereafter.

(*g*-1) The possession of the 1st plaintiff had nothing to do with the starting point of limitation.

(*g*-2) Wrongful possession by the 1st plaintiff after the 27th February 1900 could

not postpone the starting point of limitation for the 1st plaintiff's suit against the trust to enforce his charge, as plaintiff could have sued the trust represented by its *de jure* trustees to enforce the charge,

(*h*) Even if the 1st plaintiff *bona fide* believed till April 1902 that he could not sue the trust as he himself was the *de jure* trustee and could not, therefore, sue the trust so represented by himself, his said belief could not prevent limitation from commencing to act, no provision being made in the Limitation Act for postponing the commencement of a limitation period, because the 1st plaintiff was labouring under a *bona fide* mistake and believed that he had no right to bring a suit till he lost possession or till a Court of Justice declared that he had no legal status as trustee.

(*i*) The acknowledgment by the 2nd defendant in 1907 could not bind the other defendants or the trust.

(*j*) The *razinamah* (Exhibit G) was not sanctioned by the Court and is useless, as one of the defendants is still a minor.

(*k*) That the time spent in the 1st plaintiff's conduct of the defence in Original Suit No. 22 of 1901 cannot be deducted in the plaintiffs' favour.

That the charge created in favour of a trustee of a religious or charitable trust enables him to take the sums he has expended on behalf of the trust only from the rents and profits of the trust estate (except in very exceptional cases) and cannot entitle him to put an end to the trust itself by bringing the *corpus* of the religious or charitable trust properties to sale has been decided both in England and India. In *Prosunno Kumari Debya* v. *Golab Chand Baboo* (3), their Lordships of the Privy Council say "it is to be observed that execution of the judgments sought to be set aside" (passed in favour of a creditor who had lent moneys to a temple trustee for carrying on the *pooja*, etc., in a temple) "is decreed, *and in their Lordships' view rightly, only against the rents and profits of the* debuttur *lands.*" That a trustee has a lien and a charge upon not only the rents and profits of the trust property, but also upon the *corpus* is clear law (see Lewin on Trusts, Chapter 25, section 2, paragraph 12). Section XXV of the Trusts Act (which Act, though it does not relate to religious or charitable trusts according to section 1, contains several provisions which lay down principles applicable to all trusts) says that besides the right of reimbursement out of trust property, the charge which a trustee has upon the trust property for out of pocket expenses "shall be enforced *only* by prohibiting any disposition of the trust property without previous payment of such expenses and interest." This indicates that such a trustee has got only two rights :- -

(*a*) to reimburse, to pay or dicharge himself in respect of such out of pocket expenses out of the income and profits of the trust property (such right being an unconditional paramount right) and

(*b*) to a charge on the trust property including its *corpus*, a charge which can be enforced only by prohibiting any disposition of the trust property without previous payment of such expenses.

Article 132 of the Limitation Act was evidently not intended to cover such a qualified charge and, in any case, I think we are bound by the decision of the Privy Council in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1) and to hold that Article 120 alone applies to the enforcement of such a charge—I have nothing to add to the reasons given by my learned brother for holding that Exhibits F and G cannot avail the plaintiffs and that the sums spent in defending Suit No. 22 of 1901 and in conducting the appeals from the decision in that suit could not be decreed in plaintiffs' favour. This disposes of the appellants' contentions (*a*), (*i*), (*j*) and (*k*) above.

7. That the 1st appellant as trustee had a charge for what he spent before the 27th February 1900 and could have recovered that money was not denied (I am just now leaving the question of limitation on one side). Whether he could recover what he spent out of his pocket between the 27th February 1900 and April 1902 (when the plaintiff's right to trusteeship was negatived by the decision of the Court of Law) and whether he could recover what he similarly spent, between April 1902 and February 1905 when he was dispossessed, are questions on which, I must confess, I have felt grave doubts. Was he (the 1st plaintiff) merely and purely trustee *de son tort* during those periods? Even if he was so, is he still entitled to claim

(3) 2 I. A. 145 at p. 153; 14 B. L. R. 450; 23 W. R. 253; 3 Sar. P. C. J. 449.

out of pocket expenses during the period when he was such trustee? I find that the expression "express trustees" is held to include even trustees *de son tort* who profess (without title) to hold certain properties as trustees, that trustees *de son tort* might even become constructive trustees if they renew leases in their own names (see Lewin on Trusts, Chapter X) and that a trustee *de son tort* cannot plead limitation against the *cestui que trust* as section 10 of the Limitation Act, providing that "a person in whom property has become vested in trust for a specific purpose" cannot plead limitation in a suit by the *cestui que trust*, is applicable to trustees *de son tort* also (see Mitra on Limitation, page 771). I think that if a trustee *de son tort* is subject to all the liabilities of an express tustee, he should also be given, in some cases and subject to certain conditions, some of the rights of a lawful trustee to reimburse himself or to recover properly incurred out of pocket expenses. Of course, the accounts of such a trustee *de son tort* may be liable to be subjected to a more severe scrutiny than those of a lawful trustee, but, on principle, I think that what a trustee, of whatever kind, has really spent for the necessities of the trust should be reimbursed to him, if his claim to the office of the trustee was not dishonestly made or if he did not wrongfully continue in possession. I do not say that all trustees *de son tort* are entitled to reimbursement of out of pocket expenses incurred on behalf of the trust. If a man violently and dishonestly takes possession of trust properties under a false claim to be trustee, he cannot be allowed to claim out of pocket expenses. If a man, after being told by a Court of Law that he ought to give up possession to the legal trustee, would not give possession, and then chooses to spend further moneys out of his own pocket taking the chances of obtaining a decision in appeal in his favour, he must also be held to take the risk of losing the subsequent out of pocket expenses. As my learned brother has remarked in his judgment, what the 1st plaintiff spent in Original Suit No. 22 of 1901 and the appeals therefrom to establish his own alleged title (found to be non-existent by the Courts) cannot be treated as moneys spent for the trust and could not be recovered, unless the Court had allowed his costs also to come out of the trust estate. A person who acts *bona fide* as trustee or remains in possession after he had ceased to be trustee by virtue of his lien on the trust properties to recover out of pocket expenses incurred while he was trustee, must however, (it seems to me), be allowed to claim recovery of such expenses incurred during the period when he was legal trustee, and also when he *bona fide* believed himself to be trustee, or when he *bona fide* believed that he had a right to remain in possession of the office till he was so reimbursed. The questions (*a*) whether the 1st plaintiff *bona fide* believed himself to be trustee between February 1900 and April 1902, (*b*) whether moneys were due to him from the trust in February 1900 and the 1st plaintiff believed that he was entitled to continue to hold the office till the amount was reimbursed to him, either or both of these questions might have to be decided by the lower Court for coming to a conclusion on the point whether the 1st plaintiff is entitled to out of pocket expenses (if any) between these dates. After 1902, the 1st plaintiff cannot claim out of pocket expenses, as he must be held to have taken the risk himself and as such expenses were incurred in assertion of his own false title, which he could not have *bona fide* believed in after that date, as his claim to remain in possession after that date was disallowed by the Court. If he afterwards spent money for necessary purposes less than the income got, he must, of course, account for the surplus, but if he spent more, it was at his own risk. He should, however, (I think) be given credit for necessary expenses incurred by him as *de facto* trustee up to the limit of the income derived and should not be debited with the whole income received without being given any credit at all for even necessary expenses incurred.

In the present case, the 1st plaintiff's right to reimbursement of out of pocket expenses before February 1900 is unquestionable (subject, of course, to the question of limitation). The question of the 1st plaintiff's *bona fide* belief as to his legal position after February 1900 till April 1902, when the Court decided against his right, may be relevant in deciding whether the plaintiffs are entitled to claim out of pocket expenses incurred between those dates. That question will, however, not arise if the trust was indebted to the plaintiffs in February

1900, when the 1st plaintiff's title as trustee ceased and if that debt had not been discharged out of the rents and profits before February 1905. The plaintiffs would have (or at least, could *bona fide* claim) a right to remain in possession till the money was paid up and so long as they remained in possession, they should maintain the trust as *de facto* trustees lawfully in possession of the trust properties. As however, in April 1902 a Court of Law decided against the 1st plaintiff's right to remain in possession, the plaintiffs could not (it seems to me) claim out of pocket expenses incurred after April 1902.

The last question remaining for disposal, the question involved in contentions (*g*) and (*h*) of the appellants, is also one of great difficulty. I was, at first, inclined to hold that the right to sue for the relief of declaring and enforcing a trustee's charge accrued at once on each occasion when he spent moneys out of his own pocket and that after six years from the date of each such accrual, the right to sue for such money became barred. In *Kandasami Pillai* v. *Avayambal* (4), it was held by Benson and Krishnaswami Iyer, JJ., that an agent who had got a right of retainer and a right of lien (sections 217 and 222 of Contract Act) has only three years from each of the dates of his spending moneys for his principal for recovery of that money and that the commencement of the running of limitation is not postponed to the termination of the agency It might fairly be argued, by analogy of reasoning, that the trustee's right also to recover from the trust accrued at once on his incurring each out of pocket expense. But I find in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1) that their Lordships of the Privy Council held that the executors of the deceased trustee, Bijoy, were entitled to a period of six years *from the date of his death*, when he, of course, ceased to be a trustee, (and not from the respective dates of his incurring expenses on behalf of the trust) within which to bring their suit for reimbursement out of the trust property. And the reasons given by my learned brother in the judgment just now pronounced by him (and which I had the advantage of perusing before writing this judgment) have led me to the same conclusion as is expressed in his judgment, namely, that till the trustee lost possession of the trust properties, no right to bring a suit to enforce his claim against the trust properties accrued to the trustee. As I said above, this also seems to have been the view of their Lordships of the Privy Council in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1), though their Lordships do not set out the reasons which led them to the conclusion that the date of the death of the former trustee, Bijoy, was the date of the commencement of the cause of action in that case. There is no doubt this difference between the facts of this case and those in *Peary Mohan Mukerji* v. *Narendra Nath Mukerji* (1), namely, that the trustee whose representatives were the plaintiffs in that case was a lawful trustee till his death, whereas the trustee suing in this case ceased to be a lawful trustee in 1900 and was directed in 1902 by a Court of Justice to give up possession of the trust property. But I think that this difference could not affect the principle that, till possession of the trust property out of which the plaintiff could reimburse himself is lost, the peculiar suit to enforce a trustee's peculiar charge could not be brought against the trust. An agent has only the rights of retainer and lien, whereas a trustee has also a distinct charge even after he loses possession of the trust properties; an agent has only three years to sue, whereas a trustee has six years to enforce his charge; an agent can at any time sue his principal, whereas a religious or charitable trustee or one who claims to be such trustee cannot as plaintiff sue the trust as defendant, himself representing the defendant trust, and these distinctions probably prevent the analogy of the case of *Kandasami Pillai* v. *Avayambal* (4) being applied as regards the commencement of the period of the limitation. I would, therefore, hold that the plaintiffs' cause of action arose only in February 1905.

In the result, I concur in the order of reversal and remand made by my learned brother.

Appeal accepted; Case remanded.

(4) 7 Ind. Cas. 399; 34 M. 167; 20 M. L. J. 989; 8 M. L. T. 194; (1910) M. W. N. 316.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 751 OF 1913.

February 14, 1915.

Present:—Mr. Justice Scott-Smith.

KISHEN NARAIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

PURAN CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Award, application to file—Suit referred to arbitrators—Suit compromised independently of arbitrators—Compromise signed by parties and arbitrators—No inquiry by arbitrators—Civil Procedure Code (Act V of 1908), Sch. II, para. 20.

The parties after appointing arbitrators settled their differences independently of the arbitrators and drew up a deed in the form of a compromise. It was signed by the parties and the arbitrators:

Held, that the deed could not be treated as an award and an application to file it in Court as an award could not be granted.

Miscellaneous first appeal from an order of the Divisional Judge, Delhi Province, dated the 14th February 1913, ordering that the award marked as Exhibit PW11 be filed in Court.

Lala *Balwant Rai*, for the Appellants.

Mr. *Roshan Lal* and Lala *Bhagwan Das*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the Divisional Judge of Delhi directing the filing of an award in Court. The facts are given in the judgment of the lower Court and need not be repeated. The main point upon which Counsel contests the correctness of the order of the learned Divisional Judge is that the so-called award is not any award at all. It appears that after the arbitrators had been appointed, the parties themselves on the 14th July 1912 came to an agreement and settled their dispute. The settlement was drawn up in the form of a compromise and was signed by the parties and by the arbitrators. The arbitrators did not themselves make any inquiry into the merits of the dispute, and there was no necessity for them to do so as the parties had settled it themselves.

The first question is whether the document of the 14th July 1912 is an award or not. In coming to the decision that it is an award, the learned Divisional Judge has relied chiefly on *Gobardhan Das v. Jai Kishen Das* (1). In that case an award, which purported to be a considered award of the

(2) 22 A. 224; A. W. N. (1900) 52.

arbitrators framed after consideration of the statements of the parties and the evidence of witnesses, was found in reality to be merely an adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference. It was held that this did not prevent the award being a valid and binding award between the parties. That case is, in my opinion, distinguishable from the present one, for there the arbitrators adopted the agreement of the parties as their own award and delivered it as such. In the present case the agreement between the parties, though signed by the arbitrators, has not been adopted by them as their own award at all, and it does not purport to be their award. Whether the agreement is or is not binding upon the parties, I am clear that it is not an award to which the provisions of rule 20 of the second Schedule of the Civil Procedure Code apply. I, therefore, hold that the Court could not order it to be filed and could not pass a decree upon it. I accept the appeal, set aside the order of the Divisional Judge and dismiss the plaintiffs' suit. I direct that parties shall bear their own costs in both Courts. Mr. Balwant Rai on behalf of the appellants argues that any ornaments which were made over to the other side in execution of the decree should be returned by them. If any ornaments have been made over in execution of the decree, it will be a question for the lower Court to decide whether they should be returned or not. I decline to pass any order in the matter.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 345 OF 1914.

February 9, 1915.

Present:—Justice Sir P. C. Banerji, KT.

DINA—DEFENDANT No. 1—APPELLANT

versus

HARKISHEN DAS AND OTHERS—PLAINTIFF—DEFENDANTS Nos. 2 & 3—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 57 (b), 177—Ejectment for doing acts inconsistent with the purpose for which land was let—Appeal to District Judge—

DINA v. HARKISHEN DAS.

Jurisdiction—Conversion of part of an agricultural holding into brick-field—Ejectment, whether from part or whole of holding.

Where the plaintiff sought to eject the defendants in the Revenue Court on the ground that they had committed acts inconsistent with the purpose for which the land had been leased:

Held, that an appeal lay to the District Judge. [p. 299, col. 2.]

Lachman Das v. *Nabi Bux*, 1 Ind. Cas. 61; 31 A. 109; 6 A. L. J. 39, distinguished.

Where a land was let for agricultural purposes and the lessee converted a portion of the land into brick-field:

Held, that the conversion was clearly an act detrimental to the land and was inconsistent with the purpose for which it was let and that the lessee was liable to be ejected from the entire holding and not from the portion only. [p. 300, col. 1.]

Second appeal from the decision of the District Judge of Benares, dated the 21st February 1914.

Mr. *Braj Nath Vyas*, for the Appellant.

Mr. *Parmeshwor Dayal* (for the Hon'ble Mr. *Gokal Prasad*), for the Respondents.

JUDGMENT.—The plaintiff-respondent granted a perpetual lease to the appellant in respect of fourteen plots of land covering an area of 12·54 acres. The appellant sublet two of these plots, the area of which is 1·58 acres, to the defendants Nos. 2 and 3 for the purpose of making bricks and setting up brick-kilns. The defendants Nos. 2 and 3 converted these plots into a brick-field, and thereupon the suit out of which this appeal has arisen was brought by the plaintiff against all the defendants for their ejectment from the entire holding, on the ground that the defendants had done an act detrimental to the land in the holding and inconsistent with the purpose for which it had been let. The suit purported to be one under section 57, clause (*b*), of the Agra Tenancy Act. The Court of first instance decreed the claim for ejectment, but ordered the defendant-appellant to pay compensation to the plaintiff and directed that upon payment of compensation ejectment shall not take place. On appeal the learned District Judge affirmed the decree for ejectment, but gave the defendant-appellant liberty to remove the brick-kilns, and restore the land to the condition in which it was before it had been converted into a brick-field. The defendant No. 1 has preferred this appeal. The first contention put forward on his behalf is that the appeal from the decree of the Court of first instance did not lie to the District Judge but lay to the Commissioner. This contention is, in my opinion, untenable. As I have said above, the suit was brought on the ground that by reason of the defendant having done an act detrimental to the land in his holding and inconsistent with the purpose for which it was let, he had rendered himself liable to ejectment under section 57, clause (*b*). A suit for ejectment on one of the grounds specified in clause (*b*) of section 57 is one of the suits mentioned in group B of the fourth Schedule to the Tenancy Act and an appeal from the decree in such a suit lies to the District Judge. In a suit of this description the sub-lessees from the tenant should, as provided in section 64 of the Act, be joined as parties, so that the circumstance of the sub-lessees being made defendants to the suit did not alter its nature. It was not a suit on the ground that the tenant had sub-let in contravention of the provisions of the Act and did not come within the purview of clause (*d*) of section 57. The learned Vakil for the appellant has referred to the ruling in *Lachman Das* v. *Nabi Bax* (1). That case has, in my opinion, no application to the present, inasmuch as it was held in that case that it was a suit in which the land-holder sued for ejectment of the tenant and his sub-tenants on the ground mentioned in clause (*d*) of section 57 and was a suit under section 31 (2), an appeal from a decree in which lay to the Commissioner. The present case, as I have said above, is a case in which the plaintiff sought to eject the defendants on the ground that they had committed the acts mentioned in clause (*b*) of section 57. The appeal, therefore, lay to the District Judge.

The next contention on behalf of the appellant is that the defendants have done nothing detrimental to the holding or inconsistent with the purpose for which the land was let and that the lease granted to the defendant-appellant was not a lease for agricultural purposes but permitted the defendant to build on the land and do any other act he liked in regard to it. This contention, which was also raised in the Court below, has, in my opinion, been rightly repelled by that Court. From the terms of the lease it

(1) 1 Ind. Cas. 161; 6 A. L. J. 39; 31 A. 109.

appears that it was taken for agricultural purposes. In the preamble of the lease it is stated that the defendant had asked that he should be given a right to cultivate the land, so that the main object of the letting was agricultural. No doubt the tenant was permitted to sink wells or make constructions on the land, but these apparently were ancillary to the main object of the tenancy, *viz.* agriculture. The buildings which might be erected were apparently buildings for keeping cattle or implements of husbandry. Using a part of the land as a brick-field was clearly an act detrimental to the land for agricultural purposes and was inconsistent with the purpose for which the land was let. The appellant, therefore, in granting a sub-lease for the making of bricks committed an act detrimental to the land leased out to him and became liable to ejectment from his holding. The learned Judge has allowed the defendant to restore the land to its original condition and has provided in the decree that if this be done, the decree shall not be executed for his ejectment. This he has done in exercise of the powers vested in him by section 65. It is urged that the omission to restore the land sub-let to the defendants Nos. 2 and 3 to its former condition should entail the ejectment of the appellant from that portion of his holding only and not from the entire holding. I cannot agree with this contention. Under section 57, clause (*b*), a tenant is liable to ejectment from his holding on the ground of any act or omission detrimental to the land in that holding. If any such act is done in respect of a part of the holding, he is liable to ejectment from the entire holding and not from that portion only. As the holding was one entire holding for which a lump sum was to be paid as rent, the Court could not order the appellant's ejectment from a portion only of the holding and apportion the rent, thereby substituting a different contract of tenancy for that into which the parties had entered. I accordingly dismiss the appeal with costs, including fees on the higher scale, but extend the time for restoring the land to its former condition to four months from this date.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL FIRST CIVIL APPEAL No. 38 OF 1914.

February 18, 1915.

Present:—Mr. Justice Parlett.

T. KATCHI ROWTHER—PLAINTIFF—APPELLANT

versus

R. NAINA MOHAMED—DEFENDANT—RESPONDENT.

Promissory note—Payable otherwise than on demand—Stamp Act (II of 1899), ss. 2 (22), 35, Sch. I, Arts. 13, 49—Agreement—Court Fees Act (VII of 1870), s. 13—Court-fees, refund of.

A document by which the executant undertakes to make certain specified payments towards the sum due and agrees that his failure to do so shall render him liable to forfeit any payments he may already have made, is not a promissory note payable otherwise than on demand but only an agreement and is stampable with 8 annas only. [p. 301, col. 1.]

Mr. *Karaka* for the Appellant.

Mr. *A. C. Dhar*, for the Respondent.

JUDGMENT.—Appellant sued on 2nd January 1914 to recover Rs. 1,637-8, interest and principal due on a promissory note in terms of an agreement, both notes and agreement being dated 1st June 1912. His suit was dismissed on the ground that it did not lie, *first*, because the promissory note was insufficiently stamped, and *secondly*, because money was not recoverable under the agreement. He now appeals and asks that the case may be remanded for trial on its merits. It appears that on 1st June 1912 plaintiff sold to defendant a boat for Rs. 3,000 of which Rs. 300 was paid in cash, and for the balance of Rs. 2,700 defendant executed a pro-note bearing interest at 1 4 per cent. per mensem. In it the defendant promises to pay the sum to plaintiff or his order on demand; it is stamped with a one-anna revenue stamp. At the same time defendant executed an agreement in favour of the plaintiff attested by a witness, in which he set out the reason wherefor the pro-note was executed and undertook to make payments to him as follows:—

The interest month by month in full;

		Rs.
On 1st September 1912	...	200
On 1st January 1913	...	200
On 1st June 1913	...	300
On 1st October 1913	...	300
On 1st January 1914	...	300
On 1st April 1914	...	200
On 1st June 1914	...	200
On 30th July 1914	...	1,000
Total Rs.	...	2,700

He went on to say: "If I should fail to pay before the date specified above, I shall forfeit the payments made towards principal and interest and hand over boat No. 724 and its appurtenances." The Judge held this document to be a pro-note payable otherwise than on demand and requiring more than a one-anna stamp. As a matter of fact the document bears a one-rupee stamp, but even this would be insufficient under Article 49 read with Article 13 of Schedule I to the Stamp Act, if it is held to be a promissory note payable otherwise than on demand, and the insufficiency could not be remedied under section 35 of the Act. But, in my opinion, it is not a promissory note at all. Clause 22 of section 2 of the Stamp Act shows what is meant by a promissory note which is not payable on demand, and the document in question is not of that nature. In my opinion it is an agreement and as such is sufficiently stamped. Its meaning and effect are, I think, plain. Defendant undertakes to make certain specified payments towards the sum due under the promissory note and agrees that his failure to do so shall render him liable both to forfeit any payments he may already have made and to return the boat. If the stipulated payments were made, the plaintiff would doubtless forbear to enforce his rights under the promissory note, but upon default in payment he was, I consider, entitled to do so, and this he has done in this case, which is brought on the promissory note. The defendant alleged certain payments which the plaintiff did not give credit for, and he must now have an opportunity to prove them. The decree is reversed, and the suit will be re-admitted and decided on its merits, costs to follow the result. A certificate for refund of Court-fees in this appeal will issue under section 13 of the Court Fees Act.

Decree reversed; Suit remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1812 OF 1912.

March 22, 1915.

Present:—Mr. Justice Scott-Smith.

MUHAMMAD ALI—PLAINTIFF—APPELLANT

versus

DR. MIR HAIDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Suit to establish reversionary right—Subsequent suit for possession—Cause of action, whether same.

A second suit is not barred by the provisions of Order II, rule 2, of the Civil Procedure Code, unless the same cause of action is to be found within the four corners of the plaint in the first suit [p. 302, col. 1.]

Where, therefore, a widow sold her husband's house to the defendant and the husband's brother sued for and obtained a decree that the sale could not affect his reversionary rights in half of the house after the widow's death and then sued for possession of the other half:

Held that the act of the widow in selling the house, though a single act, gave rise to two distinct causes of action being an infringement of two distinct rights possessed by the plaintiff and, therefore, the second suit was not barred by Order II, rule 2, of the Civil Procedure Code. [p. 302, col. 2.]

Second appeal from the decree of the Court of the Divisional Judge, Sialkot Division, dated the 6th August 1912, reversing that of the Subordinate Judge, second Class, Sialkot, dated the 21st December 1911, decreeing plaintiff's claim in part.

Bhagat *Govind Das*, for Lala *Mul Chand*, for the Appellant.

Sheikh *Umar Bakhsh*, for Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—The facts of the case out of which this appeal arises sufficiently appear from the judgments of the Courts below and are briefly as follows:—*Musammat* Hakim Bibi, widow of Sher Ali, sold her husband's house to Dr. Mir Haidar, defendant-respondent. The plaintiff, Muhammad Ali, present appellant, who is the brother of Sher Ali, brought a suit for a declaration that the sale by the widow of half of the house would not affect his reversionary rights after her death. In the plaint in that suit he expressed the intention of bringing another suit for possession of the other half of the house, which he said belonged to him. In that suit he was given a decree that the sale would not affect his reversionary rights in half of the house after the death of the widow.

COLLECTOR OF BENARES v. SHIAM DAS.

He has now brought the present suit for possession of the other half of the house and the lower Appellate Court has dismissed it, holding it as barred by the provisions of Order II, rule 2, Civil Procedure Code. The plaintiff has filed a second appeal to this Court.

The learned Divisional Judge in his judgment says that the two defendants gave the plaintiff only a single cause of action, *viz.*, the sale and the transfer of possession of the house as a whole. It appears to me that though a part of the cause of action in the present case is the same as in the previous one, the whole cause of action is not the same. In the former case the cause of action was the alienation of the house in which, it was alleged, the widow had only a life-interest, the alienation not having been made for valid necessity. In the present case the cause of action is the sale coupled with the entry of the vendee, Mir Haidar, into possession. In the former suit it was not necessary to allege that the vendee had taken possession as that fact was not an essential part of the plaintiff's cause of action. In the present case Mir Haidar's entry into possession is an essential part of the cause of action. It has been held that a second suit shall not be barred unless the same cause of action is to be found within the four corners of the plaint in the first suit, and I am clear that the whole of the plaintiff's present cause of action is not to be found within the four corners of the plaint in the previous suit. Bhagat Gobind Das, for the appellant, has cited *Khairati* v. *Akko* (1), in which it was held that a previous suit for declaration in regard to a sale by a widow did not bar a subsequent suit for pre-emption. It was pointed out in that case that the act of the widow was an infringement of two distinct rights possessed by the plaintiffs, *viz.*, their right as reversionary heirs of the widow's husband and their right of pre-emption: although the act of the widow in selling the house was a single act, it really gave rise to distinct causes of action, upon which separate suits comprising distinct subject-matters might be brought. Similarly in the present case the act of *Musammat* Hakim Bibi in selling the house was an infringement of two distinct rights possessed by the plaintiff. (1) his right as reversionary heir of the widow's husband in half the house, and (2) his right as proprietor in the other half of the house. The act of the widow in selling the house was a single one, but it gave rise to two distinct causes of action. I am, therefore, clear that the present suit is not barred by Order II, rule 2, of the Civil Procedure Code. The appeal is accepted, and the order of the lower Appellate Court being set aside, the appeal is remanded thereto under Order XLI, rule 23, Civil Procedure Code, for re-decision. Stamp in this Court will be refunded and the other costs will be costs in the cause.

Appeal accepted.

(1) 108 P. R. 1882.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 90 OF 1914.

February 8, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

THE COLLECTOR OF BENARES IN CHARGE OF THE COURT OF WARDS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHIAM DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 79—Person in constructive possession of holding, dispossession of Remedy.

A person who has been constructively in possession of a holding may be regarded as having been ejected within the meaning of section 79 of the Tenancy Act and, therefore, must sue under that section if he wishes to recover possession of the holding. [p. 303, col. 1.]

First appeal from an order of the Subordinate Judge of Jaunpur, dated March 2nd, 1914.

Mr. *Ryves*, for the Appellant.

Mr. *B. E. O'Conor* (with him the Hon'ble Mr. *Gokul Prasad*), for the Respondents.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Jaunpur, directing that the plaint be returned to the plaintiff for presentation to the proper Court. The Subordinate Judge was of opinion that the suit as brought was cognizable only by the Revenue Court. The only facts which need to be stated for our present purpose are that in 1869 the

ancestors of some of the defendants made a simple mortgage of the property in favour of the ancestor of Rai Sheo Prasad and Rai Shambhu Prasad, who are represented in the present case by the Collector of Benares as Manager of the Court of Wards. A decree *nisi* for sale was obtained on the mortgage in February 1901. An order absolute for sale was passed in April 1904. The property was put up for sale in March 1907, when it was purchased by Sheo Prasad and Shambhu Prasad, and the sale was confirmed in May 1907. In the plaint it is stated that the plaintiffs endeavoured to obtain possession of the property in October 1907 but were resisted by the defendants. The cause of action is said to have arisen on October 3rd, 1907. The original mortgagors of the property were fixed-rate tenants. The principal defendants to the suit are the *zemindars* of the land. On March 21st, 1904, they obtained a decree for arrears of rent against the fixed-rate tenants and on May 14th, 1904, they obtained an order for their ejectment and in due course ejected them and took possession of the land. The plaintiffs in the present case claimed to have acquired the rights of the fixed-rate tenants and so to have become themselves fixed-rate tenants of the land. The Subordinate Judge was of opinion that this was a suit by tenants, who had been ejected otherwise than in accordance with the provisions of the Tenancy Act, against their land-holders for recovery of possession of a holding within the meaning of section 79 of the Tenancy Act. From the facts stated above it appears that the plaintiffs have never in fact held possession of the land in suit. It has been held by this Court in several cases that a person who has been constructively in possession of a holding may be regarded as having been ejected within the meaning of section 79 of the Tenancy Act and, therefore, must sue under that section, if he wishes to recover possession of the holding. We need not review the rulings cited to us, for it seems to us quite clear that in the present case it is impossible to hold that the plaintiffs have ever been even in constructive possession of the holding. The persons whose rights they claim to have acquired were ejected by the landlords in May 1904. The plaintiffs did not purchase the property till March 1907 and they do not profess to have gone anywhere near the property till October 1907. As the plaintiffs do not assert that they have ever actually held possession of the land and it is impossible to hold that they have ever been even constructively in possessoin of the land, we cannot hold that they have been ejected within the meaning of section 79. We express no opinion whatever on the merits of the case, but we are of opinion that the suit was maintainable in the Civil Court and that the order of the Subordinate Judge cannot be maintained. We allow this appeal, set aside the order of the Subordinate Judge and remand the case to the Subordinate Judge for trial according to law. Costs here and hitherto will be costs in the cause and will include in this Court fees on the higher scale.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 128 OF 1913.

January 6, 1915.

Present:—Mr. Stuart, A. J. C.

LALTA SINGH—PLAINTIFF—APPLICANT

versus

PRINCE *Mirza* HUMAYUN QADAR AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Oudh Rent Act (XXII of 1886), s. 108 (10)—Declaration that plaintiff is not tenant but under-proprietor, suit for, maintainability of—Jurisdiction of Civil and Revenue Courts.

Section 108 (10) of the Oudh Rent Act applies not only to under-proprietors whose rights as such have been declared by a competent Court or admitted by the superior proprietor, but also to persons who claim to be under-proprietors but are asserted by the superior proprietor to be tenants. And such persons cannot sue in a Civil Court for declaration of their title to under-proprietary rights until they have instituted a suit in the Revenue Courts under section 108 (10) of the Oudh Rent Act. [p. 304, col. 1.]

Khadim Husain v. *Musammat Jamil Bibi*, 7 Ind. Cas. 608; 13 O. C. 188, followed.

Application against the order of the District Judge, Lucknow, dated 26th June 1913, upholding that of the Munsif, South Lucknow, dated 24th April 1914.

Babu *Salig Ram*, for the Appellant.

Babu *Bisheshwar Nath*, for the Opposite Party.

MOHABIR PERSHAD CHOWDHURY v. CHANDRA SHEKAR SAHAI.

JUDGMENT.—In this case the applicant alleges that he is a *chakdar* and as such an under-proprietor of the land in question. The lessees of the superior proprietors sued him for rent in a Rent Court and obtained a decree against him. Subsequently they applied to eject him from possession of the land, treating him as a tenant. He asserted that he was an under-proprietor and contested their right to eject him by a suit under section 108, clause 8, Act XXII of 1886. His suit was dismissed and the ejectment was upheld. He has now attempted to come into the Civil Court to obtain a declaration that he is an under-proprietor in possession of the land.

It is laid down in *Khadim Husain* v. *Musammat Jamil Bibi* (1) by a Bench of this Court that the application of section 108, clause 10, of the Oudh Rent Act is not confined to under-proprietors whose rights as such have been declared by a competent Court, and that not only a person who has been declared to be an under-proprietor under a Settlement Court decree and a person whose under-proprietary rights are admitted by the superior proprietor, but also a person who claims to be an under-proprietor and who is asserted by the superior proprietor to be a tenant, has a right to sue for recovery of occupancy of land from which he asserts that he has been illegally ejected under the provisions of section 108, clause 10, and that it is not open to him to assert his title to under-proprietary rights in a Civil Court until he has instituted a suit under section 108, clause 10. The facts in this case make that decision absolutely applicable, and according to the view taken in that decision, this application must fail. The learned Counsel for the applicant has endeavoured to distinguish the facts in the present case, but he has not succeeded in establishing that there is any distinction. His main point is that, as the land in question is land which accreted to the *mahal* by alluvion, the provisions of section 108, clause 10, would not apply to it. I cannot accept this argument. For the above reasons I dismiss this application. The applicant will pay his own costs and those of the other side.

Application rejected.

(1) 7 Ind. Cas. 608; 13 O. C. 188.

CALCUTTA HIGH COURT.

CIVIL RULE No. 451 OF 1914.

December 15, 1914.

Present:—Justice Sir Herbert Carnduff, KT., and Mr. Justice Chapman.

MOHABIR PERSHAD CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS—PETITIONERS

versus

CHANDRA SHEKAR SAHAI—DEFENDANT—APPELLANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 151, 152, *scope of—Mortgage-decree—Property formed into new* mahal—*New description not given in decree—Amendment of decree—Failure of justice.*

A decree for the sale of a mortgaged property which was originally an undivided share in a *mahal* and was so described in the mortgage-deed, but which was before the institution of the suit formed into a separate *mahal*, was passed describing the property as in the deed. On an application being made for amending the decree so as to give the new description of the mortgaged property:

Held, that the Court had jurisdiction under section 151 of the Code of Civil Procedure to amend the decree to prevent mockery and travesty of justice. [p. 305, col. 1.]

Appeal from Original Decree No. 87 of 1912, being an appeal preferred against that of the Sub-Judge, third Court, Patna, passed in Suit No. 41 of 1903 and dated the 18th May 1908.

Dr. *Rash Behari Ghosh*, Babus *Umakali Mukherjee* and *Abani Bhusan Mukherjee*, for the Petitioners.

The Hon'ble Sir *S. P. Sinha* and Babu *Rajendra Pershad*, for the Opposite Party.

JUDGMENT.—This was a Rule calling on the opposite party to show cause why we should not amend a decree of this Court which is now under execution. It was heard at length on the 3rd instant, when at the suggestion of the petitioner who has also sought for a remedy by appealing to this Court against the refusal of the lower Court to execute his decree, we reserved judgment and intimated that we would dispose of both the appeal and the Rule together. On further consideration, however, and in view of the delay which the course suggested will involve and of the circumstance that the question now raised is totally different from that raised by the appeal, we are strongly of opinion that we ought to deal with the latter as soon as possible.

MAHANTA HUNUMAN SARAN *v.* SHEONATH MAHTO.

The decree was for the sale of certain property, which was originally an undivided share in a *mahal* bearing *Touzi* No. 588 in the Patna Collectorate and is so described in the mortgage-deed, but which was before the institution of the suit formed into a separate *mahal* bearing *Touzi* No. 2014/9706. No mention of the change was made during the proceedings in the trial and Appeal Courts and our decree naturally and properly followed the description in the deed. The result is that the decree has so far been found to be waste paper and we are asked to make the necessary amendment.

For the opposite party Mr. Sinha has argued that the only provision of the Code of Civil Procedure, 1908, under which this could be done is section 152 and that that obviously has no application. In this he is, we think, clearly right, but we are unable to yield to his further argument that if this special section cannot be applied we cannot fall back upon and apply the general provision saving our inherent jurisdiction to be found in section 151. For section 151 expressly declares that "nothing in this Code" and, therefore, nothing in the next section 152 "shall be deemed to limit or ortherwise affect the inherent jurisdiction of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." And it seems to us that, if ever there was a case of justice calling for our intervention in order to prevent mockery and travesty of itself, this is one. The facts are admitted and on the merits all that can be suggested is that the petitioner had a sinister motive in deliberately giving the misdescription, but we confess ourselves wholly unable to conceive how it can possibly have been so, while we cannot see that the opposite party has been in any way damnified or prejudiced in the slightest degree.

We make this Rule absolute with costs and amend the decree by including in it both the old and the new description of the mortgaged property and we fix the hearing-fee at five gold *mohurs*.

Rule made absolute.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1000 OF 1911.

December 10, 1914.

Present:—Mr. Justice Holmwood and Justice Sir Herbert Carnduff, Kt.

MAHANTA HUNUMAN SARAN—PLAINTIFF—APPELLANT

versus

SHEONATH MAHTO AND OTHERS—DEFENDANTS—RESPONDENTS.

Gift by a tenant's widow—Possession by donee—Death of donee—Resumption by widow—Ejectment, liability of.

The widow of an original tenant made a gift of her husband's tenancy in absolute title and permanently to a stranger who, after enjoying it for three years, died. On his death the widow resumed the tenancy:

Held, that by merely occupying the land on the death of the donee without proving herself an heir, she could not acquire any right of tenancy in the land in question, and, therefore, she was liable to ejectment by the *zemindar*. [p. 306, col. 2]

Appeal against the decree of the Additional District Judge of Patna, dated the 14th of January 1911, reversing that of the Munsif, second Court of that place, dated the 13th of June 1910.

Babus *Umakali Mukherjee* and *Surendranath Ghosal*, for the Appellant.

Mr. *M. Khurshed Hussain*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff as the *malik* of the village to eject the defendants Nos. 1 to 4 as trespassers. We are now only concerned with defendant No. 4. The Munsif in the first Court held that the defendants had failed to prove any tenancy, or rather the plaintiffs's title as *zemindar* has been admitted and proved, and, therefore, gave a decree to the plaintiff. In appeal the learned Additional District Judge has held that the defendant, who is the widow of the original occupancy *raiyat*, has established her title to the disputed land as occupancy tenant and, therefore, the plaintiff's suit must fail.

It appears that the defendant No. 4 was the widow of the original tenant, Dular Chand, and in the view we take of the case it is unnecessary to consider the questions that have been incidentally argued, whether the holding of 1 *bigha* 18 *cottahs* forms a complete *raiyati* holding in the plaintiff's *tukhta*

and whether there is a custom of transferability in the village. We were at first inclined to think that these questions would have to be decided, but in the simple view of the case that the widow made a gift in absolute title and permanently to one Gajadhar Mahton, who enjoyed this piece of land and other portions of Dular Chand's holding for nearly three years, and that on his death the widow resumed these lands without any legal title whatever, certainly not as the heir of Gajadhar, it is difficult to see how the learned Judge's finding, that Sheoruttan as widow of Dular Chand has established her title to the disputed land, can be supported. By the *tamliknama* she lost all right to the land that she gave to Gajadhar, and she has, as the learned Judge rightly points out, now to show how she again became the tenant of the plaintiff. By merely occupying the land upon the death of Gajadhar without ostensible heirs she could not acquire any right of tenancy in this land. She is, therefore, in this view of the case a person who is upon the *zemindar's* land without any subsisting title and, therefore, liable to ejectment and it being found that plaintiff is sole landlord of the piece of land in suit, he is entitled to succeed.

In this view the appeal must be decreed. The judgment and decree of the lower Appellate Court must be set aside and those of the Munsif restored with costs in all Courts.

Appeal decreed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 225 OF 1913.
February 9, 1915.
Present:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Tudball.
DIN DAYAL—DEFENDANT—APPELLANT
versus
RAMDHAN—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Pre-emption suit by one co-sharer against another—Custom, proof of—Burden of proof—Wajib-ul-arz *entry, production of, whether sufficient*—Karibi *and* baidi, *meanings of.*

In a suit for pre-emption against another co-sharer it lies upon the plaintiff to prove not only that a custom of pre-emption exists, but that there is a custom under which he has a right to pre-empt as against another co-sharer. [p. 306, col. 2.]

Therefore, in such a case the mere production of an entry in a *wajib-ul-arz* the meaning of which is more than doubtful, is not sufficient to discharge the onus which lies on the plaintiff. [p. 307, col. 1.]

The expressions *karibi* and *baidi* are ambiguous expressions and they may refer to nearness or distance in space or nearness or distance in relationship. [p. 306, col 2.]

First appeal from an order of the Judge of Azamgarh, dated the 31st July 1913.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Hamilton*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The plaintiff and the vendee are both co-sharers and the former stated in his evidence that he was also a relation. An entry in the *wajib-ul-arz* records a right of pre-emption first in the *hissadar karibi* and then *hissadar baidi*. It appears that at one time there were a number of subdivisions of the *mahal* which have now ceased to exist. The Court of first instance dismissed the plaintiff's suit, holding that a custom giving the plaintiff a preferential right over the defendant was not proved. The lower Appellate Court reversed the decreee of the Court of first instance and remanded the case. The vendee comes here in appeal.

We think that the decree of the Court of first instance was correct and ought to be restored. It lay upon the plaintiff to prove not only that a custom of pre-emption existed, but that there was a custom under which he had a right to pre-empt as against another co-sharer. The only evidence he adduced was the extract from the *wajib-ul-arz*. This extract contains the expressions "*karibi*" and "*baidi*". They are ambiguous expressions which may refer to nearness or distance in space, or nearness or distance in relationship. The opening paragraph of the plaintiff's own plaint would seem to show that he then attributed the meaning of "space" to the expressions and not that of "relationship". The written statement of the defendant

shows that he also attributed this meaning to the expressions. In our opinion it cannot be said that the plaintiff by production of an entry, the meaning of which was more than doubtful, discharged the onus which lay upon him.

We allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 66 OF 1912.

March 31, 1914.

Present:—Mr. Lindsay, J. C. and Mr. Stuart, A. J. C.

RAM AUTAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja ABUL HASAN KHAN—PLAINTIFF—RESPONDENT.

Cause of action, accrual of—Declaration that defendant is not proprietor, superior or inferior, suit for—Limitation, starting point of—Jurisdiction of Civil and Revenue Courts—Declaration that defendant is or is not agricultural tenant, suit for, maintainability of—Plaintiff owning half share in village, when entitled to declaratory decree against rights of defendant in village—Decree, declaratory, validity of.

The cause of action for a suit for a declaration that the defendant is not a proprietor or an under-proprietor, does not necessarily accrue to the plaintiff at the time when the defendant asserts the title implying that he is not liable to ejectment and that assertion finds place in *khewat* entries, until that assertion is put forward as a substantial defence in ejectment proceedings before the Revenue Court. [p. 308, col. 2.]

Budesab v. *Hanmanta*, 21 B. 509, referred to.

A Civil Court is entitled to declare that a person is or is not an agricultural tenant, even though the Revenue Court has exclusive jurisdiction to determine the nature of the tenancy and to eject that person. [p. 309, col. 1.]

Raghubar v. *Raja Rampal Singh*, 3 O. C. 365 and *Maheshwar Parshad* v. *Muhammad Ewaz Ali Khan*, 3 Ind. Cas. 200; 13 C. W. N. 1093; 10 C. L. J. 133; 11 Bom. L. R. 868; 31 A. 394 (P. C.); 6 M. L. T. 168; 19 M. L. J. 442; 12 O. C. 293, referred to.

A decree for a declaration that the principal defendant is neither a superior nor an inferior proprietor in the village, is good, although the plaintiff is owner of only one half of the village, if the mortgagee in possession of the remaining half is impleaded as a defendant in the case. [p. 309, col. 2.]

Appeal from the decree of the Subordinate Judge, Gonda, dated 30th March 1912.

Nawab Mirza *Sadiq Ali Khan*, for the Appellants.

Mirza *Sami Ullah Beg*, for the Respondent

JUDGMENT.—This is an appeal against a declaratory decree to the effect that the appellants have no proprietary interests, inferior or superior, in the village of Barahra Jot. The appellants are members of a Brahman family descended from a certain Bhawani. In 1869 Harbans, son of Bhawani, instituted a claim in the Settlement Court for *nankar* and *dahyak* against the superior proprietor of the village. This claim was dismissed on a finding that Harbans had no rights in the village as a sub-proprietor. In 1871 the Court of Wards, as Manager of the village on behalf of the superior proprietor, issued a notice of ejectment against Harbans. He objected alleging sub-proprietary title. An issue was framed as to whether he had any title in the village, and it was decided that he had no title of a sub-proprietary nature. In 1874 Munna, a grandson of Bhawani, made a claim in the Settlement Court for a *birt* right in the village. That claim was also dismissed. In 1885 the superior proprietor of the village issued a notice of ejectment against Brij Lal, son of Harbans, in respect of 11 *bighas* 14 *biswas*, of which he was in possession. He objected alleging a right as *thekadar* for the year 1293 *Fasli*. His objection was allowed with respect to 8 *bighas* 10 *biswas* only. In September 1903 an application was made to the Tahsildar for the substitution of the names of Ram Autar, Ram Prakash, Indar Datt, Parmeshwar, minor under the guardianship of Ram Autar, Ram Sudh and Mathura Prasad, members of the same family, in place of the names of Brij Lal and Ram Nidh, deceased. There is nothing to show the exact capacity in which the names of the deceased persons were entered in the *khewat*. Their names were apparently entered as *thekadars*. When the application for mutation was

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made, a certain Nasir Ahmad, stated to be an agent of the superior proprietor of half the village, and a certain Maulvi Muhammad Abdussami, stated to be an agent of the Balrampur Estate which held a mortgage over the remaining half of the village, deposed before the Tahsildar that the family to which the applicants belonged were *thekadaran dawami*, that is to say, perpetual lessees of the village. The application was granted. There is nothing to show that the names of the applicants were entered as perpetual lessees. The superior proprietor of half the village was apparently under the impression that the names of the applicants had been entered as perpetual lessees, for in 1906 an application was made on his behalf for correction of the *khewat*. This application was refused, on the ground that it was his duty to have appealed against the correctness of the entry made in 1903 and that as he had failed to do so, it was not open to him to apply for subsequent amendment. In 1908 the Court of Wards in charge of the village on behalf of the superior proprietor, and the Balrampur Estate, issued a notice of ejectment against the appellants in respect of the rights that they possessed in the village. The validity of this notice was contested in the Revenue Court, which decided that the appellants were perpetual lessees of the village, and that they could not be ejected by a notice issued under the provisions of the Oudh Rent Act. On the 15th August 1911, the suit in question was brought for the ejectment of the appellants, and for a declaration that they had no rights as proprietors or under-proprietors in the village in question.

The learned Subordinate Judge dismissed the suit for possession and decreed the declaration as prayed in the plaint. The present appeal is preferred.

The appellants have set up that they are perpetual lessees by virtue of a lease alleged to have been executed in their favour more than a hundred years ago. They filed a document which they asserted was such a lease. The learned Subordinate Judge refused to accept the document as genuine. We agree with his finding upon this point. The document in question has been produced in this case for the first time. If it were genuine, it would have assisted the appellants' predecessors-in-title in every portion of the litigation to which we have referred. It appears inconceivable to us that, if this document had been genuine, it would not have been produced at the time of the First Regular Settlement, or during subsequent settlement proceedings, or in the course of the previous litigation. The document was not capable of proof on the allegation that it was over a hundred years old, but we see no reason to presume its genuineness. Upon the facts we are able to come to an affirmative finding that it has been fabricated. The remaining evidence to support the plea that the appellants are perpetual lessees of the village in question consists of the depositions of the two agents. There is every reason to suppose that both these agents colluded with the applicants when the application for the correction of the *khewat* was made, and in the case of one agent we find that there is reliable evidence that he was actually bribed to make the statement which he made. In no circumstances was the evidence of either agent of value to prove that a perpetual lease existed, and we have no hesitation in finding on the facts that the appellants are not perpetual lessees of the village in question.

The learned Counsel for the appellants has urged that the suit is barred by limitation. We find that it was open to the respondent to date his cause of action from 1908 when the Revenue Court refused to uphold the notice in ejectment. The cause of action did not necessarily accrue in 1906 when the *khewat* was corrected. An assertion of title by a tenant which would imply that he is not liable to ejectment would not become effective against the landholder until such time as it was put forward as a substantial defence in ejectment proceedings. We are supported in this view by the decision in *Budesab* v. *Hanmanta* (1). The view taken of the law in that case was to the effect that allegations by a tenant to the effect that he is not liable to ejection, do not necessarily throw upon a landlord the onus of refuting them

(1) 21 B. 509.

by suit (page 516) but that, when a suit for ejectment is filed, the period of limitation commences from the date when the plea to avoid ejectment is asserted in the proceedings.

The learned Counsel for the appellants has also argued that the decree is bad in law, for the reason that a Civil Court in Oudh has no right to pass a declaration with regard to the status of an agricultural tenant, inasmuch as the question of the status of an agricultural tenant can be determined only by a Revenue Court. The law on the subject was stated by a Bench of this Court in *Raghubar* v. *Raja Rampal Singh* (2). Subsequent decisions upon the point have followed the pronouncements made in the decision in that case. At page 369 in that judgment Mr. Spankie said: "But, as far as I know, it has not been held that, where the Revenue Court has decided that the plaintiff is not a tenant, or has decided that he is a tenant, it has power to decide the question whether the plaintiff is or is not a tenant finally, and the Civil Courts cannot take cognizance of such question. It seems to me that, whichever way the question is decided by the Revenue Court, the party against whom it is decided can go into the Civil Courts and claim, if he is the plaintiff, a declaration that he is not a tenant, or if he is the defendant, a declaration that the plaintiff is a tenant, and that the Civil Courts can make the declaration claimed. The Revenue Courts have, I think, exclusive jurisdiction to decide, where a tenancy is admitted, what the nature of the tenancy is, but where the existence of the relation of landlord and tenant is denied, I do not think that they have exclusive jurisdiction to decide as to the existence of such relation." In the case of *Maheshwar Parshad* v. *Muhammad Ewaz Ali Khan* (3), their Lordships of the Privy Council decided that, where a Settlement Court had given a decree declaring a certain person the permanent lessee of the village, and where this decree was subsequently altered by the superior Appellate Court to a decree granting the applicants a farming lease for 30 years, although the holder of this lease could not be ejected except by a Revenue Court, the *talukdar* was entitled to a declaration in a Civil Court to the effect that the descendants of the lessee were not entitled to the rights of under-proprietors or to any rights other than those of tenants for a term of 30 years whose term has expired. This decision of their Lordships of the Privy Council covers the facts in the present case and justifies the decree of the learned Subordinate Judge who, while finding that he cannot give possession of the village in question to the plaintiff-respondent, has decreed a declaration that the appellants are not entitled to proprietary or under-proprietary rights of any kind, including rights as perpetual lessees. We, therefore, find against the appellants on the above point.

The remaining point taken by the learned Counsel for the appellants is that the plaintiff-respondent is owner of only one-half of the village in question. The assertion is correct, but as he joined the mortgagee in possession of the remaing half as a defendant in suit this circumstance does not invalidate the decree.

These conclusions dispose of all the matters argued in appeal before us. We, therefore, dismiss this appeal. The appellants will pay their own costs and those of the contesting respondent.

Appeal dismissed.

(2) 3 O. C. 365.

(3) 3 Ind. Cas. 200; 12 O. C. 293; 13 C. W. N. 1093; 10 C. L. J. 133; 11 Bom. L. R. 868; 31 A. 394 (P. C.); 6 M. L. T. 168; 19 M. L. J. 442; 36 I. A. 114.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1211 OF 1913.

February 2, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

SAPTHARISHI REDDIAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF TRICHNOPOLY—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s 70—Plaintiff and defendant co-owners of land irrigated from same source—Repairs effected by plaintiff—Defendant benefited by repairs—Contribution—Option to accept or refuse benefit if necessary.

The plaintiff and the defendants held equal areas of land irrigated from the same source and certain repairs became necessary for the preservation of the irrigation works. The plaintiff submitted an estimate of repairs to the defendants and called on them for a proportionate contribution. The defendants replied that they had no objection to the repairs being done but they were under no liability to contribute and would not do so. The plaintiff effected the repairs and brought the present suit to recover a proportionate share of the cost from the defendants. It was found that the repairs were lawfully effected and the defendants were benefited by them and the plaintiff did not intend to do them gratuitously:

Held, that section 70 of the Indian Contract Act applied to the case and the defendants were liable to contribute towards the cost of the repairs. [p. 311, col. 2; p. 314, col. 1].

Damodara Mudaliar v. *Secretary of State for India*, 18 M. 88; 4 M. L. J. 205; *Yogambal* v. *Naina Pillai Marakayar*, 3 Ind. Cas. 110; 6 M. L. T. 162; 19 M. L. J. 489; 33 M. 15 and *Gajapathi Kristna Chandra Deo* v. *Srinivasa Charlu*, 20 Ind. Cas. 445; 25 M. L. J. 433; (1914) M. W. N. 99; 14 M. L. T. 20, referred to.

Per *Ayling, J.*—Section 70 of the Contract Act does more than reproduce the English Law as laid down in *Lampleigh* v. *Brathwait*, 1 Sm. L. C. 141; Hob. 105; Moore 866; Brownl. & Gold. 7 and it is the duty of the Courts of India to have regard to the section itself without considering the restrictions imposed by the English Case-Law. [p. 311, col. 1.]

Per *Tyabji, J.*—There is no warrant for introducing the necessity for option of declining or accepting the benefit in construing section 70 of the Indian Contract Act. [p. 313, col. 1.]

Yogambal v. *Naina Pillai Marakayar*, 3 Ind. Cas. 110; 6 M.L.T. 162; 19 M. L. J. 489; 33 M. 15, dissented from.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suit No. 251 of 1912, preferred against that of the Court of the District Munsif of Namakal, in Original Suit No. 1 of 1910.

Mr. *T. V. Muthukrishna Iyer*, for the Appellant.

The *Government Pleader*, for the Respondent.

JUDGMENT.

AYLING, J.—The facts of this case as found by the lower Appellate Court may be summarized thus. The plaintiff and defendants hold approximately equal areas of land irrigated from the same source—the Andapuram tank and the Karuvattar anicut and channel feeding the same. Certain rapairs became necessary for the preservation of these irrigation works. The plaintiff prepared an estimate for the repairs, informed the defendants that it was proposed to effect them and called on them for a proportionate contribution. The defendants replied that they had no objection to the plaintiff's carrying out the repairs but that it was not customary for them to contribute to such repairs, and they declined to do so. The plaintiff then effected the repairs and brought the present suit to recover a proportionate share of the costs from the defendants, basing his claim on section 70 of the Contract Act. The only question is whether this section applies.

That the repairs were lawfully effected is not disputed. That they were for the benefit of the defendants is also not disputed: and I can see no basis for the argument that because the plaintiff also benefited by them the section is inapplicable. Vide *Damodara Mudaliar* v. *Secretary of State for India* (1). That the plaintiff did not intend to effect them gratuitously is found and there is certainly evidence to support the finding. It only remains to determine whether the defendants enjoyed the benefit of the repairs within the meaning of section 70 and this is the crux of the whole controversy. The defendants (appellants) rely on the ruling of Sankaran Nair, J., in *Yogambal* v. *Naina Pillai Marakayar* (2) that a person cannot be said to have enjoyed a benefit within the meaning of section 70, Contract Act, unless he has had an option of accepting or rejecting it. The plaintiff-respondent on the other hand draws attention to the views expressed by Miller and Sadasiva Aiyar, JJ., in *Gajapathi Kristna Chendra Deo* v. *Srinivasa Charlu* (3).

I think there can be no question that the judgments in these cases indicate a very substantial difference of opinion between the learned Judges who disposed of them. The wording of section 70 is very wide indeed. It might even be contended that it covered the case of a benefit forced on a man against his will as long as the act conferring it was not unlawful: though in view of the obligatory nature of the words "is bound to make compensation," that is an interpretation which any Court would be loth to adopt. That some more restricted meaning should be

(1) 18 M. 88; 4 M. L. J. 205.

(2) 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 489.

(3) 20 Ind. Cas. 445; 14 M. L. T. 20; 25 M. L. J. 433; (1914) M. W. N. 99.

given to it is in fact recognised by both the learned Judges in the later case as well as in *Damodara Mudaliar* v. *Secretary of State for India* (1). Miller, J., in effect holds (1) that it is not necessary that the beneficiaries should exercise the option of accepting or declining the benefit before it is conferred and (2) that if he enjoys afterwards without objection, he must be presumed to accept it. Sadasiva Aiyar, J., is careful to state that "if the benefit is conferred notwithstanding notice of protest of the man benefited that he did not want the benefit proposed to be conferred on him, the act could not be said to have been done on his behalf." But both learned Judges appear to differ from Sankaran Nair, J., in holding that section 70 does more than reproduce the English Law as laid down in *Lampleigh* v. *Brathwait* (4) and that it is the duty of the Courts in India to have regard to the section itself without considering the restrictions imposed by English Case-Law.

In this respect I am inclined to agree with them and there can be no doubt that this application of the principles enunciated by either of the learned Judges to the present case would entail the dismissal of the appeal. I find some little difficulty in construing the defendants' letter, Exhibit 6, into an *acceptance* of the benefit, but it is clear that the defendants enjoyed the benefit without objection and in the view taken by Miller, J., must be held bound to contribute. Sadasiva Aiyar, J., takes, as it seems to me' an even stronger view than Miller, J., and his interpretation of the section would undoubtedly cover the present case.

On the other hand there are passages in Sankaran Nair, J.'s judgment in *Yogambal* v. *Naina Pillai Marakayar* (2) which seems to indicate that he would have held the facts of the present case to disclose the exercise by implication of an option to accept the benefit. I refer to the portion of his judgment in which he considers the effect of the earlier case reported in *Damodara Mudaliar* v. *Secretary of State for India* (1). The facts of that case are practically indistinguishable from those of the case before us: and the learned Judges Collins, C. J., and Shephard, J. (with whose judgment I respectfully agree) hold section 70 to be applicable, although according to English Law the suit would not have been sustainable. Sankaran Nair, J., does not say the decision in that case was wrong but on his own interpretation accepts it as correct. He says:

"He (the person benefited) must have been held liable, therefore, on the facts of the case, that repairs were necessary for the preservation of the tank and there would have been no water in the tank for irrigation but for such repairs, and when, therefore, the *zamindar* elected to use the water available only on account of such repair, he must be taken to have adopted the plaintiff's act and enjoyed the benefit thereof. It was also found that he was a consenting party."

The meaning of the latter sentence is somewhat obscure. There is nothing in the judgment in *Damodara Mudaliar* v. *Secretary of State for India* (1) suggestive of consent except such as can be implied from the absence of express objection, and the learned Judges distinctly say that actual consent need not be proved. Mr. Justice Sankaran Nair somewhat amplifies the brief statement in the earlier judgment that "the repairs were necessary for the preservation of the tank:" but the amplification is merely explanatory; if repairs are necessary for the preservation of the tank (and that is the specific finding in the present case also), this implies that if they are not executed the tank would become useless and without water. There is in fact specific evidence in the present case that if the work had not been carried out, the anicut would have been washed away and the bund of the tank in danger. I see no reason to doubt that this was what the lower Courts had in mind in finding the repairs necessary for the preservation of the tank.

It would appear then that there is nothing in the exposition of the law by Sankaran Nair, J., which would assist the appellants in the present case and that being so, I do not think we are called upon to refer an abstract question of law to a Full Bench. Our attention has been drawn to a more recent case, *Rajah of*

(4) 1 Sm. L. C. 141; Hob. 105; Moore 866; Brownl. & Gold. 7.

Pittapur v. *Secretary of State* (5), in which the same learned Judge (Sankaran Nair, J.) has again discussed the point; but I do not find any material addition in the later judgment to what is expressed in the earlier one.

I would dismiss this appeal with costs.

TYABJI, J.—The plaintiff and defendants have been found to be co-owners of a tank which the plaintiff has repaired; and the plaintiff has obtained a decree for compensation for part of the expenses of the repairs, under section 70 of the Indian Contract Act. The validity of this decree is questioned before us.

The finding of the lower Appellate Court is comprehensive, and couched in the very terms of section 70. In this Court, therefore, the defendants can question the decree in favour of the plaintiff, only on the ground that there was no evidence in support of the finding or of any integral portion of it. It is not questioned that the repairs were lawfully done. The arguments on behalf of the defendants can, therefore, be conveniently considered under three heads, *viz.*, whether there was any evidence for holding:

(1) that the repairs were done by the plaintiff for the defendants;

(2) that the plaintiff did not intend to do the repairs gratuitously; and

(3) that the defendants enjoyed the benefit of the repairs.

It is admitted that each of these three facts must be established by the plaintiff before he can take advantage of section 70.

With reference to the first two questions it is clear that the plaintiff was also interested in the repairs. In such a case, as observed in *Yogambal* v. *Naina Pillai Markayar* (2) the Courts will not from the mere fact that the defendants have benefited by the plaintiff's act, presume that the work was done for the defendants or that it was done in expectation of payment; if the plaintiff has done the work for himself he would clearly not expect any payment. The documents in the present case, however, leave no doubt that the repairs were done as much for the defendants as for the plaintiff [see *Damodara Mudaliar* v. *Secretary of State for India* (1)] and that there was no intention on the part of the plaintiff to do the repairs gratuitously.

With reference to the third circumstance I have mentioned above, though there is conflict of opinion, no exception has been taken to the following remark in *Damodara Mudaliar* v. *Secretary of State for India* (1);

"It is plain that the section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered."

The difference of opinion arises in the effort to read the section so as to justify such interference, and to prevent such obligations being imposed.

In *Damodara Mudaliar* v. *Secretary of State for India* (1) attention was drawn to the necessary elements of fact involved in the section, and to the distinction between cases where the plaintiff himself has an interest in doing the act, of which the defendant is alleged to have enjoyed the benefit, and where the plaintiff has no such interest. But in *Yogambal* v. *Naina Pillai Marakayar* (2) Sankaran Nair, J., with whom Munro, J., agreed, went further and held that "a person can be said to *enjoy* a benefit under the section only by accepting a benefit when he has the option of declining or accepting" (page 20). These words strictly considered seem to me to put too great a strain upon the words "such other person enjoys the benefit thereof." It may be that "enjoying" implies something more than what happens if a benefit results without any adoption on the part of "such other person" of any act by which he takes advantage of the benefit. If this is a correct interpretation of the word "enjoy," then the third requirement of the section to which I have referred above may be analysed into two component parts:—

(*a*) that the act of the plaintiff is calculated to have results which may confer a benefit on the defendant; and

(*b*) that the defendant has availed himself of such beneficial results.

(5) 25 Ind. Cas. 783; 16 M. L. T. 375.

Yet I can see no warrant for introducing the necessity for an option of declining or accepting the benefit. It may be that the defendants have availed themselves of the results of the plaintiff's acts because the defendants could not do otherwise. They would still be said to have enjoyed the benefit. It seems to me that the view alluded to by Miller, J., in *Gajapathi Kristna Chandra Deo* v. *Srinivasa Charlu* (3) is the correct one and the attitude of the defendant towards the results of the acts which are alleged to have been beneficial to him, (including the circumstance whether the defendant had the option of accepting or declining the alleged benefits of the act) can only be relevant to the question whether the plaintiff did actually confer a benefit upon the defendant. "It would seem," says Mr. Justice Miller "to be a sufficient answer to the plaintiff's claim if the defendant declined the benefit which it was proposed to thrust upon him." He may be taken to be the best judge of what is beneficial to himself in ordinary cases and could not in such cases be said to have enjoyed a benefit which was no benefit. On this ground or on the grounds that in such cases the payment is not really made for the defendant, may be rested the cases which decide that unless the defendant is willing to accept the benefit, the payment will not be recoverable under the section.

Hence where some act is done by the plaintiff (1) under such circumstances that the defendant has had the option of either availing himself of the results of that act, or of remaining in the same position in which he would have been if the act had not been done and where having such option, the defendant has chosen the former alternative, the proof of the exercise of such option satisfies the requirements of section 70 of the Indian Contract Act: the defendant cannot then deny that he "enjoyed" the results of the plaintiff's acts or that the results were "benefits" so far as he was concerned. But (2) in the converse case, where the defendant has not had any choice, so that he could not have prevented the plaintiff doing the act, nor avoided (even if he had desired it) being affected by its results, the plaintiff must establish that as a matter of fact his act resulted in a benefit to the defendant. Finally (3) when the defendant has (as suggested by Sadasiva Aiyar, J., in the same case at page 439) given notice of protest, then not only would the act not be said to be on his behalf, but it may well be inferred that it was not for his benefit. In this view the fact whether or not there was an option to the defendant to enjoy the benefit of the plaintiff's act, would supply strong indications as to whether the act really brought any benefit to the defendant, or whether he is sought to be made liable to pay compensation for some act in which he was not interested and whether the plaintiff seeks re-payment of expenses alleged to be incurred on behalf of the defendant, which the defendant would not have considered worth incurring if he had been consulted.

The absence of any option to the defendant may place a heavier burden on the plaintiff to prove that his act really resulted in a benefit to the defendant. But the absence of such an option cannot, it seems to me, by itself prevent the result being considered a benefit to the defendant or prevent the defendant being said to have enjoyed the benefit, should it be found that the results reached the defendant and were beneficial to him.

The repairs in the present case were urgently necessary for the very preservation of the tank. Prior to undertaking the repairs, the plaintiff informed the defendants of his desire to do so, and after stating that the defendants were bound to contribute to the expenses, informed them that they would be required to contribute. In reply the defendants answered that they had no objection to such repairs being carried out by the plaintiff, and added: "To the question whether we have any objection to contribute our share of the charge of the said repairs, our answer is that we never used to contribute the said share and that there is no reason to pay the same."

It was open to the plaintiff's Counsel to argue as he did that the defendant's present plea is inconsistent with the attitude then taken up by them. The defendants

now say that the alleged benefit of the repairs is thrust on them ; they then said that they were entitled to enjoy the benefit as a matter of right without contributing to the expenses, and implied that they would so enjoy it.

Moreover, there is a finding that the repairs were urgently necessary for the tank and that but for the repairs the tank was in danger of breaching and of overflooding the lands of the defendants ; it is not denied that the repairs were carried out after notice to the defendants, and after they had been informed that they would have to contribute to the expenses ; it is not alleged that there was any repudiation by the defendants or anything to show that they honestly did what may reasonably be expected to be done if they had really intended to renounce the benefit of the repairs rather than contribute to the expenses or if they had intended to continue in the same position in which they would have been but for the repairs. It seems to me to be clear, therefore, that the defendants cannot deny either that the repairs have resulted beneficially to them or that they have availed themselves of those results. Though the plaintiff did not specifically call upon the defendants to declare whether they would or would not enjoy the benefit of the repairs, the defendants left no doubt on the point that they did intend to enjoy the benefit.

In my opinion, therefore, the finding that the defendants enjoyed the benefit of the plaintiff's act within the terms of section 70 of the Indian Contract Act was justified by the evidence and the appeal should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1693, 3087 AND 3088 OF 1912.

August 31, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

IN APPEAL NO. 1693 OF 1912

AMATOO—DEFENDANT—1ST PARTY AND *Sheik* HASSAN ALI—DEFENDANT 2ND PARTY —APPELLANTS

versus

Sheik MUKSUD ALI AND OTHERS—PLAINTIFF—RESPONDENTS

IN APPEAL NO. 3087 OF 1912

DUNDI DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Sheik MUKSUD ALI—PLAINTIFF—RESPONDENT.

IN APPEAL NO. 3088 OF 1912

Musammat SUNURI AND OTHERS—DEFENDANTS —APPELLANTS

versus

Sheik MUKSUD ALI—PLAINTIFF—RESPONDENT.

Merger, applicability of doctrine of Land tenures in India—English doctrine of merger, how far applicable in India—Equity—Transfer of Property Act (IV of 1882), s. 111 (d) (f).

Where two leases in favour of the same person for the same land are not conterminous and the lessors of the two leases have different rights and the leases have different lives although some part of their existence be co-existent, the different interests do not merge either under the provisions of the Transfer of Property Act or the general law of merger. [p. 316, col. 1.]

The English doctrine of merger does not apply in its entirety to land tenures in India. [p. 316, col. 1.]

In deciding whether there is a merger in equity, what must be first looked is the intention of the parties and if that be not expressed, then the Court looks to the benefit of the person in whom the interests coalesce. [p. 317, col. 1.]

Appeals against the decrees of the District Judge of Purnea, dated the 3rd of April 1912, reversing that of the Munsif, 1st Court, at Kishangunj, dated the 26th of January 1911.

Dr. *Rash Behary Ghose* and Moulvi *Nur-ud-din Ahmed*, for the Appellants.

Babus *Dwarka Nath Chakervarthy*, *Jogendra Nath Mukherjee* and *Nanda Lal Banerjee* and Moulvi *A. K. Fazal Huq*, for the Respondents.

Babu *Biraj Mohan Mojumdar*, for the Deputy Registrar.

JUDGMENT.—The plaintiff No. 1 is the auction-purchaser at a rent sale in respect of a

patni taluq of 8-annas 1-*ganda* share in *Taluqa* Jibba Kata Gheringaon. The plaintiff No. 2 was said to be the real purchaser, plaintiff No. 1 being his servant and *benamdar*. It was owing to an objection made by the defendants that they became joint plaintiffs. It has been held that the *benami* has not been proved: this finding has been very strongly impeached before us, but the finding is one of fact, however unsatisfactorily it may have been arrived at.

The defendants first party are the cultivating *raiyats* and defendants second party, holders of an intermediate tenure said to have been annulled by the plaintiff No. 1 under section 167 of the Bengal Tenancy Act.

The plea of the defendants first party was, amongst other things, that they had paid the rent to their landlords, the defendants second party, and the relation of landlord and tenant did not exist as between themselves and the plaintiffs.

The defendants second party pleaded that they had a permanent *malguzari* right granted by the 16-anna proprietors more than 200 years ago in the time of their ancestors and that although the *mokarari* right granted by the defaulting *patnidar* in a recent year might have been annulled, the *malguzari* right could not be and had not been annulled.

The main question in the appeal is whether the *malguzari* right of defendants second party merged in the *mokarari* right granted by the defaulting *patnidar* and has been annulled with the *mokarari* by the service of notice under section 167 of the Bengal Tenancy Act.

The Court of first instance held that as the *malguzari* interest exisisted long before the creation of the *patni*, it was not an incumbrance within the meaning of section 161 and had not been annulled by the sale of the *patni* and the notice under section 167.

The learned District Judge has upset that decision on the ground that the *malguzari* interest had merged into the *mokarari* interest and the annulment of the *mokarari* was sufficient for the destruction of the rights of the defendants second party. The learned Judge thinks that section 111 (*d*) of the Transfer of Property Act had the effect of merging the *malguzari* right in *mokarari* right and even if the Transfer of Property Act had no application the law of merger applied on general principles and there was a welding of the two rights in one. The correctness of the judgment of the learned Judge has been impeached on various points, but it will be sufficient to deal with the question of merger alone.

The *mokarari patta* granted by the *patnidars* to the defendants second party is to the effect that "you have been in possession from a very ancient time—from the time of your ancestors of—a *malguzari* right &c.,.....now at your desire we give you a *mokarari* etc.....," so that the ancient *malguzari* rights are recited as existing when the *mokarari* was given. The defendant in his deposition says, he paid a *nazrana* and had the *malguzari* made *mokarari i.e.*, not liable to enhancement. Neither the document nor the deposition shows that any subsisting right was given up. It is probable that the incidents of the ancient *malguzari* right were questioned by the *patnidar* who demanded enhancement and some *nazrana* was paid to stop all future claims for enhancement. Supposing that the Transfer of Property Act was applicable to the case, let us see how it favours the case for the plaintiffs. Section 111 (*d*) is: "A lease of immoveable property determines in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right." The lessors of defendants second party were the *zemindars* of 16-annas: the *patnidar* was lessee under an 8as. 1g. *malik*. Supposing that the *patnidar* could be taken as the lessor of the defendant second party to the extent of 8as. 1g. the entire interest of the *patnidars*. did not come into the hands of defendant second party, but says the learned District Judge that the *patnidar* gave the *mokarari* and the *mokarari* and the pre-existing *malguzari* came into the same hands. In the first place, that would not be an union of the entire interests of the lessor and the the lessee in the same hands and in the second place, the union would not be in the same right. The difference obviously is that the *malguzari* was granted by the *zemindars* and would last as long as the *zemindari* lasted,

but the *mokarari* was granted by the *patnidars* and would last as long as the *patni* lasted. Those two rights could not possibly coincide all along their length and breadth: section 111 (*d*) would not, therefore, do. The only other provision of the Transfer of Property Act that might be referred to was section 111 (*f*). That has not, however, been relied on, obviously on good grounds: that clause is: "A lease of immoveable property determines...(*f*) by implied surrender" and the illustration is—A lessee accepts from his lessor a new lease of the property leased to take effect during the continuance of the existing lease. This is an implied surrender of the former lease and such lease determines thereupon. The same considerations that apply to section 111 (*d*) seem to apply here also: the two leases are not conterminous, the lessors of the two leases have different rights—the leases have different lives although some part of their existence might be co-existent. The Transfer of Property Act, therefore, does not help the plaintiff.

The English doctrine of merger in Common Law has been broken in upon by various Statutes from time to time in England, and I think it has never been held that the law in its entirety is applicable to land tenures in India. On the other hand very eminent Judges have doubted that it does. In the case of *Woomesh Chunder Gooptu* v. *Raj Narain Roy* (1) Sir Barnes Peacock said, "my own impression is that the doctrine of merger does not apply to lands in the *moffusil*." In the case of *Jibanti Nath Khan* v. *Gokool Chunder Chowdhury* (2) (Pigot and Banerjee, JJ.) it was said: No authority has been shown us for holding that the doctrine of merger applies to such cases as this in India, that is that a *patni* interest must merge in the *zemindari* interest if they come into the same hands and we do not think that we should, for the first time, so far as we are aware, apply the doctrine to such a case." Then in the recent case *Lal Mahomed Sarkar* v. *Jagir Sheik Mallik*(3) (Sir Lawrence Jenkins, C. J., and Mookerji, J.), the learned Chief Justice said: "It is at least doubtful whether the doctrine of merger applies to lands in the *Moffusil*." Reliance is placed, however, on several other cases which it is said help the plaintiffs and on some of which the learned District Judge has relied in this case. The mainspring of these later cases seems to be the decision of the Privy Council in the case of *Raja Kishen Datt Ram* v. *Rajah Mumtaz Ali Khan* (4). That was a case in which the mortgagee acquired certain *birt-tenures* existing within the mortgage *taluq* on very favourable terms and treated them as merged in the *taluq*: the mortgagor was allowed to redeem the whole *taluq* including the *birts* on paying the mortgage-money and the purchase money of the *birts* as compersation. This case was decided on the ground that the mortgagee had taken advantage of his position as such to acquire the *birts* upon very inadequate consideration and not treated the *birts* as surviving. If the case had been decided on the ground of merger, the mortgagor would not have been compelled to pay the purchase-money paid by the mortgagee as a condition precedent to the redemption. Their Lordships made a remark: "Had they (the purchases of the *birts*) been made by or on behalf of a *taluqdar* holding under an absolute, as distinguished from a mortgage, title, the tenures would, as a matter of course, have merged in the *taluq*."

In the case of *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (5) Maclean, C. J., and Banerjee, J., held that when a *patni* interest created after the Transfer of Property Act is purchased by the *zemindar*, the *patni* merges in the *zemindari* under section 111 (*d*) of the Transfer of Property Act. Mr. Justice Banerjee, who was a party to the case of *Jibanti Nath Khan* v. *Gokool Chunder Chowdhury* (2), explains the distinction by saying that no reference was made to the Transfer of Property Act in that case. In the case of *Surja Narain Mandal* v. *Nanda Lal Sinha* (6) reference was no doubt made to the remarks of the Privy Council in the case of *Raja Kishen Datt Ram* v. *Rajah Mumtaz Ali Khan* (4), but the case was decided on

(1) 10 W. R. 15.
(2) 19 C. 760.
(3) 2 Ind. Cas. 654; 13 C. W. N. 913.
(4) 5 C. 198; 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique and Jackson's P. C. No. 58; 3 Ind. Jur. 126; 3 Shome L. R. 1.
(5) 28 C. 744.
(6) 33 C. 1212.

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the ground that the acquisition by the mortgagor enured to the benefit of the mortgagee and enhanced his security. In the case of *Ulfat Hossain* v. *Gayani Dass* (7) (Stephen and Vincent, JJ.) the proprietary and the *mokarari* interests were both purchased by one person. All these cases are clearly distinguishable from the present. In all these cases the interests of the lessor and the lessee came into the same hands and apart from the application of section 111 (*d*) of the Transfer of Property Act, there was no equitable consideration to prevent the merging of the rights.

In the present case, however, as I have shown the provisions of section 111 of the Transfer of Property Act do not apply and there is no equitable consideration which attracts the application of the doctrine of merger.

Mr. Foa, in his book on the Law of Landlord and Tenant, says: "In deciding whether there is a merger in equity what must be first looked at is the intention of the parties and if that be not expressed, then the Court looks to the benefit of the person in whom the interests coalesce." Foa, 5th Edition, page 629. This doctrine of benefit was laid down by the Judicial Committee of the Privy Council in the case of *Gokal Das Gopal Das* v. *Puran Mal Premsukh Das* (8): "The obvious question to ask in the interests of justice, equity and good conscience is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest." Here there is no *express evidence* that the defendant second party intended to give up the ancient *malguzari* right. It must be assumed, therefore, that he intended to keep it, and if he did, the annulment of the subsequent *mokarari* cannot destroy the pre-existing *malguzari* right. In this view of the case I set aside the decree of the District Judge and restore that of the Munsif with costs in all Courts. The learned Vakil for the respondents says that the appeals other than No. 1693 have been settled; the learned Vakil for the appellants says he has no instructions on the point. If they have been settled, well and good; if not, they will be decreed with costs.

Appeal allowed.

(7) 3 Ind. Cas. 994; 36 C. 802.

(8) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1609 OF 1914.

February 13, 1915.

Present:—Mr. Justice Shadi Lal.

HARI RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HUKAM CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 46—Debt—Attachment—Payment to decree-holder—Judgment-creditor not entitled to recover debt—Debtor not absolved from liability to pay debt to creditor.

A debtor is not absolved from liability to pay debt due to his creditor by the fact that he paid the debt to a decree-holder on receipt of a warrant attaching the debt in execution of his decree, when the judgment-creditor was not entitled to recover the debt from the debtor against whom warrant of attachment was issued, for in such cases it is the duty of the debtor to contest his liability to pay the debt to the decree-holder. [p. 318, cols. 1 & 2.]

Second appeal from the decree of the Divisional Judge, Amritsar Division, dated the 1st June 1914, varying that of the Subordinate Judge, first Class, Amritsar, dated the 2nd August 1913, decreeing claim.

Mr. *B. Bevan Petman*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The facts of this case are simple and have been stated correctly in the judgment of the learned Divisional Judge. The plaintiffs have obtained Letters of Administration *cum testamento annexo* of the estate of one Lok Nath, to whom the defendants owed a debt, and the present suit is for the recovery of that debt. It appears that certain creditors of Lok Nath's grandson, Radha Kishen, who had been disinherited by his grand-father's Will, sued out execution, and attached under Order XXI, rule 46, the debt due by the defendants to Lok Nath's estate on the allegation that Radha Kishen was entitled to it jointly with Karm Chand, who

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is the legatee under the Will. The defendants, thereupon, paid out of Court Rs. 526-12-9 about the end of 1910 to the decree-holders and obtained their receipts. Now it has been held in *Fida Husain* v. *Maula Bakhsh* (1) that a payment out of Court which has been duly certified is quite as good as a deposit in Court and I must, therefore, regard the payment as having been made in pursuance of the order of the Court.

The question then arises whether this payment to the creditors of Radha Kishen operates as a discharge *pro tanto* of the defendants' liability to the plaintiffs and prevents the latter from recovering the entire sum due to the estate of Lok Nath. It is quite clear that the plaintiffs were not a party to the proceedings in which the order under Order XXI, rule 45, was passed, and they are certainly not bound by anything done in pursuance of that order. It is also clear that the Court was quite wrong in taking action against the defendants who did not owe anything to Radha Kishen. It is true that the Letters of Administration were not granted to the plaintiffs until the 15th of November 1912, but it appears from the notice dated the 16th of May 1909 and other evidence on the record that the defendants at the time of the payment were fully cognisant of the contents of the Will and knew that the plaintiffs denied *in toto* the claim of Radha Kishen to a share in the property of Lok Nath.

On these facts it is manifested that the plaintiffs are the only persons who are entitled to recover the debt and I cannot understand how any payment made behind their backs by the defendants to the creditors of Radha Kishen could be legally put forward as a valid answer to this suit. To put the matter in the most favourable light for the defendants, it reduces itself to this. *B*, who is a debtor of *A* pays *bona fide* and under the orders of a Court money to *C*, who wrongfully claims to be the joint creditor of *B*; can such payment by *B* be regarded as a payment to *A*? I have no hesitation in returning the answer in the negative. I am not aware of any authority, and certainly none has been quoted before me by the learned Pleader for the respondents, which makes a payment of this kind binding upon the plaintiffs. The defendants have no doubt suffered for the mistake of the Court, but it seems to me that they have themselves to thank for it. It was their obvious duty to press before that Court the contention that they were not liable to pay the money to Radha Kishen or to his creditors, and to carry the matter to a higher Court in the event of the decision of the Court of first instance being adverse to them. Be that as it may, I am quite clear that there is absolutely no reason for depriving the plaintiffs of their legitimate dues. The view taken by the learned Divisional Judge is incorrect and cannot be upheld.

In regard to interest, Mr. Tek Chand frankly admits that if the plaintiffs are entitled to the principal they are equally entitled to the interest thereon.

I accordingly accept the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. They must pay the costs of the original Court as ordered by that Court, but as regards the lower Appellate Court and this Court, I in view of all the circumstances of the case, direct that the parties bear their own costs.

Appeal accepted.

(1) 21 A. 145; A. W. N. (1899) 12.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 110 OF 1914.

February 4, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

MR. R. G. ORR AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

VA. PE. RI. MU. CHITHA CHINNA YEGAPPA CHETTY—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 74—Deposit of certain amount—Condition of forfeiture on breach of contract—Amount deposited only one-twentieth of the amount stipulated to be paid under the contract—Forfeiture or penalty.

Whether a certain sum of money was paid by way of deposit to be forfeited in case of a breach of contract or penalty to be relieved against, is a question of fact to be determined on the facts of each case. [p. 319, col. 2.]

In such cases the smallness or largeness of the amount is only a factor in determining whether

there was deposit in reality although it goes by that name in the contract. [p. 320, col 1.]

The rule of law applicable to cases of sale, which forfeits the deposit in case of breach of contract, equally applies to leases also, and there is no essential difference in the characteristics attached to each of these kinds of contract. [p. 320, col. 1.]

Where there is an express contract which stipulates that on breach of it the amount deposited shall be forfeited, that contract must be given effect to without reference to section 74 of the Contract Act. [p. 319, col. 2.]

Manian Pattar v. *Madras Railway Company*, 16 M. L. J. 37; 29 M. 118; *Natesa Aiyar* v. *Appavu Padayachi*, 19 Ind. Cas. 462; 13 M. L. T. 391; 24 M. L. J. 488; (1913) M. W. N. 341, followed.

Srinivasa v. *Ratnasabhapathi*, 16 M. 474; 3 M. L. J. 124, overruled.

In re Dagenham (Thames) Dock Company, Ex parte Hulse, (1873) 8 Ch. 1022; 43 L. J. Ch. 261; 21 W. R. 898, followed.

Cornwall v. *Henson*, (1900) 2 Ch. 298; 69 L.J.Ch. 581; 82 L.T. 735; 49 W. R. 42, *Howe* v. *Smith*, (1884) 27 Ch. D. 89 at p. 101; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J P. 773, distinguished.

Section 74 of the Contract Act has no application to cases where a certain sum of money was paid as a precautionary measure for the performance of a contract. [p. 319, col. 2.]

Where there are two remedies open to a party independent of each other, adoption of one does not show that effect is given to the other also. [p. 320, col. 2.]

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Small Cause Suit No. 266 of 1913.

Messrs. *K. Srinivasa Iyenyar* and *S. Gopalaswami Iyengar*, for the Petitioners.

Mr. *K. V. Krishnaswami Iyer*, for the Respondent.

JUDGMENT.—The plaintiffs, who are the lessees of the Sivaganga *zamindari*, gave a sub-lease of certain properties to the defendant in *Fasli* 1318 for ten years. On the allegation that a default was made by the defendant in carrying out the stipulations contained in the lease deed, the plaintiffs cancelled the lease and entered into possession of the properties. They brought this suit on the ground that a sum of Rs. 483-6-0 is due to them as arrears of rent. The defendant pleaded that he is entitled to a set-off of the sum of Rs. 362-8-0 which was deposited by him with the plaintiffs in *Fasli* 1318 when the lease was granted.

The Subordinate Judge held that the stipulation that the deposit amount should be forfeited if the conditions were not complied with was in the nature of a penalty and that it should be relieved against. I am unable to agree with him in this conclusion. The amount deposited represents one twentieth of the amount due to the plaintiffs for rent. *Prima facie* there is nothing unreasonable in such a sum being forfeited for non-performance of the conditions of the contract.

Mr. Krishnaswami Iyer argues that, as under clause 22 of the lease deed, the amount of deposit is to be applied as the last instalment of the rent due to the plaintiffs, the sum of Rs. 362 8-0 is not really a deposit but only a provision by way of penalty. Clause 22 has to be read with clause 23. Clause 22 contemplates the lease as subsisting and provides that if the lease continues to be in force, the defendant is entitled to claim that the sum of Rs. 362-8-0 shall be applied towards the last instalment of rent due from him. Clause 23 provides for the cancellation of the lease. In that case, it states that the amount of deposit shall be forfeited. This is an express stipulation. It matters little whether we call it an independent or collateral contract. I do not think that clause 22 takes away from the liability to forfeiture referred to in clause 23. It has to be remembered that this stipulation is not a provision for damages for breaches of contract but is one to enforce its due performance.

As pointed in *Manian Pattar* v. *Madras Railway Co.*, (1) the applicability of section 74 cannot arise in cases where a precautionary provision is made for the due performance of the contract. That section would only apply to terms which are intended to provide a certain sum of money by way of damages to the party whose contract has been broken.

I am bound by the Full Bench decision reported in *Natesa Aiyar* v. *Appavu Padayachi* (2) which holds that if there is an express contract which stipulates that on breach of it the amount deposited shall be forfeited—that contract must be given effect to, without reference to section 74 of the Contract Act. Mr. Krishnaswami Iyer seeks to distinguish the present case from *Natesa Aiyar* v. *Appavu* (2) on the ground that the contract therein

(1) 29 M. 118; 16 M. L. J. 37.

(2) 19 Ind. Cas. 462; 13 M. L. T. 391; (1913) M. W. N. 341; 24 M. L J. 488.

considered was one for the sale of land; he argues that the principle enunciated in that case has no application to contracts of lease. I am unable to agree with him in this contention. There are statutory provisions in the Transfer of Property Act regarding relief against forfeiture. In section 112 there is a provision for relieving against non-payment of rent. Section 114 provides for relief against re-entry. Relief against forfeiture of deposits is not provided for: and in the absence of a statutory declaration to that effect in the Act the general law of contracts must apply. I hold that there is no distinction between contracts of sales and contracts of lease on this point. In both classes of contracts deposits are usual. Mr. Krishnaswami Iyer relies upon the decision in *Srinivasa* v. *Ratnasabhapathi* (3) I do not think Sir Arnold White, C. J., intended to regard that case as binding authority, as he subsequently refers with approval to the decision in *Manian Pattar* v. *Madras Railway Co.* (1) which cast doubts on the correctness of the decision in *Srinivasa* v. *Ratnasabhapathi* (3).

Another point relied on by the learned Vakil is that even if the forfeiture had been incurred the question of the reasonableness of the amount to be forfeited has to be decided by the Court below, and that he is entitled to a finding upon that question. Reliance is placed upon the observation of the learned Chief Justice in *Natesa Aiyar* v. *Appavu* (2). As I read the judgment of the learned Chief Justice, I do not understand him to lay down that where there is an express contract relating to the forfeiture of the deposit, the question of the reasonableness of the amount can enter into the consideration as to whether the forfeiture has been rightly incurred or not. The reference to *In re Dagenham (Thames) Dock Co., Ex parte Hulse* (4) shows that the reasonableness of the amount is one of the factors in determining whether there was a deposit in reality, although it goes by that name in the contract. If the amount is very large, naturally the Courts would be unwilling to hold that it was by way of deposit that the money was originally paid. In this case, as I pointed out at the outset, the sum deposited represents only one-twentieth of the amount due under the lease. The learned Chief Justice himself has stated in the case already referred to that there is certainly nothing extraordinary in a 10 per cent. deposit under an agreement for the sale of land being regarded as reasonable. I am, therefore, unable to hold that the amount of Rs. 362-8-0 is such a large amount that its forfeiture should be regarded as unreasonable. Speaking for myself, whether the amount is large or small, if there are unmistakable indications that the original payment was by way of deposit and if there is an express clause relating to forfeiture, the quantum of the deposit is not an element for consideration.

Mr. Krishnaswami Iyer referred to the decision in *Cornwall* v. *Henson* (5) as throwing doubt upon the correctness of the decision in *Howe* v. *Smith* (6). The case in *Cornwall* v. *Henson* (5) was not one of deposit at all. In that case the plaintiff sought for the refund of instalments which had been paid under the contract, and the learned Lords Justices who took part in the case held that the principle regulating the forfeiture of deposits would not apply to such a case.

On the whole I have come to the conclusion that the decision of the Subordinate Judge is wrong and must be set aside.

It was argued by Mr. K. Srinivasa Iyengar that the mere rescission of the contract indicates that the forfeiture had been rightly incurred. I cannot follow this argument. The lessees were entitled to two remedies against the defaulting party. One was to rescind the contract; the other was to enforce the forfeiture. It is open to the defendant to say that notwithstanding that the contract had been put an end to, he is entitled to show that the forfeiture has not been incurred.

As the Sub-Judge has disposed of the case upon a preliminary point, his decree must be reversed. He must take the case back on his file and dispose of it according to law. Costs will abide the result.

Decree reversed.

(3) 16 M. 474; 3 M. L. J. 124.

(4) (1873) 8 Ch. 1022; 43 L. J. Ch. 261; 21 W. R. 898.

(5) (1900) 2 Ch. 298; 69 L. J. Ch. 581; 82 L. T. 735; 49 W. R. 42; 16 T. L. R. 422.

(6) (1884) 27 Ch. D. 89 at p. 101; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 31 OF 1914.

July 23, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

VINAYAK NARAYAN ARTE—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 349, 528—Reference to Sub-Divisional Magistrate—Jurisdiction—Transfer.

Jurisdiction to deal with the proceedings under section 349 of the Criminal Procedure Code is conferred upon District Magistrates and Sub-Divisional Magistrates and upon no other Magistrates. [p. 321, col. 2.]

Section 528 of the Code has no application to proceedings submitted to a Sub-Divisional Magistrate by a second Class Magistrate under section 349. [p. 321, col. 2.]

Criminal reference made by the Additional Sessions Judge of Thana.

Mr. *Manubhai Nanabhai*, *amicus curiae*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT

SHAH, J.—The facts that have given rise to this reference are briefly these. The accused was in the first instance tried by a second Class Magistrate for offences punishable under sections 336 and 452, Indian Penal Code. He sent up the proceedings under section 349 of the Criminal Procedure Code to the Sub-Divisional Magistrate, Kolaba, Northern Division, as he thought that he could not pass a sentence sufficiently severe against the accused. The Sub-Divisional Magistrate, instead of disposing of the matter himself, transferred the case to a first Class Magistrate, and the first Class Magistrate committed the accused to the Court of Session. The Additional Sessions Judge of Thana has made this reference pointing out that in his opinion the commitment by the first Class Magistrate is illegal.

Having regard to the special character of the provisions of sections 349 I am of opinion that it is only the District Magistrate or the Sub-Divisional Magistrate who has jurisdiction to exercise the powers mentioned in paragraph 2 of section 349, *i. e.*, to pass such judgment, sentence or order in the case as he thinks fit. The Sub-Divisional Magistrate in this case has apparently acted under section 528 of the Criminal Procedure Code, which, in my opinion, has no application to proceedings submitted to him by a second Class Magistrate under section 349; and in the argument before us it is not suggested that the powers of transfer under section 528 could justify the transfer of the proceedings to the first Class Magistrate in this case.

Having regard to the powers of a first Class Magistrate and of a Sub-Divisional Magistrate as specified in Schedule III and to section 530, clause (*l*), of the Code, I feel fortified in the view I take of the section that the jurisdiction to deal with the proceedings under section 349 is conferred upon District Magistrates and Sub-Divisional Magistrates and upon no other Magistrates. Even assuming that the Sub Divisional Magistrate had the power to transfer these proceedings to the first Class Magistrate, he could not transfer the jurisdiction which was conferred upon him by the section, and not upon the first Class Magistrate. It seems to me that this is not a question of the power of the Sub-Divisional Magistrate to transfer any proceedings before him, but a question of jurisdiction.

The Government Pleader has sought to support the order of commitment by relying upon section 532, Criminal Procedure Code. But it is quite clear that the section has no application to the facts of this case, in which the proceedings are supposed to be wholly without jurisdiction. I think, therefore, that the proceedings before the first Class Magistrate are without jurisdiction. The result is that the order of commitment is set aside and the proceedings are sent back to the Sub-Divisional Magistrate, to whom they were, in the first instance, submitted by the second Class Magistrate under section 349, to be disposed of by him according to law. We are indebted to Mr. Manubhai for having argued the reference on behalf of the accused at our request.

HEATON, J.—I concur. I do not feel any doubt now (at one time I did) that section 349 confers special powers, or, what may be called, a special jurisdiction, and confers it only on District and Sub-Divisional Magistrates. That being so, every case which is referred under section 349 must

be disposed of by a Magistrate who has that special jurisdiction. In this particular case the matter was disposed of by a Magistrate who had not this jurisdiction and I concur in the proposed order.

Order set aside.

PUNJAB CHIEF COURT.

SPECIAL BENCH.

CRIMINAL MISCELLANEOUS CASE No. 12 OF 1915.

March 17, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge, Justice Sir Donald Johnstone, KT., and Mr. Justice Rattigan.

FAROOQ ALI—PETITIONER

versus

EMPEROR—RESPONDENT.

Press Act (I of 1910), ss. 4 (1) (c), 17, 19, 20—Order of forfeiture—"Disaffection," meaning of—High Court, power of—Motive or intention of writer—"Government established by Law in British India," meaning of—Supplementary paper-book, relevancy of—Seditious intentions—Truth of statement, when not sufficient justification.

The words "'disaffection' includes disloyalty and all feelings of enmity" in section 4 of the Press Act are wide words, and the duty of a High Court under section 19 of the Act is strictly limited to consideration of the question whether the Government order of forfeiture of an article is justified by the words and tendencies of the article. [p. 325, col. 1.]

Mahomed Ali v. Emperor, 20 Ind. Cas. 977; 41 C. 166; 14 Cr. L. J. 497; 18 C. W. N. 1, followed.

The writer's intentions or motives in writing an article are irrelevant and even if the article be unobjectionable in itself, it is the possible results and not the intentions which have to be considered. [p. 325, col. 2.]

In order that an application under section 17 of the Press Act be successful, it is necessary for the petitioner to show that the article in question did not as a matter of fact contain "any words, signs or visible representations" likely or having a possible tendency to excite disaffection towards His Majesty or the Government established by law in British India. [p. 326, col. 2.]

A supplementary paper-book, prepared under section 20 of the Press Act, is irrelevant when the subject-matter re-printed lies outside the scope of section 20. [p. 326, col. 1.]

The Supreme Government in India is in the last resort the Government in England. Therefore, anything which tends in India to excite disaffection against the Government as represented by the British Cabinet must be taken as tending to excite disaffection against the Government established by law in British India. [p. 327, col. 1.]

Emperor v. Bhaskar Balvant Bhopatkar, 4 Cr. L. J 1 at p. 16; 30 B. 421; 8 Bom. L. R. 421, referred to.

Word "disaffection" explained. [p. 327, col. 2; p. 328, col. 1.]

Queen-Empress v. Ramchandra Narayan, 22 B. 152, approved.

Per *Johnstone, J.*—The truth of a statement regarding the Government is not sufficient justification for the statement in all circumstances nor is an honest belief on the part of a writer in the truth of what he is saying in all cases sufficient justification.

Therefore even if the destruction of the tomb of *Mahdi* at *Khartum* carried out by British Government was an unnecessary sacrilege, it is extremely improper for any newspaper in India at such a time as the present, after the lapse of 15 years, to say so. [p. 328, col. 2.]

Messrs. *Beechey* and *Asad Ali*, for the Petitioner.

Mr. *Beran Petman*, Government Advocate, for the Respondent.

JUDGMENT.

KENSINGTON, C. J.—This is an application under section 17 of the Indian Press Act, I of 1910, to set aside an order passed by the Governor-General in Council on the 2nd November 1914 against the applicant, Farooq Ali, keeper of the *Comrade* and the *Hamdard* Press, Delhi, declaring the security of Rs. 2,000 deposited in respect of the said press to be forfeited under section 4 (1) of the Act in consequence of an article entitled "The Choice of the Turks" published in the *Comrade* on the 26th September 1914, and further declaring forfeiture of all copies of the *Comrade* newspaper issued on that date. It is unnecessary to recite the order in full, as both it and the article in question have been printed in the paper-book.

The article is very long, covering some 20 pages of print, and is objected to by Government in respect of (1) the whole tenor of the article, and (2) particular passages indicated in a schedule. The virtual applicant is not the keeper of the press, but Mr. Muhammad Ali, the Editor of the newspaper and the admitted writer of the article. This gentleman appeared before us in person as well as by Counsel, and gave a very full explanation of the circumstances under which the article was written and of the motives by which he professed to have been guided. He also in reply to questions gave us an interesting sketch of his previous career both in India and in England. It is understood that after many years in the Aligarh College he took his degree at th

Allahabad University in 1898, and then went to Oxford where he again graduated, with honours in the School of History. Returning to India in 1902 he served in various capacities in the Rampur and Baroda States, and in 1911 he started the *Comrade* in Calcutta. From September 1912 the newspaper has been published in Delhi, and he has continually edited it except for a short period during which he returned to England in the autumn of 1913. From the manner in which he conducted a good part of the proceedings before us we recognise that he is a highly educated man of considerable journalistic capacity.

The order of forfeiture is framed with special reference to the last portion of clause (*c*) under section 4 (1) of the Act, the allegation being that the article is "likely or has a tendency, directly or indirectly, whether by inference or suggestion or otherwise, to excite disaffection towards His Majesty and the Government established by law in British India." Explanation I to the section amplifies the expression "disaffection" as including disloyalty and all feelings of enmity, while Explanation II prescribes the extent to which newspaper comment on the administrative or other action of Government is permitted. The main line of argument adopted by Counsel and by Mr. Muhammad Ali himself is that the article under discussion cannot be treated as one tending to excite disaffection and that its publication is, therefore, protected by the terms of the Act. We have been asked to hold that the article is nothing more than a straightforward criticism of the foreign policy of Government in England, and that in so far as the writer advocated a different policy he was actuated by a genuine desire to save both the British and Turkish Governments from the risk of war, which was imminent at the time and which actually broke out some six weeks later.

Mr. Muhammad Ali has already had trouble under the Press Act at Calcutta in connection with the case reported as *Mahomed Ali* v. *Emperor* (1), and he readily admits that he himself knew quite well that his article was of a risky nature, giving this as his own explanation of the sentence, "We have launched out our bark on this perilous sea for another and a more practical purpose"—at page 4 of the paper-book. His professed object was to put forward the case of Turkey in a new light as a rejoinder to an article also entitled "The Choice of the Turks" which had appeared in the *Times* of London on the 29th August.

Taking the warnings of the *Times* to Turkey as his text, the scheme of his article was to point out that Turkey had serious grievances against Russia and France, against various other countries with which we are not immediately concerned, and to some considerable extent against the British Government. As regards the latter sins of commission were alleged with reference more particularly to the continued occupation of Egypt, the attack by Italy on Tripoli, and the recent exercise of a right of pre-emption over certain Turkish warships, and sins of omission in so far as the British Government had failed to check the repeated spoliation of Turkey by other Powers. It was urged that in order to save Turkey from the risk of drifting into war against Great Britain and her Allies, and to win her over entirely to the side of the Allies, Egypt should be immediately evacuated by the British as an act of grace. Turkey was at the same time warned that she must be on her guard against allowing herself to be treated as a cats-paw by Germany, and was informed in the clearest manner, in terms to which no exception can be taken, that it would be the duty of India to stand aside altogether and to refrain from coming to her assistance in any way.

We do not know what pretensions Mr. Muhammad Ali may have to intimate knowledge of Turkish affairs, or to influence with the authorities at Constantinople, but he has admitted that as regards Egypt he has no first hand knowledge and that he has never even stayed in the country except once for twelve hours during the night. It was a little difficult to understand precisely what he meant by the evacuation of Egypt, and he had apparently never considered what views the Egyptians themselves might have on the subject, but his contention seems to have been that the British civil and military administration should come to an abrupt end at once, and that the country should be made over unconditionally to Turkey. Whatever may

(1) 20 Ind. Cas. 977; 41 C. 466, 14 Cr. L. J. 497; 18 C. W. N. 1.

be thought of the lack of political insight indicated by views of the kind, more especially at a time like the present when the security of Egypt means so much to the Government and people of India, it is quite possible that an article could have been framed on these lines without giving offence or inviting anything more in the way of hostile criticism than caustic reflections on the writer's sanity of judgment and either knowledge or capacity to educate his readers on such grave topics. The charitable view would then have been that the writer had much over-estimated his ability to discuss high politics of the kind with discrimination, and had allowed his zeal for the wrongs of Turkey to obscure his discretion as an Editor. We were told that the article was written hurriedly against time in view of the emergent crisis then developing, so that too much should not be made of the occasional slips of an over-fluent pen. The natural reply would be that a prudent man who felt impelled to write on these lines would weigh his words with great care and avoid saying anything in any way liable to misconstruction in India.

Unfortunately the course taken by Mr. Muhammad Ali appears to us to have been the unmistakable opposite, and after considering the article as a whole with the greatest care we feel obliged to say that we are not surprised at the action taken by Government. There are many passages in the article, some of them not scheduled, which appear to us wholly incompatible with the writer's good faith.

Turning to a long section at pages 12 to 15, of which the head-note in particular has been scheduled, probably as indicating that the entire section is objectionable, it is observed that the writer starts with the intention of refraining from going over old ground once again with reference to the British occupation of Egypt, lest he might be thought desirous of exciting the Turks and Egyptians or the Mussalmans of India with a view to embarrass the authorities in India and in England. Immediately after, however, he proceeds to string together a whole series of quotations from speeches and documents with the object of doing precisely that which he professed his unwillingness to do, by suggestions that the British Government had broken faith in regard to Egypt not once but many times, special care being taken to omit reference to the well-known facts of Egyptian history during the last thirty years which have rendered it impossible to leave the country to the serious risks involved in relaxation of British control.

Following up this method of stating the case the article goes on to contend plainly enough that the Turks and Egyptians were entitled to demand the evacuation of Egypt by force. It is true that the writer qualifies his opinion by saying that force is wholly inexpedient at this juncture. He does so, however, solely because he thinks that Turkey is for the moment too exhausted by recent wars, and he suggests that the better policy would be for her to defer the pressing of her demands by force till England in her turn may become exhausted by the present war. Throughout these sections of the article there are passages which go far to neutralise even this suggestion of postponement of forcible interference by Turkey. She is told, for instance, to beware of peace at any price; to make sure that she fights her battles on her own account and not as a tool of Germany; to refrain from her "clamant revenge," but from motives of expediency only; and in short to beware how she makes her choice, but if it should be for war, to pursue it "till the claims both of honour and self-interest are satisfied." Mixed up with all this there are protestations that it is impossible for India to assist her, which are again neutralised by a suggestion that in India public opinion is not what it appears to be on the surface and that the writer's opinions are shared by a vast majority of Indians. This is followed by the words "Had the country not been demoralized by the constant condemnation of unpalatable truths and the repeated rewarding of cheap lies, every one in India would be confessing such admiration and sympathy (with the German nation) openly." The passage last quoted has been dragged in after a diatribe against vilification of Germany, with the suggestive comment that however badly the Germans may possibly have behaved, they have not yet descended to the plane on which the dead are robbed of their last resting place, words which were explained

by Mr. Muhammad Ali as containing an allusion to the Madhi's tomb incident after the battle of Omdurman in 1898.

We do not wish to lay too much stress on isolated passages put together in this way, but the writer's views are conveyed under such a cloud of verbiage that we find it difficult to arrive at the tenor of the whole article without extracting portions which appear to convey the real meaning from a mass of more or less irrelevant context. We are entirely unable to accept Counsel's explanation that the tenor of the article is commendable for its sound sense at a critical time, and that at least it was an honest expression of personal opinion given in the interest of Great Britain. Mr. Muhammad Ali's personal explanation was indeed on somewhat different lines. He represented that he was writing for a comparatively small community of highly educated persons, who would be incapable of misunderstanding his article as an incitement to disaffection in India. He told us that the circulation of the *Comrade* was about 3.000 copies only, and that writings of this class could have no possible effect upon the masses in India. This is no doubt literally correct in the sense that the *Comrade* is caviare to the general, but we do not think it unjust to assume that a man of Mr. Muhammad Ali's ability and pretensions as a writer hoped that the limited circle of his readers would take their cue from him and in their turn do their best to spread similar ideas throughout the country. The contagious process by which Indian communities assimilate misleading doctrines is liable to work with unexpected rapidity.

No useful purpose will be served by quoting at greater length from the article, and I do not myself think that matters can be made any clearer by elaborate discussion of the exact meaning of the word "disaffection" as used in the Act. Counsel for the applicant referred to certain rulings on this point quoted in Donogh's Law of Sedition, but they hardly take us further than the statutory explanation under section 4 of the Act that "disaffection" includes disloyalty and all feelings of enmity. These are wide words and our duty under section 19 of the Act is strictly limited to consideration of the question whether the Government order of forfeiture is justified by the words and tendencies of the article. In the ruling *Mahomed Ali* v. *Emperor* (1) it has been pointed out by the learned Chief Justice of Calcutta that the Court has by law only the narrowest power of intervention. Government has sources of information which are not available to Courts, and an applicant for relief under section 17 of the Act must always be in the difficult position that it is nearly impossible for him to disprove the correctness of the conclusion at which Government may have arrived. Our own difficulty in these cases is enhanced by the irrelevance of a writer's intentions or motives. Even if we assume that they may be unobjectionable, in themselves it is the possible results and not the intentions which have to be considered. To use a homely illustration, a man who carries a lighted candle into a powder magazine to search for something which he wants may, so far as his intention goes, be free from blame, but in view of possible and even probable results his act constitutes criminal negligence. In estimating the results of writing of the kind before us we are necessarily guided to so large an extent by the conclusion arrived at by Government under its wider knowledge of all that may be going on beneath the surface in India that we could hardly interfere with propriety, unless it was obvious that there had been some palpable misunderstanding of the writing called in question.

In putting the case in this extreme form, I do not wish it to be inferred that serious doubt is entertained as to the tendency of this particular article. It apears to me to be impossible to justify writings of the kind at a time when the feelings of the Mussalman population in India were already being excited and straind under the grave developments of the present war. Any responsible Editor in India, who seizes such a time and opportunity for ventilating his personal opinions in the manner described, does so at great personal risk. He must know perfectly well that the disaffected in India will disregard his own protestations and advice of loyalty, however well expressed, and will be stirred only by those portions of an article which appeal to their passions. It is not for us to say whether the appeal has any

chance of success or not. If we are satisfied that the tendency, direct or indirect, is to excite disloyalty we should not interfere with the action of the Executive Government. In the present case there appear to be grave reasons for thinking that Government has not taken an exaggerated view of the harm which can be done in this way either by direct suggestion or by the still more pernicious use of innuendo. My conclusion is, therefore, that this is emphatically not a case for interference by the Court even if our powers of interference were wider than we conceive them to be.

The applicant has, in support of his case, prepared a supplementary paper-book with reference to section 20 of the Act. As regards this all that need be said is that in so far as the reprint is confined to prior or subsequent articles in the *Comrade*, it does not take the case further to any material extent. The rest of the subject-matter re-printed lies outside the scope of section 20 and is so entirely irrelevant that we declined to allow any use to be made of it at the hearing.

Subject to anything which my learned colleagues may desire to add, I must hold that the applicant has failed to convince us that there is even much to be said in his favour. The writer of the article has deliberately gone out of his way to promulgate his views in a form which directly tends to excite disaffection towards Government both in England and in India. The application for relief should, therefore, be dismissed. The Government Advocate has asked for costs, and though we have not allowed costs in previous cases of the kind, we should do so here considering the importance of the case and the persistence and acerbity with which it has been argued on the applicant's behalf. I would fix Counsel's fee at Rs. 250.

JOHNSTONE, J.—In this case which has been argued before us for more than two days, we have anxiously listened to a lengthy discussion by Mr. Beechey, also by his client, Mr. Muhammad Ali, and on behalf of Government by Mr. Bevan Petman, Government Advocate. I have had the advantage now of reading the judgment written by the learned Chief Judge, and as I find myself in agreement with him in every point which he has taken, it is not necessary for me to write much. I should like, however, to make a few observations explaining the aspects of the case which strike me as specially important.

The article under consideration has been objected to by Government as being likely or having a possible tendency to excite disaffection towards His Majesty or the Government established by law in British India. In order to be successful with this application under section 17 of the Act it is necessary for the petitioner to show that the article in question did not, as a matter of fact, contain "any words, signs or visible representations" of the kind described above. As the learned Judge has successfully shown, the petitioner has hopelessly failed to prove his case.

The learned Chief Judge in his judgment has set forth some of the important matters dealt with in the article; but I think it is not out of place for me to repeat as well as I can remember the general abstract of the article given to us by the learned Government Advocate, in the whole of which I entirely concur. Put very briefly, Mr. Petman says the gist of the article is as follows: Turkey has been oppressed and hated by Russia, the Ally of Great Britain. She has been spoiled by France and Britain. There is a considerable estrangement between Turkey and England due to the acts of British statesmen. Turkey has many grievances against Russia and France, the friends of England. The occupation of Egypt by the English affords a good *casus belli* for Turkey against England. There is a suggestion that the English intend to seize the Muhammadan holy places, and that Germany, at present at war with England, is entitled to "admiration and sympathy" on account of the gallant fight which she is making against great odds. All Indians would openly say this if they were not "demoralised by the constant condemnation of unpalatable truths and the repeated rewarding of cheap lies." No doubt, the Germans have committed many outrages in the course of the war, but after all they are not so bad as the English, whose General ordered the destruction of the

Mehdi's tomb at Khartum. This is Mr. Bevan Petman's version of this article as it would affect the minds of readers. He very properly argues that, after expressing such views as these, it is useless for Mr. Muhammad Ali to talk in the article of the inexpediency of Turkey making war with England at the present time or of the duty of the Muhammadans in India to remain loyal to the British Government.

It was strenuously argued by Mr. Beechey that the section under which the security had been confiscated by Government refers to disaffection against His Majesty and the Government of India, and that, therefore, nothing said against the Government of England, and much less against individual ministers or officers of that Government, should be taken into account. It appears to me to be important to show that this argument will not hold water. In practice it is impossible to separate the Government of England from the Government of India. Everybody who is acquainted with the constitution of the British Empire knows well that the Supreme Government of India is, in the last resort, the Government in England. The Secretary of State for India is a member of the British Cabinet. The Governor-General in Council has no doubt great and extensive powers, but in the last resort the real Government is the British Cabinet. The Secretary of State for India is, of course, only one member of that Cabinet, but according to all correct views of the English constitution, a pronouncement by the Secretary of State for India is a pronouncement by the British Cabinet, that is to say, by the Government of Great Britain. Therefore, anything which tends in India to excite disaffection against the Government as represented by the British Cabinet must be taken as tending to excite disaffection against the Government established by law in British India ; and, apart from this constitutional way of loking at the matter, it must be obvious that, if a writer succeeds in exciting in the minds of persons in this country bad feelings against the King, Lords and Commons and the British Cabinet, in which their power is concentrated, he does thereby excite feelings hostile to British rule in India. In this connection I would like to refer to the remarks in the summing up of Mr. Justice Batty in the case under section 124-A., Indian Penal Code, to be found in *Emperor* v. *Bhaskar Balvant Bhopatkar* (2).

And it is also idle for Mr. Beechey to pretend that the article simply criticises the policy of successive ministers in England and not the Government as a whole, for the policy pursued in Egypt is the policy of the Government of England, though of course pronouncements were made from time to time by individual ministers. Similarly, when the destruction of the tomb of the Mahdi at Khartum was carried out that also must undoubtedly be taken as an act of the British Government, though the authority on the spot may at the moment have acted on its own responsibility, a point regarding which we have no information. The British Government accepted the measure, and, so far as the public is aware, never expressed any disapproval of it.

The learned Chief Judge has not thought it necessary to discuss the word "disaffection" at length, and indeed it may be better not to attempt an exhaustive definition ; but at the same time it seems to me highly important that this Court should give the public some clue as to its views on this subject. I have read remarks upon this word in various rulings and various books, but I am quite content to accept in full the discussion of the word in *Queen-Empress* v. *Ramchandra Narayan* (3). There it is said that :

"An attempt to excite feelings of disaffection to the Government is equivalent to an attempt to produce political hatred of Government as established by law, to excite political discontent, and alienate the people from their allegiance."

This is the general *placitum*, but very significant remarks are made by Parsons, J., and Ranade, J. which, I think should be published far and wide. Parsons, J. said :— "The word 'disaffection' used in section 124-A of the Indian Penal Code cannot be construed as meaning an absence of or the contrary of affection or love, that is to say, dislike or hatred; but is used in its special sense as signifying political alienation or discontent, that is to say, a feeling of disloyalty to the existing Government, which

(2) 4 Cr.L.J. 1 at p. 16; 30 B. 421; 8 Bom. L.R. 421.
(3) 22 B. 152.

tends to a disposition not to obey, but to resist and subvert the Government."

And Ranade, J., expressed the following opinion:—

" 'Disaffection' is not a mere absence or negation of love or good-will, but a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority, or when it is not defiant, *it secretly seeks to alienate the people and weaken the bond of allegiance and prepossess the minds of the people with avowed or secret animosity to Government*, —a feeling which tends to bring the Government into hatred or contempt by imputing base and corrupt motives to it, and makes them *indisposed to obey* or support the laws of the realm, and which promotes discontent and public disorder."

I have italicised certain phrases in these quotations, because it must always be borne in mind in such cases as the present that it is not necessary for the Crown to show that disobedience has actually been caused by the obnoxious writings.

We have heard a good deal of argument about the supplementary paper-books, one printed by Government and the other at the instance of the petitioner. The former is a complete single issue of the *Comrade* including the article now in question. It is unnecessary to say anything more about it than it certainly in no way helps the petitioner. But as to the other supplementary book my opinion is that the petitioner has damaged his case by bringing it to our notice. As the learned Chief Judge has pointed out, a great part of that books is irrelevant, but the first article printed, namely, "an extract from the *Comrade* of 26th August 1914" shows the spirit in which Mr. Muhammad Ali writes when he sets out to discuss the foreign policy of Great Britain. Can he in his wildest dreams suggest that a sentence like the following is innocent of seditious intention—" Unscrupulous aggressors have despoiled her (*i.e.*, Turkey) of her territories, intriguers have battened at her expense, wicked wars of spoliation have been forced upon her, while *England's ministers have looked on with apparent indifference and allowed the most solemn treaties and obligations to be cast to the winds.*" I wish to point out here that cases like this are sometimes argued as if the truth of a statemnt regarding the Government is sufficient justification for the statement in all circumstances, or as if an honest belief on the part of a writer in the truth of what he is saying is in all cases sufficient justification. This view, of course, is wholly incorrect. To take an instance, even if it were the case that destruction of the tomb aforesaid was an unnecessary sacrilege, it would be, in my opinion, extremely improper for any newspaper in India at such a time as the present, after the lapse of 15 years, to say so. This, and the following points taken from the article proscribed by Government-out of many that might be taken, show to my mind this, that Mr. Muhammad Ali in writing this article intended to create bad feelings against British rule; namely, *first*, page 17, the words "clamant revenge," which Mr. Muhammad Ali admitted before us meant revenge against her enemies, *including England*; *secondly*, page 16, the phrase "however weak the present day statesmen's sense of the solemnity of promises," and again "The Turks will pin her (England) down to her promises *even if she showed the least disposition to wriggle out of them*;" and *thirdly*, it is impossible to ignore the wilful travesty of history in the sketch of British dealings with Egypt from the time of its occupation to the present day. We find not a single word about the Dervish rule in the Sudan, and the constant menace it involved against the liberties and existence of Egypt, until that rule was, entirely through the exertions of the British Government, finally destroyed in 1898. Mr. Muhammad Ali, being a student of history, must be well aware of the fact that after 1884 it was only through the presence of the British armies in occupation of Egypt, and in consequence of the strengthening of the Egyptian Government by the presence of British statesmen and British, officers that Egypt was not overrun by savage hordes. It is impossible to acquit him of bad faith, when, in professing to give to his readers a true account of British dealings with Egyyt, he deliberately omitted all reference to these things.

Lastly, it has been constantly insisted upon before us that nowhere is there any suggestion in the article that the Muham-

madans in India should under any possible circumstances take arms against the English. Mr. Muhammad Ali, as his article shows him to be, is a shrewd and crafty man, and after his experience in the Calcutta High Court, he is not likely to give himself away openly. But even he has been unable entirely to stifle his real ideas. On page 19 of the article there is a section headed "What may England do." Like a great deal of this article the style is involved and turgid; but, if the last 20 lines of the page mean anything at all, they certainly mean that the British Government may overstep the line, nay has probably overstepped the line, and may lose all right according to the maxims of the Quran, to exact obedience from Indian Mussalmans. Of course, it is always possible, when a writer chooses to wrap up his meaning in vague and ambiguous words, to say that a passage means anything one chooses; but after reading this section of the article repeatedly and with all care and attention, this is the opinion I have arrived at regarding it.

With these remarks, which I regret are more lengthy than I had at first intended, I express my full concurrence with the decision of the learned Chief Judge.

RATTIGAN, J.—I agree with the learned Chief Judge and my brother Johnstone, whose judgments I have had the advantage of reading, that this application must be rejected, and I have nothing to add.

The application is accordingly rejected with costs, which for purposes of Pleader's fee are fixed at Rs. 250.

Application rejected.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 1954 OF 1914.

January 2, 1915.

Present:—Mr. Justice Shadi Lal.

BISHEN DAS—APPLICANT

versus

RAHMAT KHAN AND ANOTHER —RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute refused—Costs.

It is not competent to a Court to make an order as to costs in proceedings under section 195, Criminal Procedure Code.

Case reported by the Sessions Judge, Jullundur, with his No. 645 of 21st October 1914.

FACTS.—Bishen Das sued Heme Khan for recovery of Rs. 350 on the basis of a bond, dated 23rd June 1907. Heme Khan denied the execution of the bond, also that the thumb impression on the bond was his. The Munsif of Nawashahr found that the thumb impression on the bond was Heme Khan's and passed a decree against him on 21st October 1913.

In March last Bishen Das applied to the Munsif for sanction to prosecute Heme Khan and Chajju Khan and Rahmat Khan, who appeared as his witnesses in the case, for perjury. Sanction was granted as regards Heme Khan only.

Agha Muhammad Sultan Mirza, exercising the powers of a Munsif of the second Class in the Jullundur District, then ordered the applicant, Bishen Das, to pay Rs. 25 as costs of Chajju Khan and Rahmat Khan whose prosecution was refused, and Heme Khan, against whom sanction was granted, to pay Rs. 16 as costs to the applicant.

The proceedings are forwarded for revision on the following

GROUNDS.—I do not think that it is legal to add an order as to costs in proceedings under section 195, Criminal Procedure Code, and I recommend that these orders as to costs be set aside.

ORDER.—There is no doubt that the order awarding costs is illegal. I accordingly set aside the orders awarding costs to Chajju Khan, Rahmat Khan and Bishen Das.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 17 OF 1915.

February 10, 1915.

Present:—Justice Sir George Knox, KT.

ABDUL KHALIQ—PETITIONER

versus

EMPEROR THROUGH KHALAQ SINGH —OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Evidence—Evidence of Police, value of—Police diaries.

Evidence of a Police officer in a case under section 110 of the Criminal Procedure Code, when it is based upon hearsay rumour and above all on diaries, is of infinitesimal value, more particularly where other evidence is available. [p. 331, col. 1.]

ABDUL KHALIQ *v.* EMPEROR.

Police diaries may be of use when a Judge has to decide about the guilt of an accused person and they contain matter which seems to point in the opposite direction, but they are dangerous evidence against a person. [p. 331, col. 1.]

Appeal against an order of the Sessions Judge of Mainpuri.

Mr. *Wallach*, for the Petitioner.

Mr. *Satyachandra Mukerji*, for the Opposite Party.

JUDGMENT.—In the month of May 1914, a case under section 110 of the Code of Criminal Procedure was pending before a Magistrate of the first Class of Mainpuri.

The person against whom proceedings were instituted was Khalaq Singh, a *thakur*, and he was called upon to show cause why security should not be taken from him on the ground that he was a habitual dacoit and an associate of dacoits and the people of the neighbourhood were in terror of him.

The case was partly heard by Babu Raj Bahadur and partly by Thakur Hukum Singh. Thakur Hukum Singh came to the conclusion that none of the charges alleged by the prosecution had been made out or established against the accused. He found him to be a man of position, good life and family and he was not a person to be bound over under section 110, and he accordingly discharged the order made against him calling upon him to show cause.

These proceedings came to an end on the 19th of May 1914.

Somewhere in July 1914 Khalaq Singh applied for sanction to prosecute Abdul Khaliq, Circle Inspector, for having committed an offence under section 193 of the Indian Penal Code.

Babu Raj Bahadur Singh refused to entertain this application. The grounds on which he refused to entertain it were two fold. The learned Magistrate thought that Abdul Khaliq had probably made inquiries in some dacoity case and that what he deposed might have been learnt and come to his knowledge during those inquiries. The second ground was that there was nothing on the record to show that Abdul Khaliq had made two contradictory statements in the course of a judicial proceeding. Khalaq Singh then went to the District and Sessions Judge of Mainpuri, asking that the order of Babu Raj Bahadur might be set aside and sanction might be given to prosecute Abdul Khaliq under section 193. There is nothing in the petition laid before the District and Sessions Judge in which the statements supposed to be perjuries are to be found but I am told that they are to be found, in the petition made to Babu Raj Bahadur and that they are as follows:—"(1) I know Khalaq Singh accused. He is in the habit of committing dacoity. (2) There is a general complaint against him of committing dacoity and people fear him. (3) Khalaq Singh was suspected in the Nabigunj dacoity case, also in the Yamudandi case, also in the Namkarari case. (4) The complainant (apparently in the Nabigunj case) put his suspicion on Khalaq Singh in the beginning, middle and end of the inquiry. (5) Names of the persons whom Murli took in the dacoity were the enemies of Murli. (6) Kandora was not a servant of his when Nabi Singh was arrested."

How far these statements are the *ipsissimma verba* used by Abdul Khaliq I do not know. I have not compared them with the original record, and I have not been asked to compare them by the learned Advocate who appears for Abdul Khaliq nor by the learned Vakil who appears on the other side.

It was for the petitioner, Kuar Khalaq Singh, to satisfy the Courts before whom he pressed his application that there was a *prima facie* case of perjury with regard to each one of those statements put into the mouth of Abdul Khaliq. So far as I can judge, the Magistrate dealt with the case in a very proper manner. It is to be regretted that he did not deal with the case, when it was before him under section 110, in an equally succinct and common sense way. He was satisfied, and it must be remembered that most of the evidence had been recorded by him, that it was quite possible with reference to each one of those statements that Abdul Khaliq was deposing to what he came to know during the inquiry and that there was nothing in the statements which could not be explained away and honestly explained

in this way. I admit that the fourth statement, if it has been correctly stated before me, is not so easily explained; but the misfontune is that, so I am told, there was no cross-examination of Abdul Khaliq to show on what foundation he based the several statements made by him.

To my mind it is always strange that Magistrates in the present day attach so much weight and examine at such in ordinate length the Police officers who appear before them in proceedings under section 110. These officers, generally speaking, know nothing more than this that there is current in their Circle a rumour to the effect that a certain person is an associate of bad characters or otherwise a person who needs watching under that section.

There may be cases in which such officers do see something with their own eyes and in that case their evidence is of course valuable; but when it is evidence based upon hearsay rumour and above all on diaries, it is of infinitesimal value, more particularly where there is evidence available, as I understand there was in this case, of, certain number of witnesses who were not Police officers who came forward on either side.

It is the custom now, so far as I have seen in cases coming before me, to have 30 or 40 witnesses on one side and to have as many as 40 or 50 witnesses on the other side, as though proceedings under section 110 were best judged by the number of witnesses.

In the judgment recorded by Mr. Hukum Singh there is this clear defect that he deals with the case mainly upon the Police diaries and upon little else. His judgment is an apology for the diaries showing that they are entitled to be ranked as the best evidence in the case. Police diaries are sometimes of use when one has to decide about the guilt of an accused person and they contain matter which seems to point in the opposite direction, but so far as my experience goes they are dangerous evidence against a person. I am not dealing with a case in which the diaries are the diaries of the investigating officer and the question is how far he is responsible for what is contained in them; that is quite another story. Abdul Khaliq had nothing to do with these diaries except to review them after they had been written by others. Nothing in the diaries is put before me as his own personal knowledge. I do not for a moment suggest that the decision arrived at in the long run by Hukum Singh as regards the reputation of Khalaq Singh is in any way wrong, that is not a matter before me to-day; but there is nothing in his very lengthy judgment which gives ground for a *prima facie* conclusion that Abdul Khaliq has comitted perjury in the evidence which he gave before Babu Raj Bahadur. Nothing whatever of this kind has been pointed out to me and it was very properly stated before me that if the Police diaries be taken out of the judgment, there remains no foundation on which a sanction for prosecution can safely be based.

The learned Judge never seems to have had before his mind the first ground on which sanction was refused, he dealt only with the second ground and his judgment is that the Sub-Divisional Officer, instead of going into the merits, threw the application out on the ground that there were not two mutually contradictory statements. As I read the judgment of the first Court the strong point in the judgment is that statements made by Abdul Khaliq might well have been made from inferences which came before him *aliunde*.

The case is certainly not one in which sanction should have been given under section 193. The Magistrate who heard the evidence evidently did not consider that he could take upon himself the responsibility of acting under section 476. On every ground, therefore, I hold that this application for revision of the order of the Sessions Judge of Mainpuri is a good and proper application.

I set aside the order and revoke the sanction, which has been given.

Sanction revoked

BULKIS BIVI *v.* NAGOOR KANNI ROWTHER.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 285 OF 1914.
CRIMINAL REVISION PETITION 243 OF 1914.
February 8, 1915.

Present:—Mr. Justice Spencer.

BULKIS BIVI AND ANOTHER—PETITIONERS

versus

NAGOOR KANNI ROWTHER—COUNTER-PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Dispute between members of Muhammadan family—Right to collect rents from tenants—Possession with managing member, effect of—Magistrate discretion of to allow application to re-summon witnesses—Forcible dispossession—Right to fractional share, if right to tangible immoveable property.

In an inquiry under section 145, Criminal Procedure Code, it is in the discretion of the Magistrate to allow witnesses to be re-summoned upon a petition presented towards the end of his inquiry. [p. 333, col. 1.]

Tara Pada Biswas v. *Nural Haque Mia*, 2 C. L. J. 280; 2 Cr. L. J. 679; 32 C. 1093; *Abhayessari Debi* v. *Shidhessari Debi*, 16 C. 513, referred to.

A dispute as to a right to collect rents is a dispute within the operation of section 145 of the Criminal Procedure Code [p. 333, col. 1.]

Ramasami v. *Dhanakoti Ammal*, 12 M. 88; *Premnath Bhusma Deb Roy* v. *Durga Charn Bhattacharji*, 11 C. 413; *In the matter of Sribanmali Basu Mozumdar* v. *Pran Sankar Roy Chowdari*, 15 C. 527; *Abhayessari Debi* v. *Shidhessari Debi*, 16 C. 513, followed.

Where the dispute is between the members of a Mahammadan family who claim fractional shares in the properties of the family, only that person can be said to be in actual possession within the meaning of section 145, Criminal Procedure Code, who is in actual receipt of rent and to whom the tenants pay such rent. [p. 333, col. 1.]

Biboo Reddi v. *Kullappa Nattan*, 2 Weir 107; *In the matter of the petition of J. D. Sutherland*, 9 B. L. R. 229; 18 W. R. 11 Cr.; *Sri Mohan Thakur* v. *Narsingh Mohan Thakur*, 27 C. 259, 261 *note*; 4 C. W. N. 420, 421 *note*, referred to.

Where more than two months have elapsed from the date of the death of the last person in possession, there is 'no' forcible dispossession within two months within the meaning of section 145 of the Code of Criminal Procedure. [p. 333, col. 1.]

A right to a fractional share may be a right to tangible immoveable property even when the shares are not definitely ascertained. [p. 334, col. 1.]

Sri Mohan Thakur v. *Narsing Mohan Thakur*, 27 C. 259, 261 *note*; 4 C. W. N. 420, 421 *note*; *Surb Narain Singh* v. *Birj Mohan Thakur*, 23 C. 80; *Mon Mohan Ghose* v. *Rajendra Coomar Ghosh*, 7 C. W. N. 462, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of the Court of the first Class Sub-Divisional Magistrate of Ramnad, in Miscellaneous Case No. 18 of 1913.

Messrs. *R. Sadagopacharior*, *V. R. Venkatrama Aiyar* and *C. Rajagopala Aiyangar*, for the Petitioners.

Dr. *S. Swaminathan* and Mr. *Ranganatha Aiyar*, for the Respondents.

ORDER.—This is a petition to revise an order passed under section 145 of the Code of Criminal Procedure by the Sub-Divisional Magistrate of Ramnad.

The questions argued before me were three, namely :

1. Whether the Magistrate exercised his jurisdiction wrongly in refusing permission to the petitioners to examine the witnesses named in their petitions of 23rd January 1914.

2. Whether the Magistrate's omission to consider the telegrams, Exhibits M and H series, occasioned a failure of justice.

3. Whether the Magistrate has jurisdiction to declare the counterp-etitioner to be in possession of items Nos. 5 to 9 when his possession, if true, was only that of tenants attorning to him since the date of his elder brother, Rowther Nainar's death and when according to the counter-petitioner's own contention the family was an undivided one.

I am of opinion that the Magistrate's order does not need revision. It is a well-considered order dealing carefully and concisely with the contentions of the parties and the evidence adduced on either side in their support.

On the first point it is not necessary for me to go so far as the Calcutta High Court has gone in declaring in *Tara Pada Biswas* v. *Nural Haque Mia* (1) that parties to proceedings under section 145 must produce their own witnesses, that it is not obligatory on the Court to assist them in this matter, and that they cannot claim as a matter of right that processes should be issued by the Court to compel the attendance of witnesses named by them. Nor is it necessary to base my decision on the ground adopted in *Abhayessari Debi* v. *Shidhessari Debi* (2), which was that even if the lower Court's action in excluding evidence was illegal it would not justify the exercise of the Court's revisional powers to interfere. Here the Magistrate states that the petitioners had already closed their case.

(1) 32 C. 1093; 2 C. L. J. 280; 2 Cr. L. J. 679.
(2) 16 C. 513.

It was certainly discretionary with him to allow witnesses to be re-summoned upon a petition presented towards the end of his enquiry and I am not at all satisfied that in this instance he exercised his discretion wrongly.

As regards the second point the telegrams referred to have been read in Court, but I am unable to see that their contents materially affect the decision of the question which the Magistrate had to decide, namely, which of the parties was in actual possession of the properties in dispute at the date of his preliminary order, at any rate so far as the items Nos. 5 to 9 about which the revision-petition is pressed are concerned.

The third point is less easy of solution. The parties are Muhammadans, but it is conceded that they have not taken their respective shares. The family appears to own two whole villages and fractional shares in three other villages. Though the fields are in 'manual' possession of tenants, the Magistrate found, as I understand his order, that the counter-petitioner had been collecting the whole of the rents and managing these items since his brother, Rowther Nainar's death. As the latter's death was on 13th May 1913 and the preliminary order was issued on 9th September 1913 and the final order was passed on the 5th February 1914, this was not a case in which the petitioners could set up forcible dispossession within two months before the date of the order. It has been frequently held before the amendment of the Code that a dispute as to the right to collect rents is a dispute within the operation of section 145 of the Code of Criminal Procedure: vide *Ramasami* v. *Danakoti Ammal* (3), *Pramatha Bhusana Deb Roy* v. *Doorga Churn Bhattacharji* (4), *In the matter of Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (5), and *Abhayessari Debi* v. *Shidhessari Debi* (2), and now clause 2 in the present Code places the matter beyond doubt.

Now in a dispute between a tenant and a landlord as to the fact of possession, the possession of the tenant would not be the possession of the landlord; vide *Baboo Reddi* v. *Kullappa Nattan* (6), and in this case if the tenant's possession were to be treated as the actual possession, the only decision which the Magistrate could come to would have been that neither of the contesting parties were in possesion of items Nos. 5 to 9 in which event he might have ordered the attachment of these items under section 146.

As it is, he has found the counter-petitioner to be in actual possession and after careful consideration I think that he was acting within his jurisdiction in coming to this conclusion.

The Legislature had made it clear that claims to collect rents can be made the subject of inquiries under this section, and in such inquiries the question must always be, who was actually collecting rents at the date of the preliminary order. The words actual possession in disputes between rival landlords need not be taken to exclude possession by the receipt of rent, for as pointed out in *In the matter of the petition of J. D. Sutherland* (7), the tenant's possession is the possession of him by whose permission he holds the land and to whom he pays the rent, and actual possession can thus be taken to include the possession of landlord by his immediate tenant.

There was no question raised in the Magistrate's Court as to the facts of attornment and so there is no finding on it. But this is not a case of tenants paying rent for some time to one of the contesting parties and then attorning to the other contesting party and paying rent to him It was held in *In the matter of Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (5) that such conduct without notice to the first landlord would not determine his tenancy or deprive him of his right to collect the rent. Here there is no allegation that any dispute existed till Rowther Nainar died. So he was not a contesting party till his death. He being the elder brother appears to have been collecting the rents on behalf of the joint owners. After his death the counter-petitioner being the younger brother collects the rents. Although it may turn out on investigation that the petitioners have a legal right to joint ownership of these

(3) 12 M. 88.
(4) 11 C. 413.
(5) 15 C. 527.
(6) 2 Weir 107.
(7) 9 B. L. R. 229; 18 W. R. 11 Cr.

items or to have their respective shares divided off, yet the existence of such a right will not preclude the magisterial Court from finding that the counter-petitioner is at present in sole possession and management of the said property.

In *Sri Mohan Thakur* v. *Narsing Mohan Thakur* (8) a dispute between joint owners regarding the collection of rent was held to be cognizable under this section.

Lastly Mr. Sadagopachariar based an argument on the impossibility of applying the provisions of this section to undivided fractional shares and cited *Surb Narain Singh* v. *Birj Mohun Thakur* (9) and *Mon Mohan Ghose* v. *Rajendra Coomar Ghosh* (10). Those were cases where the subject-matter of dispute was uncertain and its boundaries undefined. Here I have not been shown any reason for assuming that because the share which the family holds in some of these villages is a fractional share, that share is not a definite and tangible piece of land. The result, therefore, is that I dismiss the petition.

Petition dismissed.

(8) 27 C. 259; 261 *note*; 4 C. W. N. 420, 421 *note*.
(9) 23 C. 80.
(10) 7 C. W. N. 462.

CALCUTTA HIGH COURT.
CIVIL REVISION PETITION No. 45 OF 1914.
December 15, 1914.
Present:—Mr. Justice Fletcher and Mr. Justice Beacheroft.
THE DEPUTY LEGAL REMEMBRANCER AND PUBLIC PROSECUTOR OF BIHAR AND ORISSA—PETITIONER
versus
RAM UDAR SINGH—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 209—Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—High Courts Act, 24 & 25 Vic. C. 104, s. 14—High Court's jurisdiction—Delay in applying—Mala fides.

The orders of a Munsif and of an Additional District Judge refusing to grant an application for sanction to prosecute are not orders of a Criminal Court and, therefore, cannot be revised by the High Court under section 439 of the Code of Criminal Procedure. [p. 335, col. 1.]

Emperor v. *Har Prasad Das*, 19 Ind. Cas. 197; 17 C. W. N. 647; 17 C. L. J. 245; 14 Cr. L. J. 197; 40 C. 477 (F. B.), followed.

Under section 14 of 24 and 25 Vic., C. 104, the High Court in its criminal jurisdiction has power to deal with such orders under section 115 of the Civil Procedure Code and section 15 of 24 & 25 Vic., C. 104. [p. 335, col. 1.]

Where a prosecution is undertaken by the Government, mere delay in applying for the sanction to prosecute cannot be taken as suggesting *mala fides*. [p. 335, col. 1.]

Mr. *Sultan Ahmad*, Deputy Legal Remembrancer of Bihar and Orissa, for the Petitioner.

Babu *Gonesh Dutt Singh*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule obtained by the Deputy Legal Remembrancer and Public Prosecutor of Behar and Orissa calling upon the opposite party to show cause why sanction for his prosecution under section 209 of the Indian Penal Code should not be granted.

It appears that the opposite party on the 10th of December 1912 brought a suit against Naik Lahera and Hira Lahera in the Court of the 2nd Munsif of Muzaffarpore to recover the sum of Rs. 35.

This suit was on the 3rd of February 1913 dismissed the claim being found to be false and malicious. On the 20th of November 1913 an application was made to the 2nd Munsif for sanction to prosecute the opposite party. The Munsif heard such application and examined witnesses. The conclusion arrived at by the Munsif was that although the suit brought by the opposite party was false, sanction ought to be refused on the ground of delay in making the application. An appeal was then preferred to the learned Additional District and Sessions Judge, but he refused to interfere on the ground of delay. Acting under instruction from the Government of Bihar and Orissa, the present applicant applied for and obtained the present Rule.

On the hearing of the present Rule it has been argued that we have no jurisdiction to revise the order of the Additional District Judge, such order not having been passed by a Criminal Court. A large number of authorities have been cited before us, but in the view I take it is unnecessary to consider these authorities. In my opinion the law, so far as

this Court is concerned, has been finally settled by the decision of the Full Bench in the case of *Har Prasad Das* v. *Emperor* (1) The case defore the Full Bench was no doubt an order passed under section 476 of the Code of Criminal Procedure, but no distinction can be drawn between an order under section 476 and a sanction under section 195 for the purpose of considering the question of jurisdiction. What, however, is abundantly clear from the decision of the Full Bench is that the orders of the Munsif and the Additional District Judge are not orders of a Criminal Court and, therefore, cannot be revised by us under section 439 of the Code of Criminal Procedure. We have, however, been duly authorised by the Chief Justice under section 14 of 24 and 25 Vic., C. 104, power to deal with these orders under section 115 of the Civil Procedure Code and section 15 of 24 and 25 Vic., C. 104. The point arises whether we ought to exercise such jurisdiction in the case before us.

It has not been suggested in the argument that there is any general rule of practice followed in this Court as to the Court exercising or refusing to exercise the powers that it possesses to revise orders of this nature. The authorities that were cited during the argument are in many instances difficult to reconcile with each other and in some cases difficult to understand. Ought we, therefore, to interfere with these orders refusing sanction by the lower Courts? The ground for refusing sanction in the Courts below was solely that of delay. Doubtless in many cases where there is delay by a person in applying for the sanction to prosecute, the delay may suggest a want of good faith on the part of the applicant. The present case, however, is in substance a prosecution undertaken by the Government and mere delay cannot, therefore, be taken as suggesting *mala fides*.

I think the reasons assigned by the lower Courts for refusing to grant a sanction when they came to the conclusion that the suit was false and malicious, are insufficient and have occasioned a failure of justice. I think the present Rule ought to be made absolute and sanction should be granted to prosecute the opposite party under section 209 of the Indian Penal Code. We accordingly sanction the prosecution of Ram Udar Singh under section 209 of the Indian Penal Code for having on the 10th December 1912 dishonestly made a false claim in Court, *viz.* in Suit No. 308 of 1912 in the second Court of the Munsiff at Muzaffarpore against Naik Lahera and Hira Lahera.

BEACHCROFT, J.—I agree.

Rule made absolute.

(1) 19 Ind. Cas. 197; 17 C. W. N. 647; 40 C. 477; 17 C. L. J. 245; 14 Cr. L. J. 197.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1682 OF 1914.

January 22, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge.

FATTA AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 514—Conviction of person under security—Forfeiture of bond—Proper procedure.

One *F* was put on Rs. 1,000 security for a year under section 110 of the Criminal Procedure Code. Before the year was over he was convicted of an offence under section 323, Indian Penal Code, and sentenced to imprisonment for two weeks and a fine of Rs. 20. Upon this the District Magistrate confiscated Rs. 205 of the security money from *F* and his sureties jointly:

Held, that there was no real ground for dealing heavily with the surety and a forfeiture of Rs. 50 as against the principal *F* was enough in the circumstances of the case. [p. 336, col. 1.]

Petition for revision of an order of the District Magistrate, Shahpur District, at Sargodha, dated the 5th June 1914.

Mr. *Lahkshmi Narain*, for the Petitioners.

JUDGMENT.—On the 14th October 1912 Fatta, Beloch, of the Shahpur District, aged about 40, was put on Rs. 1,000 security for a year under section 110, Criminal Procedure Code, as a reputed thief and burglar. The other petitioners, Shera and Bahawla, were his sureties.

On the 25th June 1913, Fatta was convicted in the Gujrat District under section 323, Indian Penal Code, and sentenced to imprisonment for two weeks and a fine of Rs. 20. The record of that case is before me. It shows that Fatta took a minor part in an affair in which the real offenders were two men who escaped. He was grazing his camels and unwisely joined at a late stage in a quarrel which did not concern him.

This has been treated as an offence justifying the confiscation of Rs. 250 security money from Fatta and his sureties jointly. I cannot agree with the District Magistrate

that they were "let off very lightly." On the contrary they seem to me to have been treated with unnecessary severity in a manner which is much more likely to promote crime than to keep it down.

Under the circumstances explained, there was no real ground for dealing heavily with the sureties. They could not possibly prevent Fatta from committing a petty offence of the kind and to hold them responsible is to set up a standard of conduct which is unattainable by human beings of any class, much less by rough peasants.

The revision is allowed in full as regards the petitioners Shera and Bahawla and the order of 27th March 1914 is set aside in respect of them. In Fatta's case it is reasonable to make a man understand that he must abstain from any sort of crime while under security, but a disproportionate and crippling penalty is altogether out of place. I reduce the sum to be paid by Fatta out of his security money from Rs. 250 to Rs. 50, bearing in mind that he has been already punished for his actual offence.

Revision allowed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION CASE No. 1303 OF 1914.

December 18, 1914.

Present:—Mr. Justice Shah Din.

RUP NARAIN—PETITIONER

versus

Pandit MAHA DAYAL—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 195—Application for sanction to prosecute—Dismissal for default, whether competent.

A Court has no jurisdiction to dismiss in default an application for sanction to prosecute.

In re Gopal Siddeshwar Deshpande, 32 B. 203; 10 Bom. L. R. 95; 3 M. L. T. 170; 7 Cr. L. J. 120; *Marudappa Gounden v. Bommanna Gounden*, 22 Ind. Cas. 423; 15 Cr. L. J. 71, followed.

Case reported by the Sessions Judge of the Delhi Division, with his No. 578, dated the 23rd June 1914.

FACTS.—An application of the applicant was pending before the District Judge, Delhi, for sanction to prosecute the respondent for fabricating false evidence in a suit (section 195, Criminal Procedure Code).

The applicant failing to appear, the District Judge dismissed the application in default and refused to restore, on the ground that he had no jurisdiction to do so.

The application of the applicant for restoring his application to the file was rejected by Lala Murari Lal Khosla, exercising the powers of a District Judge, Delhi, by order, dated 27th of March 1914.

The proceedings are forwarded for revision on the following

GROUNDS.—The order of dismissal was bad in law, the law providing that the application must be considered granted or refused on the merits.

The case is exactly parallel to a Bombay case, *In re Gopal Siddeshwar Deshpande* (1), where in similar cases the Subordinate Judge dismissed an application in default:

"After the Subordinate Judge had declined to review his order upon the ground mentioned above, the Public Prosecutor applied to the District Court and the District Court has accordingly accorded sanction. Now, the objection to that is, *first*, that the District Court has not gone into the details of the application, and, *secondly*, to give that Court jurisdiction under section 195, clause (*c*), there ought to have been a sanction given or refused by the Subordinate Judge. Here there was no sanction, given or refused by the Subordinate Judge. The only jurisdiction which the District Judge had under the circumstances was to revise the order of the Subordinate Judge dismissing the application as for default.

"We think, therefore, that for the reasons we have given, both the order of the District Judge and that of the Subordinate Judge ought to be set aside and the application made to the Subordinate Judge ought to be sent back to him with a direction that he should dispose of it according to law."

For the reasons given above, I forward the case to the Chief Court with the recommendation that the order of the District Judge be set aside and that he be directed to pass an order on the merits.

ORDER.—Following *In re Gopal Siddeshwar Deshpande* (1) and the case of *Marudappa Gounden v. Bommanna Gounden* (2), I set aside the order of the District Judge, dated the 27th March 1914, as passed without jurisdiction and send the case back to him with a direction that he should proceed with the application, dated the 13th October 1913, according to law. *Revision accepted.*

(1) 32 B. 203; 10 Bom. L. R. 95; 3 M. L. T. 170; 7 Cr. L. J. 120.

(2) 22 Ind. Cas. 423; 15 Cr. L. J. 71.

MADRAS HIGH COURT.

CIVIL APPEAL No. 137 OF 1910.

APPEAL AGAINST ORDER No. 177 OF 1910.

February 9, 1915.

Present:—Sir John Edward Power Wallis, Kt., Chief Justice, and Mr. Justice Hannay.

A. L. A. R. ARUNACHELLAM CHETTIAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VELAPPA THAMBIRAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mutt *properties*—Pandarasannadhi, *mortgage by—Property within jurisdiction of different Courts—Decree obtained in one Court transferred for execution to another—Jurisdiction of other Court to declare decree not binding—Disciples, suit by, to contest decree, maintainability of—Civil Procedure Code (Act V of* 1908), *s.* 92—*Compromise decree, setting aside of—Legal necessity—Burden of proof*—Pandarasannadhi *power of, to compromise*—Bona fide—*Position of* pandarasannadhi, *whether analogous to Hindu widow.*

A very small part of the mortgaged properties was situated within the jurisdiction of *K* Court while the rest was situated within the jurisdiction of *T* Court. A suit was instituted on the mortgage in *K* Court and the decree obtained was transferred to *T* Court for execution. While execution was pending the judgment-debtor sued in *T* Court that the decree was not binding. It was objected that the Court had no jurisdiction:

Held, that under the circumstances the Court had jurisdiction and that there was no absolute rule that no decree could be in any way impeached save in the Court in which it was passed. [p. 338, col. 1.]

A decree passed by consent and without contest, whereby certain *mutt* properties are made liable, stands in no better position than a settlement effected out of Court, and in the absence of sufficient reason it can be questioned in Courts other than that which passed it. [p. 338, col. 1.]

Where a party has a special interest in the preservation and the maintenance of a *mutt* and its properties, he is entitled to sue on his own behalf and without obtaining sanction under section 92 of the Civil Procedure Code, 1908, to set aside a decree wrongfully got against the *mutt* properties. [p. 338, col. 1.]

The powers of a *pandarasannadhi* to compromise suits affecting trust properties cannot be larger than those of a trustee. [p. 338, col. 2.]

Compromises of suits entered into by trustees of charitable endowments are not necessarily void. [p. 339, col. 2.]

In a suit to declare a decree against a *pandarasannadhi* not binding on the *mutt* properties, once it appears that the decree was passed not after contest but on compromise, the onus is on the decree-holders to show that the compromise was a lawful one entered into *bona fide* and, therefore, where it is proved that the compromise was not of that character, the decree cannot stand. [p. 340, col. 1.]

A compromise entered into under the influence of an indirect motive, such as a desire to escape the necessity of having to attend and be examined as a witness by the *pandarasannadhi*, amounts to a breach of duty and cannot be regarded as lawful or *bona fide*. [p. 341, col. 1.]

A *pandarasannadhi*, though not accountable for his expenditure of the income of the *mutt* properties is yet under a moral, if not a legal obligation, to apply the surplus for purposes of a religious or philanthropic nature and he cannot apply it in satisfaction of debts which have been found not to be binding on the *mutt*. [p. 341, cols. 1 & 2.]

The position of a *pandarasannadhi* is not analogous to a widow and a decree passed against a *pandarasannadhi* for debts not binding on the *mutt* cannot be treated as an alienation binding on his life-interest, as in the case of a decree passed in similar circumstances against a widow. [p. 341, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Original Suit No. 41 of 1906, and appeal against the order of the Court of the Subordinate Judge of Tinnevelly, dated the 18th February 1910, in Execution Petition No. 264 of 1910 (in Original Suit No. 100 of 1902 on the file of the Court of the Additional Subordinate Judge of Tanjore).

Messrs. *S. Srinivasa Aiyangar* and *G. S. Ramachandra Iyer*, for the Appellants.

Messrs. *K. Srinivasa Iyengar* and *T. Narasimha Iyengar* and *T. Nallasivam Pillai*, for the Respondents.

JUDGMENT.

IN APPEAL No. 137 OF 1910.

This is a suit brought by the plaintiffs, suing under section 30 of the Old Civil Procedure Code on behalf of themselves and all the disciples of the Dharmapuram *Mutt*, in the Court of the Subordinate Judge of Tinnevelly for a declaration that the decree obtained by defendants Nos. 3 to 6 against the 1st and 2nd defendants in Original Suit No. 100 of 1902 on the file of the Court of the Subordinate Judge of Kumbakonam subsequently transferred to the Court of the Additional Subordinate Judge of Kumbakonam (subsequently transferred to the Court of the Additional Subordinate Judge of Tanjore) on a mortgage executed by the 1st defendant, the then *pandarasannadhi* of the *mutt*, is not binding on the *mutt* and its properties, and for an injunction restraining defendants Nos. 3 to 6 from executing the decree and defendants Nos. 1 and 2 from alienating the *mutt* properties in satisfaction of it. The Subordinate Judge passed a decree, declaring that the suit properties are not liable under the decree in the said suit, restraining the

plaintiffs from executing the said decree against those and other property of the *mutt* and the 2nd defendant from alienating the said properties in satisfaction thereof.

Two preliminary points have been argued before us, that the Tinnevelly Court had no jurisdiction to make a declaration about a decree of the Tanjore Court and that the present plaintiffs had no right to sue. As regards the first point a very small part of the mortgaged properties is situated within the jurisdiction of the Kumbakonam Court and the rest in Tinnevelly, and though the present defendants, as they were entitled to do, sued on the mortgage-decree in the Tanjore Court they subsequently had the mortgage-decree transferred for execution to the Tinnevelly Court and it was while execution was pending in that Court, that the plaintiffs instituted the present suit. In this state of things we think the Subordinate Judge was right in holding that the Court had jurisdiction, following *Banke Behari Lal* v. *Pokhe Ram* (1). The most recent decision of the Allahabad High Court in *Umrao Singh* v. *Hardeo* (2) does not lay down an absolute rule that no decree can be in any way impeached save in the Court in which it was passed. A decree passed by consent and without conteset against the 1st and 2nd defendants whereby the *mutt* properties are made liable, stands as will be seen later, in no better position than a settlement effected out of Court, and we think there is no sufficient reason why it should be questioned only in the Court that passed it. See also *Earl of Bandon* v. *Becher* (3). We think this objection fails.

As regards the second point, the Subordinate Judge has found that the plaintiffs and other disciples of the *mutt* have a special interest in the preservation and the maintenance of the *mutt* and its properties which entitles them to sue on their own behalf and without obtaining sanction under section 92, Civil Procedure Code. The decisions relied on by the Subordinate Judge, *Budree Das Mukim* v. *Chooni Lal Johurry* (4) and *Strinivasa Ayyangar* v. *Strinivasa Swami* (5), and the rulings in S. A. No. 20 of 1898, *Subbarayadu* v. *Asan Ali Sheriff* (6) and *Subramania Aiyer* v. *Nagarathna Naicker* (7), are authorities for so holding.

The substantal question in the case is whether the decree of the Tanjore Court passed on a compromise entered into between the present defendants Nos. 3 to 6 as plaintiffs in that suit and the 1st and 2nd defendants in that suit and this, was or was not binding on the *mutt* properties. The position and powers of a *pandarsannaadhi* or head of a *mutt* in Southern India have been considered in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami* (8), and *Kailasam Pillai* v. *Nataraja Thambiran* (9). In the former case he has been compared with reference to his rights of enjoyment to an English ecclesiastical corporation sole. With reference to his powers of alienation he has been compared in *Srimath Daiva Sikhamani Pandara Sannadhi alias Nataraja Desikar* v. *Noor Mahomed Rowthen* (10) and *Srimath Deivasi Kamani Pandara Sannadhi* v. *E. K. Karutha Ravuthan* (11) to a temple trustee, whose position again has been held by the Privy Council to be analogous to that of the manager of an infant heir in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (12). More recently in *Muthusamier* v. *Methanithi Swamiyar* (13), the position of a *pandarasannadhi* as regards alienations has been compared to that of a Hindu widow; but we argee with the observation of Sadasiva Aiyar, J., in the last case that it is dangerous to press these analogies too far, in the case of the incumbent of a religious office whose rights and duties are mainly governed by usages. As regards the present question, having regard to the position of a *pandarasannadhi* as explained in the cases already referred to, we think it may safely be assumed that his powers to compromise suits affecting *mutt* properties cannot be larger than those of a trustee, and that

(1) 25 A. 48 at p. 54; A. W. N. (1902) 179.
(2) 29 A. 418; A. W. N. (1907) 112; 4 A. L. J. 392.
(3) 3 Cl. & F. 479; 5 E. R. 1388; 9 Bligh (N. S.) 532.
(4) 33 C. 789; 10 C. W. N. 581.
(5) 16 M. 31.
(6) 23 M. 100 *note*.
(7) 5 Ind. Cas. 901; 20 M. L. J. 151; 8 M. L. T. 114.
(8) 27 M. 435; 14 M. L. J. 105.
(9) 5 Ind. Cas. 4; 33 M. 265 (F. B.); 7 M. L. T. 1; 19 M. L. J. 778.
(10) 17 M. L. J. 558; 31 M. 47; 3 M. L. T. 95.
(11) 9 Ind. Cas. 150; 21 M. L. J. 129; 9 M. L. T. 327.
(12) 14 B. L. R. 450; 23 W. R. 253; 2 I. A. 145; 3 Sar. P. C. J. 449.
(13) 19 Ind. Cas. 694; 13 M. L. T. 498; (1913) M. W. N. 581; 25 M. L. J. 393.

it will be best to begin by considering the extent of such powers. Trustees now possess certain statutory powers of compromise in England, and also in India under section 43 of the Indian Trusts Act in the case of compromises effected after the passing of the Act, which however does not apply to religious or charitable trusts. In *Forshaw* v. *Higginson* (14) Turner, L. J., observed that cases of compromises by trustees without leave of the Court rarely came before the Court, no doubt because trustees were generally advised to apply to the Court for directions before making such compromises, inasmuch as if they made them of their own authority, they were liable to have them called in question after they had lost the evidence showing that they had acted in the *bona fide* exercise of their discretion. In that case, the Court refused to hold a trustee liable to the estate for a payment made by him pursuant to a compromise effected out of Court under good professional advice. On the other hand, it was held in *Wiles* v. *Gresham* (15) that a trustee who accepted a composition must show that no more could have been obtained if he was to escape being held liable for the balance. As regards compromise of suits, trustees have felt it even more necessary to obtain the sanction which the Court has power to grant in the exercise of its jurisdiction over trustees, which is said by Turner, L. J., in *Brooke* v. *Lord Mostyn* (16) to be also the foundation of its power to compromise the rights and claims of infants and persons under disability. The cases as to charitable trusts collected in Tudor at page 378 (4th Edition) are all cases in which the compromise was confirmed by the Court. In the case of infants, both in England, and in India under the Code of Civil Procedure, compromises of suits entered into without the leave of the Court are invalid, but there is no similar provision in the Code as to trustees. In *Leeming* v. *Lady Murray* (17) Jessel, M. R., seems to have been of opinion that the power to compromise was incident to the power to institute and conduct suits and in *Sankaralinga Nadan* v. *Rajeswara Dorai* (18), which was a case of compromise by a trustee of a temple pending an appeal by the other side, their Lordships of the Judicial Committee did not lay down that the trustee had no power to compromise a suit, but approved of the judgment of this Court in *Rajah M. Bhaskara Sethupathi and Irulappa Nadan* v. *Narayanasamy Gurukkal* (19), which refused to recognise the compromise in question on the ground that it was not a lawful compromise but constituted a breach of trust. The better view appears to be that compromises of suits entered into by trustees of charitable endowments are not necessarily void.

As regards the cases relied on by the appellant in support of the compromise in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (12) their Lordships merely lay down that a decree obtained after contest against the trustee for the time being is binding on his successor and that a suit to set it aside will be dismissed in the absence of fraud and collusion. In *Sudindra* v. *Budan* (20) all that the Court decided was that a decree against the *de facto* head of a *mutt* could not be resisted in execution on the ground that the debt sued on was not incurred for the benefit of a *mutt*; and that it must be set aside, if at all, by a separate suit. So too in *Manikka Vasaka Desikar* alias *Gnana Sambanda Pandara Sannadhi* v. *Balagopalakrishna Chetty* (21) as regards a compromise decree obtained against the present 1st defendant. Incidentally, however it was observed in that case that it would be unreasonable to hold that a *pandarasannadhi* is bound to waste *mutt* property in litigation when it is in the interest of the *mutt* to enter into compromise. In *Subbammal* v. *Arudaiyammal* (22) a suit to set aside a mortgage and sale of certain lands in satisfaction

(14) (1857) 8 De G. M. & G. 827; 44 E. R. 609; 26 L. J. Ch. 342; 3 Jur. (N. S.) 476; 5 W. R. 424; 114 R. R. 356.

(15) (1854) 5 De G. M. & G. 770; 43 E. R. 1069; 24 L. J. Ch. 264; 3 W. R. 87; 104 R. R. 273.

(16) (1864) 2 De G. J. & S. 373 at p. 415; 46 E. R. 419; 33 Beav. 457; 34 L. J. Ch. 65; 10 Jur. (N. S.) 1114; 11 L. T. (N. S.) 392; 13 W. R. 1115; 139 R. R. 134.

(17) (1879) 13 Ch. D. 123; 48 L. J. Ch. 737; 28 W. R. 338.

(18) 31 M. 236; 12 C. W. N. 946 (P. C.); 4 M. L. T. 101; 10 Bom. L. R. 781; 8 C. L. J. 230; 18 M. L. J. 387; 35 I. A. 176.

(19) 12 M. L. J. 360.

(20) 9 M. 80.

(21) 29 M. 553; 16 M. L. J. 415.

(22) 30 M. 3.

of a decree passed without contest in a suit against a widow on an alleged debt of her husband was dismissed, as it was found that the debt was really due by the last male owner; and it was observed that the widow as representing the estate was not bound to raise any defence when she was satisfied that the debt was really due. A still later decision of this Court, *Bhogaraju Venkatarama Jogiraju* v. *Adapalli Seshayya* (23), relied on for the respondent, lays down that such a consent decree against the widow stands in no better position than a contract made by the widow, but this is not inconsistent with the recognition of such compromises when properly entered into. Some of the other Courts have gone further and have interpreted the decision of their Lordships in *Imrit Kanwar* v. *Roop Narain Singh* (24), as laying down absolutely that a decree against a widow is only binding on the reversioners when the suit was decided after contest and not on a compromise. See the judgment of Mookerjee and Carnduff, JJ., in *Rajlakshmi Dassee* v. *Katyayani Dasee* (25) where the cases are collected. It is unnecessary to pursue this question, because for the purposes of the present case it is sufficient to say that, in a suit to declare a decree against a *pandarasannadhi* not binding on the *mutt* properties, once it appears that the decree was passed not after contest but on compromise, the onus is on the defendants to show that the compromise was a lawful one entered into *bona fide*; and that in the present case, apart from any question of onus, it is proved that the compromise was not of that character.

In 1899 the 1st defendant, who was then *pandarasannadhi* executed a mortgage for Rs. 40,000 in favour of the father of defendants Nos. 3 to 6, Exhibit AA, with the alleged object of raising money for the erection of a building, the discharge of debts left by his predecessor, the payment of *kist* and expense of the *mutt*. In 1902 the defendants Nos. 3 to 6 sued the 1st defendant on the mortgage in the Court of the Subordinate Judge of Kumbakonam and, while the suit was pending, the 1st defendant executed a deed of relinquishment appointing the 2nd defendant *pandarasannadhi* in his place. The 2nd defendant was made a party defendant, and pleaded that the money had not been borrowed by the 1st defendant for purposes binding on the *mutt*. Issues, Exhibit DD, were settled. On the 7th February 1903, and shortly before the case came on for hearing, the plaintiffs took out summonses calling on the 1st and 2nd defendants to attend and give evidence and produce documents at the trial. It is well known that persons in the position of a *pandarasannadhi* have a strong objection to appearing in Court as witnesses which they regard as derogatory to their dignity, and both accordingly applied to be examined on commission. It had recently been decided in this Court that they are not entitled to exemption under section 133, Civil Procedure Code, in the absence of a special notification by Government, and accordingly the Subordinate Judge rejected the petitions and ordered them to attend and give evidence, the 1st defendant in open Court, and the 2nd defendant in Chambers. These orders were passed on the 1st and 11th August 1904; and after an unsuccessful application for transfer and stay had been made to the District Judge and dismissed by him on the 19th September 1904, the plaintiffs and defendants Nos. 1 and 2 on the 31st October following put in a *razinamah* petition under which the plaintiff obtained a mortgage decree for Rs. 52,000. The plaintiffs in this suit plead that the *razinamah* was entered into fraudulently by the 1st and 2nd defendants in that suit and this, while the 2nd defendant pleads in effect that the plaintiffs, in order to prevent him for defending the suit, unnecessarily summoned him as a witness and opposed his examination on commission and practically coerced him to enter into the compromise. While we do not consider that the plaintiffs can be said to have exercised any coercion or undue influence on the 2nd defendant in insisting, however ill-advisedly, on their legal right to examine him as witness, we think the Subordinate Judge was well warranted, in the absence of any satisfactory explanation as to why the 2nd defendant abandoned his defence and on the other evidence before him, in coming to the conclusion that the 2nd defendant was actuated mainly by a desire to escape the necessity of having to attend and be examined as a witness. In our

(23) 12 Ind. Cas. 123; 35 M. 560; 10 M. L. T. 179.
(24) 6 C. L. R. 76.
(25) 12 Ind. Cas. 464; 38 C. 639 at p. 672.

opinion, a compromise entered into under the influence of an indirect motive of this kind by a person in the position of the 2nd defendant amounted to a breach of his duty and cannot be regarded as lawful or *bona fide*. The evidence in the present case, which was also available in that case, has satisfied the Subordinate Judge that the 2nd defendant was in a position successfully to maintain the defence he had pleaded if the case had been fought out, and that it was his duty to contest it. No serious attempt has been made to question the finding arrived at by the Subordinate Judge on a careful examination of the evidence that the mortgage debt sued on has been proved by the plaintiffs to have been contracted for purposes not binding on the *mutt*—except on the ground that before advancing the money the father of defendants Nos. 3 to 6 satisfied himself by inquiries, of the nature indicated in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (26), that the advance was necessary to discharge debts binding on the *mutt*. It is no doubt proved that the father of defendants Nos. 3 to 6 ascertained by inquiry that the 1st defendant had contracted numerous debts on pledges of jewels and otherwise; but, as pointed out by the Subordinate Judge, there seems to have been no inquiry how far the debts so contracted were binding on the *mutt*. As regards the accounts which are said to have been inspected, they either fail to show the purpose for which the debt was incurred or show purposes not binding on the *mutt* such as the purchase of rings. The defendants did not plead that the mortgage-debt sued on in the previous suit was binding on the *mutt* because they had satisfied themselves by due inquiries as to the necessity for the loan, nor was any such issue raised; and apart from this objection, the evidence on record, as the Subordinate Judge has shown, fails altogether to support such a plea.

It is then said that even if this be so, the decree should be treated as an alienation binding on the life-interest of the 2nd defendant as in the case of a decree passed in similar circumstances against a widow. The position, however, is not analogous. A *pandarasannadhi*, though he has been held not to be accountable for his expenditure of the income of the *mutt* properties, is yet under a moral if not a legal obligation to apply the surplus for purposes of a religious or philanthropic nature, and it would not, we think, be right to compel him to apply it in satisfaction of debts which have been found not be binding on the *mutt*.

The appeal is dismissed with costs.

IN APPEAL AGAINST ORDER No. 177 OF 1910.

This appeal is also dismissed.

Appeals dismissed.

(26) 6 M. I. A. 393; 18 W. R. 81 *note*; Sevestre 253 *note*; 2 Suth. P. C. J. 29; 1 Sar. P.C.J. 552; 19 E.R. 147.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1329 OF 1913.

February 9, 1915.

Present:—Mr. Justice Scott-Smith.

MADAN MOHAN LAL—PLAINTIFF—APPELLANT

versus

THE MUNICIPAL COMMITTEE OF DELHI—DEFENDANT—RESPONDENT.

Punjab Municipal Act (XX of 1891), s. 92—Punjab Municipal Act (III of 1911), s. 3 (5) (a)—Building—Erection without sanction of Municipality—Notice ordering demolition—Additions for which sanction was not obtained.

The plaintiff had asked the Municipality for permission to build a *saiban*, the plan showing eight gaps or open spaces between the supports of the roof; subsequently the plaintiff made additions by filling these gaps with frames of wood and glass, some of which were doors and some windows. On the Municipality issuing a notice to the plaintiff to demolish the additions, the plaintiff sued for an injunction restraining the Municipality from demolishing the additions. The suit was dismissed on appeal. On second appeal it was urged—

(1) that the plan had shown the position of the doors and windows, (2) that no material alteration to the building was made by the additions, (3) that the Municipality's action was arbitrary and unreasonable and (4) that the notice was illegal:

Held, that the plan showed only gaps, but no doors and windows, (2) that the opening of doors and windows constituted a 'material alteration' of the building within the meaning of section 3 (5) (*a*) of the Punjab Municipal Act, 1911, (3) that the Municipality's action was justified, one of its objects being to vindicate its authority and (4) that the notice was not illegal. [p. 342, col. 2; p. 343, col. 1.]

Second appeal from the decree of the Divisional Judge, Delhi, dated the 11th June 1913, reversing that of the Subordinate

Judge, second class, Delhi, dated the 7th April 1913, decreeing the claim.

Messrs. *Raj Narain* and *Santanam*, for the Appellant.

Rai Sahib Lala *Moti Sagar*, for the Respondent.

JUDGMENT.—The suit out of which the present appeal arises was brought by the plaintiff against the Municipal Committee of Delhi for a perpetual injunction against the Committee restraining them from interfering with certain additions made by the plaintiff to a building erected by him with the sanction of the Committee. The first Court granted the prayer, on the ground that the object of the Committee was one not warranted by the Municipal Act, and that notice in dispute had been issued without any reasonable justification. The lower Appellate Court, after fully discussing the case, came to the conclusion (1) that the additions to the building amounted to an 'erection' within the meaning of the Municipal Act; (2) that this erection was not covered by the original sanction granted by the Committee; (3) that the notice was neither ambiguous nor illegal, and (4) that the Committee was justified in issuing a notice, one of its objects being to vindicate its authority. It, therefore, accepted the appeal and setting aside the decree of the first Court dismissed the plaintiff's suit. The plaintiff has filed a second appeal in this Court.

The learned Divisional Judge has written a very clear judgment. He describes the nature of the building as appearing from the plan originally put in by the plaintiff when he applied for sanction. He also describes the additions to the building. Briefly what the plaintiff asked for permission to build was a *saiban*; it had no doors and no windows, but had eight gaps or open spaces between the supports of the roof. The additions which the plaintiff made were by filling these gaps subsequently with frames of wood and glass, some of which were doors and some windows. Mr. Raj Narain in arguing the case for the plaintiff referred me to the bye-laws framed by the Municipal Committee under section 92, Act XX of 1891, published in Punjab Government Notification No. 454, dated 6th October 1900. The first two bye-laws are as follows:—

(1). "Every person intending to erect or re-erect any building within the limits of the Municipality shall give notice in writing of his intention to the Secretary of the Committee.

"(2). Such notice shall be accompanied by a ground plan, drawn to suitable scale, showing dimensions of plinth, line of frontage of adjoining buildings, and space, if any, that will be left on any side between existing buildings and that proposed to be erected. *It shall also show the position of all outer doors.*"

Mr. Raj Narain says that the plan put in by the plaintiff with his application for permission to build does show the position of the doors which plaintiff subsequently added. In my opinion it does not. It shows open spaces no doubt, but there is nothing in the plan or the application to indicate that the plaintiff intended to put doors in those open spaces. Any one looking at the plan and the application would draw the inference that what plaintiff intended to build was a kind of open verandah without any doors. I am quite clear, therefore, that the addition of doors in the open spaces shown on the plan was not covered by the original sanction to build.

The next question is whether the plaintiff by these additions made a material alteration to the building within the meaning of section 3 (5) (*a*) of the Punjab Municipal Act III, of 1911. On this point also I have no hesitation in agreeing with the learned Divisional Judge and with the reasons given by him for his conclusion.

The plaintiff having, therefore, erected a building without sanction, the Committee was authorised under section 195 of the Act to send him a notice requiring that the building should be altered or demolished, as the Committee deemed necessary, within the space of 30 days from the date of the service of the notice. Mr. Raj Narain urges that the Committee's action was arbitrary and unreasonable, but I am unable to agree with him. As the learned Divisional Judge says, the Municipality must vindicate its authority, and the fact that a man has erected without having applied for sanction is a sufficient reason to order demolition. Such action is open

defiance of the authority of the Municipality. In *Bhawani Shankar* v. *Surat City Municipality* (1), it was held that a Municipality can in their discretion order a building erected without sanction to be altered or demolished, and that the notice of demolition cannot be questioned on the ground that the building otherwise conforms to the orders of the Municipality or can be altered so as to be made to conform to them.

The last point raised by Mr. Raj Narain was that the notice was illegal inasmuch as it required the plaintiff to demolish the building within 15 days, the time specified in section 195 being 30 days. I find that this was one of the grounds taken by the plaintiff in the first Court, but it is clear that it was not pressed in the lower Appellate Court, for in his judgment the learned Divisional Judge says, "nothing has been pointed out to me in the notice which is either ambiguous or illegal." The record shows that the notice was sent in duplicate. In the one which was kept by the plaintiff the period entered was 15 days, but that in the copy signed by him and returned to the Committee, the period was shown as 30 days. Plaintiff himself in endorsing the notice brought this discrepancy to the notice of the Municipal Committee and asked to be informed which period was correct. In my opinion the fact that the period was wrongly stated in one copy of the notice is not of itself sufficient to entitle the plaintiff to the relief asked for. No doubt if the Committee had within 15 days sought to demolish the building under section 220 of the Act, the plaintiff might have objected, and have asked to be allowed the full term of 30 days. He did not, however, object to the notice on this ground. Mr. Raj Narain asks that if a perpetual injunction be not granted to his client, it may be declared that the notice is illegal and the Committee cannot take any action, therefore, and that it should be forced to issue a fresh notice in accordance with section 195 of the Act. I am not, however, prepared to accede to this request. I do not consider the plaintiff has in any way been prejudiced by the clerical error in one copy of the notice. The copy returned to the Municipal Committee gives the time correctly as 30 days, and the Committee would not have sought to take action under section 220 of the Act until that period had expired. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 21 B. 187; (1895) P. J. 375.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 431 AND 664 OF 1911.

September 1, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

MOTOOKDHARI SHUKUL—DEFENDANT—APPELLANT

versus

JUGDIP NARAIN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Ejectment, suit for—Benâmidar, *appeal by, whether maintainable—Mesne profits, decree for—Whole decree, when to be challenged—Appeal, common ground of—Bengal Tenancy Act (VIII of* 1885), *s.* 87, *scope of—Abandonment, proof of—Occupancy holding, mortgagee of—Rent, acceptance of, by landlord, without protest, effect of—Forfeiture, waiver of.*

Where it was found, in a suit for ejectment brought against several defendants, that one of them was a *benamidar* of the defendant 1st party, and where a decree for mesne profits and costs had been passed against both defendants 1st and 2nd parties:

Held, that the appeal preferred by the *benamidar* defendant alone against the whole decree was maintainable, and that as the ground was common to himself and defendant No. 1, so far at least as the question of mesne profits was concerned, the whole case came under review in appeal, inasmuch as there could be no decree for mesne profits unless there was a decree for possession. [p. 344, col. 2.]

Section 87 of the Bengal Tenancy Act is not exhaustive and the landlord may proceed by suit, if he can prove that the facts and circumstances of the case lead to an inference of abandonment. [p. 344, col. 2.]

Samujan Roy v. *Munshi Mahaton*, 4 C. W. N. 493 and *Ram Pershad Koeri* v. *Jawahir Roy*, 12 C. W. N. 899; 7 C. L. J. 72, followed.

There is a complete recognition of the mortgagee of an occupancy holding as such where the landlord, on receipt of rent without protest even for one occasion, gives a receipt in the name of the tenant through the mortgagee, and the landlord cannot evict the mortgagee in possession as a trespasser. [p. 344, col. 2.]

Baroda Churn Dutt v. *Hemlata Dasi*, 3 Ind. Cas. 561; 13 C.W.N. 833; 10 C.L.J. 610, referred to and followed.

Acceptance under protest of rent also would operate in favour of the payer as a waiver of any forfeiture incurred. [p. 345, col. 1.]

George Henry Davenport v. *Queen*, (1877) 3 A. C. 115 at p. 132; 47 L. J. P. C. 8; 37 L. T. 727 and *Kali Krishna Tagore* v. *Fuzle Ali Chowdhury*, 12 C. L. R. 592; 9 C. 843, followed.

The protest, therefore, under which a landlord receives rent deposited by the mortgagee of an occu-

pancy holding does not make the receipt the less a receipt of rent from the mortgagee. [p. 345, col. 1.]

Appeals against the decrees of the District Judge of Mozafferpur, dated the 5th December 1910, affirming those of the Munsif, first Court of Mozafferpur, dated the 14th June 1910.

Dr. *Rash Behary Ghose* and Babus *Luchmi Narain Singh* and *Satya Charan Sinha*, for the Appellant.

Babus *Umakali Mukherjee* and *Soroshi Charan Mitter*, for the Respondents.

JUDGMENT.—The defendants third party were the tenants of an occupancy holding of 22 *bighas* and odd in *Mouza* Roshanpur. They executed a *zurpeshgi* lease of the entire holding in favour of the defendant 2nd party, who has been found to be a *benamidar* of defendant first party in 1896, and directed the *zurpeshgidar* to pay the rent. It has been found that notwithstanding the *zurpeshgi* the tenants continued in possession somehow or other until 1316 when they fled to another village. It has been found that the *zurpeshgidars* paid the rent from time to time in execution of decrees against the tenants: in one case the dues were deposited after sale. The amounts deposited by the defendant second party from time to time were withdrawn by the plaintiffs, in some cases under protest and in one case without protest. In 1909 the question whether the mortgagee was entitled to deposit the money was fought out in Court and the learned Munsif held that he could deposit under section 170, clause (3) and allowed the deposit and struck off the case as satisfied, but he made a remark at the close of his judgment that this order would not affect the jural relations between the parties, which would remain as before. This suit was brought for the ejectment of the defendants from the 14 *bighas* odd that have fallen to the *patti* of the plaintiffs under a *bataiara* by the Collector, on the ground that there was no custom of transfer and the defendants were trespassers.

Both the Courts below decreed the suit and defendant Motookdhari Sukul of the second party has appealed.

It has been argued in bar of the appeal that the appellant has been found to be a *benamidar* of Ami Prosad, defendant first party, and cannot, therefore, maintain the appeal. It has been pointed out, however, that the decree for mesne profits and costs are against both defendants, first and second parties, and I think the defendant second party can appeal against the decree, and as the ground is common to himself and defendant No. 1, so far at least as the question of mesne profits is concerned, the whole case comes under review, inasmuch as there can be no decree for mesne profits unless there is a decree for possession.

On the merits it has been contended by the learned Vakil for the appellant that (1) whether under protest or not the plaintiffs have accepted rent deposited by him as a mortgagee and have thereby recognized the mortgage.

(2) That there has been no abandonment by the tenants as they have arranged for the payment of the rent.

(3) That the plaintiff is entitled to only 14 *bighas* out of 22 *bighas* and there can be no ejectment from a part of a *jote*.

The third ground was set at rest at once as there was no plea upon the same in the Courts below and no ground in this Court.

As regards the second ground, it is contended that all the requirements of section 87 of the Bengal Tenancy Act do not exist, in that the only ground on which the tenant is said to have abandoned the holding is that he has left the village. The plaintiffs, however, are not proceeding under that section, and it has been held that the section is not exhaustive and the landlord may proceed by suit if he can prove that the facts and circumstances of the case lead to an inference of abandonment: See *Samujan Roy* v. *Munshi Mahaton* (1); *Ram Pershad Koeri* v. *Jawahir Roy* (2).

Then coming to the first ground, I have to consider it in two aspects.

It is contended that as rent paid by the mortgagee as such has been received without protest even for one occasion, there has been a recognition of the mortgagee as such. In the case of *Baroda Churn Dutt* v. *Hemlata Dasi* (3), Sir Lawrence Jenkins, C. J., and Mookerjee, J., held that there was a complete recognition of the mortgagee as such when

(1) 4 C. W. N. 493.
(2) 7 C. L. J. 72; 12 C. W. N. 899.
(3) 3 Ind. Cas. 561; 13 C. W. N. 833; 10 C. L. J. 610.

the landlord on receipt of rent gave a receipt in the name of the tenant "through Baroda Churn Dutt, the mortgagee." In this case the plaintiffs received without protest the rent deposited by the mortgagee as such and I think the same principle is applicable, and there has been such a recognition of the rights of the mortgagee as such that the plaintiffs cannot evict the mortgagee as a trespasser.

In this view of the first aspect of the question it is not necessary to labour the second aspect of the case which also appears to be in favour of the appellant. The next aspect of the question is that the acceptance under protest also would operate in favour of the payer as a waiver of any forfeiture incurred. In the case of *George Henry Davenport* v. *Queen* (4), their Lordships of the Judicial Committee said: "Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt." This case was followed in the case of *Kali Krishna Tagore* v. *Fuzle Ali Chowdhry* (5). In that case the tenant had incurred a forfeiture, but the landlord received a portion of the rent but kept the payment in suspense until the whole rent was paid. It was held that such a qualification did not make the payments anything else than payments of rent and that the lessor had waived his right to insist on ejectment. The protest, therefore, under which the plaintiffs received the amount deposited by the mortgagee did not make the receipt the less a receipt of rent from a mortgagee.

In either view of the question, therefore, the mortgage has been recognized by the plaintiffs and they are not entitled to a decree for ejectment.

The appeal is accordingly decreed with costs in all Courts. The same order will be made in Appeal No. 664.

Appeals decreed.

(4) (1877) 3 A. C. 115at p. 132; 47 L. J. P. C. 8; 37 L. T. 727.

(5) 9 C. 843; 12 C. L. R. 592.

MADRAS HIGH COURT.

CIVIL APPEAL SUIT No. 24 OF 1913.

February 8, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Hannay.

NACHIAPPA CHETTY, MINOR, THROUH HIS MOTHER AND GUARDIAN, VISALATCHI ACHI—PLAINTIFF—APPELLANT

versus

DAKSHINAMURTHY SERVAI AND OTHERS —DEFENDANTS—RESPONDENTS.

*Hindu Law—Suit on promissory note executed by father—Sons impleaded as parties to suit—Burden on sons to show that debt is not binding on them—Plea of failure of consideration—*Onus *of proof—Same in case of son and father.*

In a suit on a promissory note executed by a father and filed against him, it is sufficient to join the sons and give them an opportunity of showing circumstances which would prevent the debt being binding on them or a decree being passed against them, and it is not necessary to plead and prove that the debt was incurred by the father for purposes binding on the family. [p. 347, col. 1.]

Where the plea of want of consideration is raised, the *onus* of proof in the case of the sons is not different from that in the case of the father. [p. 347, col. 1.]

Govindan Nair v. *Nanu Menon*, 26 Ind. Cas. 750; (1914) M. W. N. 782; 27 M. L. J. 595, explained.

Krishna Iyer v. *Krishnaswami Iyer*, 23 M. 597, followed.

Subba Narayana Vathiyar v. *Ramaswami Iyer*, 1 M. L. T. 377; 16 M. L. J. 508 (F. B.); 30 M. 88, referred to.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 74 of 1912.

Messrs. *T. R. Ramachandra Aiyar* and *A. Krishnaswami Aiyar*, for the Appellant.

Messrs. *K. Srinivasa Iyengar* and *C. Padmanabha Iyengar*, for the Respondents.

JUDGMENT.—This is a suit brought upon two promissory notes against one Ramaswami Chetti, the 1st defendant, who has since died and his minor son, the 2nd defendant. So far as the 1st defendant is concerned, the *onus* was of course upon him to show that the promissory notes were not supported by consideration, and the Subordinate Judge has found that he had failed to discharge that *onus*. The 1st defendant was residing at Kundanoor in the Ramnad District and was a partner in a firm which carried on business in Tinnevelly and also in Rangoon. He is stated to have executed the plaint notes for Rs. 7,000 and 6,000 respectively in May and July 1908. The plaintiff's case is that

the notes were executed by him at Elayirampunnai, the plaintiff's father's village, whereas according to the defence one of them was executed at Kannakude near Madura during a festival and the other in a dancing girl's house at Madura. The defence case is that the second note was a mere renewal of the first and was antedated to May 1908. The defendants have put forward a very extraordinary story which we are altogether unable to accept.

* * * *

While we have no hesitation in rejecting the case put forward for the defence, we have carefully considered whether on the evidence for the defence it might not be said that there was sufficient to shift the *onus* and throw upon the plaintiffs, the *onus* of proving that full consideration had been given for the notes. No doubt the plaintiffs have exercised what might perhaps be described as a considerable economy of truth. They merely prove the execution of the notes and the payment of the money at the plaintiff's village and they give no explanation as to how the transaction came to be entered into nor do they produce any accounts. But on the whole we have come to the conclusion that there is not sufficient to justify us in holding that the *onus* is shifted or in differing from the conclusion at which the Subordinate Judge has arrived. So much for the facts.

It has, however, been argued that as against the minor, the 2nd defendant, the *onus* was upon the plaintiffs and the recent decision of the Full Bench in *Govindan Nair* v. *Nanu Menon* (1) has been referred to, and it has been argued on the authority of that decision that as the suit is on the note it cannot, according to numerous cases, be treated as on the original cause of action against the maker of the note and that consequently the other defendants, who are sons of the 1st defendant cannot be made liable in this suit. That was an application to revise a decree of a Small Cause Court against the members of a *tarwad* on a promissory note executed by the deceased *karnavan* of the *tarwad* and was the subject of a reference to a Full Bench. It did not appear that it had either been alleged in the plaint or proved in evidence that the debt was contracted for purposes binding on the *tarwad*, facts necessary to be proved according to the decision of the Full Bench in *Krishna Iyer* v. *Krishnaswami Iyer* (2). It was held in that case that in order to enforce a promissory note not only against the maker who was the managing member of the family when he executed it, but also against the other members of the joint family, it was necessary to allege in the plaint and prove that the debt was contracted in circumstances binding on the family and that in a suit so framed the junior members of the family might properly be held liable. In the judgment of the Full Bench in *Subba Narayana Vathiyar* v. *Ramaswami Iyer* (3) the authority of this case was purposely left unaffected and all that was decided in *Govindan Nair* v. *Nana Menon* (1) was that the circumstances of that case did not bring it within the authority of *Krishna Iyer* v. *Krishnaswami Iyer* (2), which they did not as I have already pointed out. This seemed to us sufficient to dispose of the case, and the judgment which is very brief merely says that the suit was based on the promissory note and not on the original cause of action and that consequently *Krishna Iyer* v. *Krishnaswami Iyer* (2) did not apply. I do not think this meant anything more than that the facts which gave rise to the liability of the junior members were not alleged in the plaint and proved. If they had been alleged and proved, it might be said that in one sense it was a suit upon the original cause of action, but this way of putting it does not take account of the decisions that where the debt and the promissory note came into existence at one and the same time, the maker must be sued on the promissory note and not on the original cause of action. The decision in *Krishna Iyer* v. *Krishnaswami Iyer* (2) is authority for the position that even if the suit against the maker is on the promissory note, it is permissible in the same suit to plead and prove facts which render the other members of the joint family liable, and it was not intended to interfere in any way with the

(1) 26 Ind. Cas. 750; 27 M. L. J. 595; (1914) M. W. N. 782.

(2) 23 M. 597.

(3) 30 M. 88; 1 M. L. T. 377; 16 M. L. J. 508 (F. B.).

*air*thority of the decision in *Govindan Nau* v. *Nana Menon* (1) to which I was a party. In the present case in order to make the 3rd defendant as guardian of 1st defendant liable, it is not necessary to plead and prove that the debt was incurred by the father for purposes binding on the family, and it is enough to give him an opportunity of showing, if he can, that it was incurred for purposes which were illegal or immoral which it is for him to prove. Applying the principle of the decision in *Krishna Iyer* v. *Krishnaswami Iyer* (2) to the case of a suit against a father, the executant of the promissory note, and his sons, it is sufficient to join the sons and give them an opportunity of showing circumstances which would prevent the debt being binding on them or decree being passed against them. This form of suit is of every day occurrence and there is in my opinion nothing in the decision in *Govindan Nair* v. *Nana Menon* (1) to affect its validity. In these circumstances there can be no question of there being any different *onus* in the case of sons from that in the case of the father. Therefore, that objection also fails.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 177 OF 1914.

February 8, 1915.

Present:—Mr. Justice Shadi Lal.

Seth RADHA KISHEN—PLAINTIFF—PETITIONER

versus

THE FIRM OF LADHA MAL-RAM CHAND DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 908), s. 14—Time spent in prosecuting suit in another Court—Good faith—Due diligence.

On the 25th October 1912, the plaintiff lodged his suit in the Munsif's Court claiming a sum of money over Rs. 500. On 22nd July 1913 he learnt that the amount due to the insolvent firm, whose assets he had purchased, was less than Rs. 500. He applied for the return of his plaint and filed the amended plaint on 30th July 1913 in the Munsif's Court, reducing the claim to Rs. 438-9-6. On 7th August 1913, the plaint was returned to be filed in the proper Court and on 11th August 1913 the plaint was filed in the Court of Small Causes:

Held, that the plaintiff acted in good faith and with due diligence up to 22nd July 1913 and was entitled to deduct that period only. [p. 348, col. 1.]

Petition for revision, under section 70 of Act IV of 1912, of the order of the Judge, Court of Small Causes, Amritsar, dated the 1st December 1913, dismissing the suit.

Mr. *Santanam*, for the Petitioner.

Bakhshi *Tek Chand*, Lalas *Balmokand* and *Duni Chand*, for the Respondents.

JUDGMENT.—The suit out of which this application for revision has arisen was instituted in the Small Cause Court, Amritsar, on 11th of August 1913, and it is not disputed by the learned Counsel for the plaintiff that the last day for filing the suit was 3rd of November 1912. The claim is, therefore, clearly barred by limitation, unless the time taken by the plaintiff in prosecuting the abortive proceedings in the Munsif's Court is excluded. It appears that the plaintiff originally claimed to recover from the defendant a sum of money over Rs. 500 and consequently filed his plaint in the Court of the Munsif on the 25th October 1912. On the 22nd of July 1913, he learnt that the amount due to the insolvent firm, whose assets he had purchased, was less than Rs. 500 and he, therefore, applied to the Court for the return of the plaint to him for amendment. This application was granted, the claim was reduced to Rs. 438-9-6 and the plaint was again filed in the Munsif's Court on 30th of July 1913. On the 7th of August 1913, the Munsif returned the plaint for presentation to the proper Court and it was ultimately filed in the Small Cause Court on the 11th of August 1913.

The question then arises whether the plaintiff has made out a case under section 14 of the Indian Limitation Act for excluding the period from 25th of October 1912 to 11th of August 1913. The answer to this question depends upon whether it could be said that he, in prosecuting his remedy in the wrong Court, was acting in good faith and with due diligence. Now it seems to me that the plaintiff was originally ignorant of the exact amount of the claim against the defendant and he, therefore, filed his plaint in good faith in the Munsif's Court and prosecuted the suit with due diligence

In the matter of MAHARAJ SOMESHAR DUT.

up to 22nd of July 1913. He is consequently entitled to the deduction of the period between the 25th October 1912 and 22nd July 1913. But this deduction alone does not help him and his suit is still beyond time, unless he gets a further deduction on account of the time spent after the 22nd of July 1913. Upon this point I am of opinion that he has failed to satisfy the requirements of section 14.

A number of rulings have been cited to me by the learned gentlemen on both sides, but it seems to me that the question in each case is whether due diligence and good faith required by the section have been established upon the facts of the case. The principle of law is well established, and its application to a case must depend upon its particular circumstances. It is, therefore, unnecessary for me to notice the judgments quoted before me, which proceed upon different sets of facts and which have not much bearing upon the present case.

In this case, it appears that the plaintiff learnt on the 22nd of July 1913 at the latest, that he was entitled to a sum less than Rs. 500 and that being so, it was clearly his duty to take immediate steps to file his plaint in the Court having jurisdiction to adjudicate upon it. On that date he must have known that the Munsif had no jurisdiction to try the case, and I cannot, therefore, hold that he exercised due care and caution in the action he took after that date.

I accordingly concur with the lower Court in holding that the suit is barred by time and dismiss this application for revision; in view of all the circumstances of the case, I direct the parties to bear their own costs in this Court.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FULL BENCH.

CIVIL MISCELLANEOUS APPEAL No. 620 OF 1914.

February 9, 1915.

Present:—Justice Sir George Knox, Kt., Mr. Justice Rafique and Mr. Justice Piggott.

In the matter of Maharaj SOMESHAR DUT.

Stamp Act (II of 1899), s. 4—Settlement—Duty to be imposed.

Where the two brothers *T* and *S*, to settle a dispute between them, executed two instruments, one a deed of gift whereby *T* conveyed all his property to *S* and another by which *S* undertook to maintain *T* during his life:

Held, that the two instruments together were one transaction within the meaning of the word "settlement" in section 4 of the Stamp Act and were chargeable with the stamp duty in accordance with that section. [p. 349, col. 1.]

Stamp reference made by the Board of Revenue.

Mr. *Ryves*, for the Crown.

JUDGMENT.—On the 15th of May 1914 two brothers, Tirbhuwan Dut Sukul and Maharaj Someshar Dut Sukul, executed each of them a document. The deed of gift executed by Tirbhuwan Dut Sukul has been endorsed by us as Exhibit A and the deed executed by Maharaj Someshar Dut Sukul has been marked as Exibit B and will be alluded to in the course of this judgment in those terms.

Deed A is said to bear a stamp of Rs. 1,125. Deed B bears a stamp of Rs. 10. When the two documents were taken to the Registration Office, deed B was impounded and on its coming before the Deputy Commissioner, Sitapur, that officer came to the conclusion that the stamp required was a stamp of Rs. 360. He also considered that a penalty of Rs 700 should be paid by Maharaj Someshar Dut. Someshar Dut appealed from the decision of the Deputy Commissioner to the Board of Revenue.

The Board of Revenue were unable to come to any conclusion as to what was the right and proper stamp to impose and have referred the matter to this Court under section 57 of the Indian Stamp Act.

We have had both deeds read to us and we have had the assistance of the learned Government Advocate in considering the matter. Deed B is very inartistically drawn up, the language in which it is expressed is

of such a dubious kind that it has not been easy to come to a decision on the question referred.

Briefly stated the case is as follows:—Tirbhuwan Dut Sukul in consideration of love and affection and the promise to be maintained by his brother executed a deed of gift over his immoveable and moveable property. It is this deed which has been stamped with a stamp of rupees 1,125. Maharaj Someshar Dut Sukul, as said above on the same date, executed deed B. In that deed he promises that during the life-time of *Pundit* Tirbhuwan Dut he will pay whatever expenses may be required on account of food, conveyance, travelling for pilgrimage, charity, clothing, etc., provided that Tirbhuwan Dut lives permanently in the ancestral house or in the house in which he may with his consent put him up and that have no concern with the quarrelsome persons who created disunion between *Pundit* Tirbhuwan Dut and himself.

There is a further clause which lays down the maximum amount per mensem which Tirbhuwan Dut may expend for charity and railway journey, etc. Up to this maximum Maharaj Someshar Dut Sukul agrees to pay. There is also a clause regarding money "required for expenses" and how that is to be assessed, no definite sum is given. Certain property which is detailed in the deed is hypothecated and the deed says that that property will be responsible for the expenses of *Pundit* Tirbhuwan Dut whereever and to whomsoever it is transferred. The property scheduled differs, save and except one house, from the property scheduled in deed A.

We have tried to see whether deed B can come within any of the deeds set out in Schedule I of the Indian Stamp Act, but we cannot find any Article which exactly covers the deed.

Looking broadly to the two documents we are satisfied that the deed B is one which comes within section 4 of the Indian Stamp Act. The transaction before the parties may fairly be said to come within the word "settlement." The two instruments were intended by the parties to be employed in completing this one transaction and the principal instrument as determined by the parties has been stamped and more than sufficiently stamped.

Deed B has in our opinion been properly stamped and more than sufficiently stamped in accordance with the provisions of section 4 of the Act.

We have not overlooked the fact that in dealing with an Act of this kind we have to construe the Act in favour of the subject.

Let a copy of this our judgment be sent to the Chief Controlling Revenue Authority *i.e.*, to the Board of Revenue, as our opinion on the matter referred to us.

Reference answered.

MADRAS HIGH COURT.

CIVIL APPEAL No. 175 OF 1907.

December 2, 1914.

Present:—Sir John Edward Power Wallis, Chief Justice, and Mr. Justice Seshagiri Aiyar.

KANNEPALLI BALA TRIPURA SUNDARAMMA GARU—PLAINTIFF—APPELLANT

versus

KANNEPALLI SURYANARAYANA GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Mitakshara—*Partition of family property—Mother's right to share—Her right to maintenance against estate—Sons and step-sons, liability of.*

Under the *Mitakshara* a mother is entitled to a share in the family property when a partition takes place among the sons. Her right to maintenance is not against her sons alone, but against the estate possessed by her husband and which is the subject of partition among his sons. [p. 350, col. 1.]

Therefore, where a mother has got both sons and step-sons the maintenance ought to be paid by both of them. [p. 350, col. 2.]

Mahabeer Prasad v. *Ramyad Singh*, 12 B. L. R. 90; 20 W.R. 192; *Ganesh Dutt Thakoor* v. *Jawach Thakoorain*, 31 C. 262; (P. C.); 31 I. A. 10; 8 C. W. N. 146; 14 M. L. J. 8; 6 Bom. L. R. 1; *Sivananja Perumal* v. *Meenakshi Ammal*, 5 M. H. C. R. 377; *Subbarayulu Chetty* v. *Kamalavalli Thayaramma*, 10 Ind. Cas. 347; 10 M. L. T. 1; (1911) 2 M. W. N. 148; 21 M. L. J. 493; 35 M. 147; *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar*, 23 Ind. Cas. 264; (1913) M. W. N. 1034; (1914) M. W. N. 284; 15 M. L. T. 307, followed.

Mari v. *Chinnammal*, 8 M. 107; *Hemangini Dasi* v. *Kedar Nath Chowdhry*, 16 C. 758; 16 I. A. 115, distinguished.

Appeal against the decree of the District Court of Ganjam in Original Suit No. 31 of 1904.

Mr. *P. Narayanamurthy*, for the Appellant.

CHATTAR SINGH v. RALIA RAM.

Messrs. *K. V. L. Narasimham* and *V. Ramesam*, for the Respondents.

JUDGMENT.—We are not prepared to increase the rate of maintenance and the allowance for utensils, but we think that Rs. 150 must be substituted for Rs. 100 for a house unless all the parties agree upon a house for her residence. The appeal is dismissed with proportionate costs of the 3rd respondents.

MEMO. OF OBJECTIONS IN APPEAL NO. 173 OF 1907.

It is argued for the 3rd respondent, the step-son, that the maintenance of his step-mother should be decreed only against her son and that he should not be made liable for any portion of it. This contention is opposed both to the text of Hindu Law and to the decided cases. Under the *Mitakshara* a mother is entitled to a share in the family property when a partition takes place among the sons. There are numerous cases in Bengal where in administering the *Mitakshara* law it has been held that a share should be set apart for the mother either by way of maintenance or as a portion of the inheritance, even though the partition takes place in the life-time of the father. See *Mahabeer Prasad* v. *Ramyad Singh* (1), *Ganesh Dutt Thakoor* v. *Jewach Thakoorain* (2). In Southern India in consequence of the view of the author of the Smirithi Chandrika in Chapter IV, Pl. 17, where he restricts the right of the mother to maintenance from out of the family estate, it has uniformly been held that in a partition of the family property all that a mother is entitled to is only maintenance from out of the family estate and not a share of the inheritance. It is, therefore, clear that the right to maintenance is not against her son alone but against the estate possessed by her husband and which is the subject of partition among his sons. This view has consistently been held in Madras. The earliest case is that which is reported in *Sivananaja Perumal* v. *Meenakshi Ammal* (3). There it was decided that a step-son in possession of the *zemindari* was bound to pay maintenance to his step-mother notwithstanding the fact that her own sons obtained a share in the partible property of the *zemindari*. This has been followed in the decision reported as *Subbrayalu Chetty* v. *Kamalavalli Thayaramma*(4) and in the more recent case of *Srinivasa Aiyangar* v. *Thiruvengadatha Aiyangar* (5). These decisions refer to an additional ground that the word 'mother' includes the step-mother as well. Our attention has been drawn to the decision of the Full Bench in *Mari* v. *Chinnammal* (6), where for the purpose of inheritance the term 'mother' was held not to include the step-mother. That decision should not be read as holding that for all purposes under the Hindu Law, the term 'mother' would not include step-mother The decision in *Hemangini Dasi* v. *Kedar Nath Chowdhry*(7) proceeds upon the interpretation of the text belonging to the Bengal School of Law and is no authority for deciding cases under the *Mitakshara*. We have no hesitation in holding that both on the texts of the Hindu Law and upon the decided cases, the Subordinate Judge was right in holding that the maintenance ought to be paid both by the son and by the step-son. The memorandum of objections should be dismissed with costs.

Appeal and Memo. of objections both ***dismissed.***

(1) 12 B. L. R. 90; 20 W. R. 192.

(2) 31 C. 262 (P. C.); 31 I. A. 10; 8 C.W.N. 146; 14 M. L. J. 8; 6 Bom. L. R. 1.

(3) 5 M. H. C. R. 377.

(4) 10 Ind. Cas. 347; 21 M. L. J. 439; 10 M. L. T. 1; (1911) 2 M. W. N. 148; 35 M. 147.

(5) 23 Ind. Cas. 264; 15 M. L. T. 307; (1913) M. W. N. 1034; (1914) M. W. N. 282.

(6) 8 M. 107.

(7) 16 C. 758; 16 I. A. 115.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1394 OF 1913.

January 25, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge.

CHATTAR SINGH—DEFENDANT—APPELLANT

versus

RALIA RAM AND OTHERS—PLAINTIFFS AND JAI KISHEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Building improvements—Co-sharers—Sale of house by some of co-sharers during minority of others—New

house erected by vendee—Right of minors on attaining majority—Delay in filing suit.

By deeds of 8th July 1899 and 10th December 1901, the collaterals of the plaintiffs during their minority sold away the whole of a house in which the plaintiffs were entitled to a quarter share. On 7th July 1911, after attaining majority, the plaintiffs sued for their share in the house which was newly built by the vendees on the site of the old house. On appeal the Divisional Judge awarded the plaintiffs a quarter share in the newly built house as claimed, allowing vendee three months to clear the site:

Held, that in view of their delay in asserting title the plaintiffs were not entitled to demand that the building should be pulled down or that they should be given a share in the newly built house without reasonable compensation to the vendee for the improvements. [p. 251, col. 2.]

Second appeal from the decree of the Divisional Judge, Gujranwala Division, at Lahore, dated the 19th of May 1913, reversing that of the Munsif, first class, Montgomery, dated the 13th of April 1913, dismissing the suit.

Mr. *Nand Lal*, for the Appellant.

Diwan *Mehr Chand*, for the Respondents.

JUDGMENT.—The facts established may be taken to be as follows. The plaintiffs are by pedigree sharers to the extent of one-fourth in the house in dispute. During their minority the remaining sharers, collaterals of the plaintiffs, sold the entire house to Chattar Singh, defendant-appellant, for Rs. 199 by two deeds of 8th July 1899 and 10th December 1901. The property was at that time a *kacha* house of very little value. The plaintiffs were at the time, and have ever since continued to be, resident in Shergarh, said to be some 18 *kos* away. Their uncle, Bahadur Singh, vendor of half the house in 1899, had no right to ignore plaintiffs' right to a quarter share, but the circumstances under which he did so cannot now be elucidated, and the purchaser seems to have bought in good faith without knowledge of plaintiffs' rights.

Having acquired the entire house the purchaser at once re-built it as a *pakka* house, which is now valued at Rs. 1,600. The plaintiffs have come into Court with a demand for their quarter share in the property as it stands, instituting their suit on the 7th July 1911, one day within limitation if reckoned from the date of the sale by Bahadur Singh.

There is no explanation of the delay in suing, and the plaintiffs are said to be now from 20 to 30 years old. Their suit was at first dismissed, but on a remand the Munsif found that plaintiffs were entitled to a quarter share conditionally on their paying to the vendee Rs. 300, as being the equivalent of a quarter of his outlay on the house.

The Divisional Judge has disposed of the case by a vaguely worded decree giving plaintiffs a quarter of the existing house as claimed, but adding that Chattar Singh "shall be allowed three months in execution to clear the site." Apperently he considered it necessary that Chattar Singh should pull down the whole of a well-built house in order that plaintiffs' rights should be satisfied. There is no sort of justification on the merits for so absurd a proceeding, and in view of their delay in asserting title the plaintiffs are certainly not entitled either to demand that the building should be pulled down or that they should be given a share in the existing house without reasonable compensation to the vendee for his improvements.

After some discussion about the terms on which this belated suit by plaintiffs should be settled, the parties have consented to a money settlement on terms suggested, which are based on the original value of the house in dispute as it stood in 1899 and on certain other matters taken into consideration.

The appeal of Chattar Singh, defendant, is accordingly accepted The decree of the lower Appellate Court is set aside, and in place thereof the plaintiffs are given a money decree for Rs. 150 against Chattar Singh defendant alone, it being understood that this decree is in satisfaction of plaintiffs' claim on the house in dispute, in which they will then retain no sort of title. The parties will pay their own costs throughout.

Chattar Singh undertakes to pay Rs. 150 into Court within a month from this date, and the plaintiffs will not be entitled to apply for execution unless he fails to do so.

WAZIR AHMAD *v.* DAYA KISHUN.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 235 OF 1914.
January 27, 1915.
Present:—Mr. Justice Rafique.
Haji Moulvi WAZIR AHMAD—PLAINTIFF—APPELLANT
versus
DAYA KISHUN—DEFENDANT—RESPONDENT.

Grove planted in occupancy holding—Right of tenant to transfer trees.

Where an occupancy tenant plants a grove on his holding, he has no right of transfer in the trees. They cannot be sold privately or in execution of a decree against the tenants. [p. 353, col. 2.]

Kasim Mian v. *Banda Husain*, 5 A. 616; A. W. N. (1883) 169; *Imdad Khatun* v. *Bhagirath*, 10 A. 159; A. W. N. (1888) 32; *Kausalia* v. *Gulab Kuar*, 21 A. 297; A. W. N. (1899) 72; *Janki* v. *Sheodhar*, 23 A. 211; A. W. N. (1901) 52; *Wahida Khatun* v. *Bulaqi Das*, 3 A. L. J. 385; A. W. N. (1906) 140, referred to.

Muhammad Ismail Khan v. *Mithu Lal*, 17 Ind. Cas. 656; 11 A. L.J. 649; *Habibullah* v. *Kalyan Das*, 25 Ind. Cas. 169; 12 A. L. J. 1080, distinguished.

Second appeal from the decision of the Subordinate Judge of Budaun, dated the 30th of January of 1914.

The Hon'ble Mr. *Abdul Raoof*, for the Appellant.

Mr. *Damodar Das*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by a *zemindar* for a perpetual injunction restraining the defendant from cutting down trees of a grove or otherwise interfering with his (*zemindar's*) possession over it. It was alleged in the plaint that Moulvi Wazir Ahmad, the plaintiff, was the *zemindar* of the village of Shitabnagar, and that Bhopal and others were his tenants in respect of plots, among others, numbered 74, 81 and 89. There was a mango grove on the said plots which was in the possession of Bhopal and others merely as his tenants, whose sole right in the grove was that of taking fruits. They had no right of transfer in respect of the trees of the grove nor could the said trees be sold in execution of a decree against them. One Daya Krishna in execution of his decree against them had some of the trees of the said grove put up to auction and purchased them himself on the 28th of June 1911. The said sale was void at law and put an end to the rights of the tenants in the grove and the plaintiff became entitled to its possession. He entered on possession but Daya Krishna, the purchaser, with the help of two others attempted to cut down the trees purchased by him and was prevented by the plaintiff. The plaintiff, therefore, sued for perpetual injunction restraining Daya Krishna and his friends from cutting down any trees of the grove in question or otherwise interfering with the plaintiff's possession over the said grove. The claim was resisted on various grounds. The pleas with which we are concerned in this appeal were that the plots Nos. 74, 81 and 89 were granted to Debi Singh, ancestor of Bhopal and others, by the *zemindar* of the village for planting a grove and Debi Singh accordingly planted a grove and his descendants had a proprietary right in the grove which they could transfer either privately or which could be sold in execution of a decree against them. Moreover, under a custom obtaining in the village and also under the terms of the *Wajib-ul-arz* tenants have a transferable right in the trees in their possession. The learned Munsif held that the land of the grove in suit had not been granted to Debi Singh for planting a grove, but was his occupancy holding over which he had planted a grove. He further held that the custom set up for the defence was not proved and that the terms of the *Wajib-ul-arz* were not applicable to the present case. The claim was accordingly decreed. Daya Kishen, the auction-purchaser of the trees, preferred an appeal. The only point urged on his behalf before the learned Subordinate Judge was that under the terms of the *Wajib-ul-arz* of the village of Shitabnagar tenants had a transferable right in the trees planted by them. In order to dispose of the question raised in the appeal the learned Subordinate Judge framed a fresh issue and remitted it for trial to the first Court. The finding of the first Court on the fresh issue did not support the contention of the appellant that under the terms of the *Wajib-ul-arz* a tenant had a right of transfer in the trees planted by him on his holding. The learned Subordinate Judge accepted the finding of the first Court, but for other reasons held that the tenants of the grove in suit had a right of transfer in the trees. He accordingly accepted the appeal and dismissed the claim of the plaintiff. The latter has come up in second appeal to this Court. He contend that an occupancy or non-occupancy tenant who plants trees on his holding has

no right of transfer in the trees in the absence of a custom or contract to the contrary. The following cases are relied upon in support of this contention: *Kasim Mian* v. *Banda Husain* (1); *Imdad Khatun* v. *Bhagirath* (2); *Kausalia* v. *Gulab Kuar* (3); *Janki* v. *Sheodhar* (4); *Wahida Khatun* v. *Bulaqi Das* (5).

For the respondent the reply is that the finding of the lower Appellate Court is that the land of the grove in suit was given to Debi Singh on a fixed rent for the purpose of planting a grove and, therefore, the principle laid down in the cases relied upon by the appellant does not apply. It is said that when a *zemindar* grants land on rent to a person to plant a grove, that person has a right of transfer in the trees. In support of his argument the respondent refers to the following cases.—

Muhammad Ismail Khan v. *Mithu Lal* (6); *Habibullah* v. *Kalyan Das* (7).

The case-law, no doubt, makes a distinction between the rights of a tenant, occupancy or non-occupancy, who plants trees on his holding and of a person who is given land at a specified rent solely for the purpose of planting a grove. The contention of the respondent must prevail if it has been found that the land of the grove in suit was granted to Debi Singh for the purpose of planting a grove. It is true that the learned Subordinate Judge does say that he thinks that the land of the grove in suit was let to Debi Singh on a fixed rent for the purpose of planting a grove. But there does not seem to be any evidence in support of this finding. The defendant-respondent produced evidence to prove that the plaintiff-appellant had granted the land of the grove in suit to Bhopal and others who had planted the grove. The first Court disbelieved that evidence. The learned Subordinate Judge did not accept it also, for he holds that the land was granted to Debi Singh. He means presumably that the land was granted by the former *zemindars*, as the plaintiff-appellant was not the *zemindar* in the life-time of Debi Singh. In fact the learned Subordinate Judge, in an earlier part of his judgment, accepts the finding of the first Court that the grove in question was planted with the permission of the former *zemindar*. The revenue papers show that the land of the grove was the occupancy holding of Debi Singh for a long time before any trees were planted by him on it. The reason for the finding seems to be that the learned Subordinate Judge thought that the permission of the former *zemindars*, which was assumed in the absence of any protest by them, to Debi Singh to plant a grove amounted to the grant of a fresh lease to him of the land for the purpose of planting a grove. If that were a valid reason the cases referred to above by the appellant were erroneously decided. But I do not think that it can be said that the permission by a *zemindar* to his occupancy or non-occupancy tenant to plant trees on his holding cancels the original lease and is a fresh lease for the purpose of planting trees. The finding under discussion being unsupported by any evidence cannot be accepted. The character of the grove in question then is that it was planted by an occupancy tenant on his holding. He or his successors have, therefore, no right of transfer in the trees. They cannot be sold privately or in execution of a decree against Bhopal and others. But it is further contended for the respondent that as soon as the grove was planted by Debi Singh the land lost its character as an occupancy holding and the *zemindar* could have ejected him. The *zemindar* having failed to do so Debi Singh became a trespasser and his possession became adverse to the *zemindar*. Debi Singh and his successors have been in adverse possession for more than twelve years prior to the sale of the trees, and hence the plaintiff-appellant cannot question the sale to Daya Kishen. No such plea was taken by the latter in his defence. But apart from that, the case of Daya Kishen was and the finding of the lower Court is that the trees were planted with the permission of the former *zemindars* No

(1) 5 A. 616; A. W. N. (1883) 169.
(2) 10 A. 159; A. W. N. (1888) 32.
(3) 21 A. 297; A. W. N. (1899) 72.
(4) 23 A. 211; A. W. N. (1901) 52.
(5) 3 A. L. J. 385; A. W. N. (1906) 140.
(6) 17 Ind. Cas. 656; 11 A. L. J. 649.
(7) 25 Ind. Cas. 169; 12 A. L. J. 1080.

question of adverse possession can, therefore, arise. The appeal prevails, the decree of the lower Appellate Court is set aside and that of the first Court is restored. Costs are allowed to the appellant throughout.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 720 OF 1912.

December 18, 1914.

Present:—Mr. Justice Spencer and Mr. Justice Tyabji.

PERIAMMAL AND OTHERS—DEFENDANTS Nos. 2 TO 6—APPELLANTS

versus

VAITHILINGA UDAYAR AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1 AND 7 TO 12—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Appellate Court's judgment—Finding on each material issue necessary.

An Appellate Court's judgment which does not set out the points for determination, the Court's decision thereon and its reasons for so deciding, does not fulfil the requirements of Order XLI, rule 31, Civil Procedure Code, and cannot be upheld. [p. 354, col. 1.]

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 72 of 1911, preferred against that of the Court of the District Munsif of Ariyalur in Original Suit No. 75 of 1910.

Mr. *T. Rangachariar*, for the Appellants.

Mr *M. D. Devadoss*, for the Respondents.

This second appeal coming on for hearing on the 9th April 1914 the Court delivered the following

JUDGMENT.—We cannot regard the lower Appellate Court's judgment as satisfactorily disposing of the questions upon which the parties were at issue. The District Judge does not set out the points for determination, his decision thereon, and his reasons for so deciding, as Order XLI, rule 31, Civil Procedure Code requires. After some passing comments on some portions of the evidence and upon the significance attached by the District Munsif thereto, the Judge concludes by saying. "The lower Court's decree will be reversed and the plaintiff's suit will be decreed with costs throughout. Ordinary mortgage decree. Subsequent interest 6 per cent." He should have recorded a distinct finding on the material issues in the case, especially on the 7th issue, which was whether the discharge pleaded by the defendants was true.

We must, therefore, ask the present District Judge to record fresh findings on all the issues on the evidence on record and in doing so he should deal with the grounds upon which the District Munsif in paragraphs 14, 16, 17, 18 and 19 of his judgment held the suit bond to have been discharged, among which the following have been mentioned to us:—

(1) That no demand had been made for payment since the amount became due in 1879, although other claims between the same parties were proceeded with;

(2) that this debt was excluded at partition (*vide* Exhibit VI);

(3) that a certain other encumbrance was mentioned in the sale-deed, Exhibit II, and it was stated that there were no other encumbrances;

(4) that plaintiff attempted unsuccessfully to negotiate his interest in this bond;

(5) that the 1st defendant had a motive to surrender possession of this document as he was quarrelling with his son;

(6) that there is evidence that Exhibit A was at some time after its execution in the possession of the mortgagor, from which a presumption might arise that it had been discharged (*vide* Indian Evidence Act, section 114, Illustration I).

Findings must be returned within six weeks from the re-opening of the District Court. Ten days will be allowed for filing objections.

In compliance with the above order of this Court the District Judge, Trichinopoly, submitted the following

FINDINGS.—Plaintiff sued on a hypothecation bond for Rs. 400, dated 15th July 1877, by 1st defendant to plaintiff's junior paternal grandfather. The Munsif found that the bond was discharged and that plaintiff sued only at the instance of his friend, first defendant. First defendant was *ex parte*. The other defendants alienees from him and the people really affected, contested the suit. My predecessor found dis-

charge was not proved and he decreed the suit.

2. On second appeal I am asked for fresh findings on all the issues in the light of remarks made by the High Court.

3. *Issues* 1, 2, 3 *and* 6: The Munsif found these in plaintiff's favour. It is conceded now that these findings are right. I find accordingly.

4. *Issues* 4 *and* 7 are the matters in dispute, whether certain payments relied on by plaintiff are true and valid—and is the discharge pleaded by defendants true? This simple mortgage-bond of 1877 had two years for re-payment and died a natural death in 1891. It lay dead for 19 years and was then dug out of its grave and sued on in virtue of section 31. There is a strong common sense presumption against documents brought to life in this fashion. There is a large human probability that they were in fact paid off somehow, because people do not usually allow such things to become barred. Now plaintiff claims that this document was not really barred at all, because defendants made three payments in 1887, 1895 and 1900. These payments are not endorsed on the bond. They are spoken to only by plaintiff and 1st defendant who are, I think, colluding.

5. In Exhibit VI in 1901, a partition-deed between 1st defendant and his sons, all the debts, however small, are mentioned. Plaint debt is not mentioned. First defendant explains the omission as he says he thought it was barred. It would not have been barred if payments had been made in 1887, 1895 and 1900. Hence I do not believe these payments and find issue 4 against plaintiff. First defendant sold property to his son. The son compelled registration and sued for the property in Original Suit No. 1620 of 1909—some of the items being hypotheca in the present case. It was after this that plaintiff sued on this mortgage-bond and defendants contend that 1st defendant gave him the old discharged bond for the purpose out of enmity.

6. I agree with the Munsif that suit bond must have been discharged. I find this partly on general presumption—that nothing was done with it during its natural life-time and the three payments alleged by plaintiff are false in view of 1st defendant's statements—and partly on Exhibit I and evidence connected therewith.

7. Exhibit I is a mortgage-bond of 11th November 1887 by 1st defendant to plaintiff's brother-in-law for Rs. 250. According to D. W. No. 3, a *karnam* who attested this bond, it was executed to pay off plaint mortgage which bond was then returned to 1st defendant.

8. First defendant denies this and says he got no money on Exhibit I which was cancelled. But the document recites both payment and re-payment of money and in view of 1st defendant's contention about payments on suit bond and his omission of suit debt in his partition-deed, I attach no value to 1st defendant's statements. First defendant's son, D. W. No. 2, swears to the same effect as D. W. No. 3.

9. I am of opinion that suit bond was discharged finally by money received under Exhibit I. Nothing is due on it, and on issue 5 no interest is due. This suit is the result of collusion between plaintiff and 1st defendant in consequence of 1st defendant's son suing him. Hence on the 8th issue plaintiff is entitled to no relief.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—Accepting the findings we allow the appeal and restore the decree of the District Munsif. Appellants will get their costs in this Court and the District Court from the assets of the plaintiff in 9th respondent's hands. Respondents will bear their own costs.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 73-B OF 1913.

January 29, 1914.

Present:—Mr. Mittra, A. J. C.

NARAYAN—PLAINTIFF—APPELLANT

versus

VITHOBA—DEFENDANT—PETITIONER.

Berar Land Revenue Code; 1896, *s.* 205—*Ante-nuptial gift of the interest of a co-occupant in*

NARAYAN v. VITHOBA.

survey number—Transfer, whether amounts to relinquishment—Gift—Pre-emption.

Where a registered occupant of a survey number transferred his interest in the *khata* by way of ante-nuptial settlement and the plaintiff brought a suit for pre-emption:

Held, that the transaction did not amount to a sale or relinquishment in favour of a specified person for valuable consideration within the meaning of section 205 of the Berar Land Revenue Code but was in the nature of a gift and, therefore, was not subject to pre-emption by the other co-occupants. [p. 356, col. 2.]

Appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 7th October 1912, confirming that of the Senior Munsif, Akola, dated the 5th March 1912.

Mr. *M. Chuckerbutty*, for the Appellant.

JUDGMENT.—The plaintiff has thirteen-annas four-pies share in Survey No. 10, the remaining share belonged to defendant No. 1. On the 9th September 1909 the defendant No. 1 executed a sale-deed conveying his share to the second defendant. The ostensible consideration shown in the document was a payment of Rs. 200, said to have been made by the second defendant. The Courts below have, on the authority of *Gangabai* v. *Pandoo* (1), held that as against the plaintiff who is no party to the deed, oral evidence is admissible to show the real nature of the transaction. This view of section 92 of the Evidence Act has not been challenged before me, as it is clearly supported by the authority above cited. It has been found that on the day of the sale-deed the defendant No. 1 married defendant No. 2 by *pat*, that no money was ever paid by her, and that the transaction was a transfer in consideration of the marriage that followed the transfer. The plaintiff has brought this suit for pre-emption. His right to pre-emption is based on the provision of section 205 of the Berar Land Revenue Code, 1896, which runs as follows: "When the interest, or any part of the interest, of a co-occupant in any survey number is transferred by sale, foreclosure of mortgage or relinquishment in favour of a specified person for valuable consideration, every other co-occupant in the same survey-number shall have a right of pre-emption." The plaintiff can only succeed if the transaction was a sale or relinquishment in favour of a specified person for valuable consideration. The transaction in question is in the nature of an ante-nuptial settlement, but it cannot be called a sale as ordinarily understood, or as defined in the Transfer of Property Act. Here there is no price paid or promised or part paid and part promised. Then is it a relinquishment in favour of a specified person for valuable consideration? No doubt, for certain purposes marriage is valuable consideration in the eye of the law. But there was no such relinquishment in favour of a specified person as the Berar Land Revenue Code contemplates. Such a mode of transfer is only open to the registered occupant, popularly called the *khatedar*. Section 69 of the Land Revenue Code lays down that a registered occupant may, by giving notice in writing to the Tahsildar, relinquish the occupancy either absolutely or in favour of a specified person. As pointed out in *Bapu* v. *Maruti* (2): "A relinquishment in favour of a specified person for valuable consideration in section 206 means a transfer, for valuable consideration, of the kind described in section 69. Such a transfer is usually described as a transfer by *razinama* and *kabuliyat*." In this case the defendant No. 1 was not the registered occupant, and there was no notice to the Tahsildar as would be essential for a relinquishment under section 69 of the Code. I would even go further and hold that even if the defendant No. 1 had been the registered occupant and had given notice in accordance with section 69, the plaintiff would still have no right of pre-emption. Although marriage is a valuable consideration, section 205 appears to me to refer to such consideration as would ordinarily be the consideration for a sale or mortgage. Upon a gift, there is no right of pre-emption; and for purposes of section 205, this ante-nuptial settlement is more in the nature of a gift than a sale. If the document had been executed after the marriage and without reference to any prior agreement, the transaction would have been called a gift, and there would have been no right of pre-emption. I agree, therefore, with the lower Courts that the plaint-

(1) 4 N. L. R. 115.

(2) 3 N. L. R. 138.

iff has no right of action in the circumstances of the case. The appeal is, therefore, dismissed without notice to the respondent.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 511 OF 1912.

December 22, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

SHEOAMBAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BALBHADRA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse title—Possession, adverse, of one, when not to be tacked on to that of another—Estoppel—Agreement, force of—Claim, bar of.

If *A* and *B* get a decree against *C* for possession of property, and afterwards *A* sues *B* for possession of that very property, *B* cannot set up an adverse title by adding *C*'s possession to that of his own. [p. 357, col. 2.]

Where the nephews and grand-nephews agreeing to unite and claim property from the daughters and to divide it among themselves, got a decree against the daughters and afterwards the nephews claimed the entire property as against the grand-nephews on the allegation that they were nearest collaterals of the deceased and were thus entitled to inherit his estate in preference to the grand-nephews:

Held, that the nephews were estopped from setting up the claim by virtue of the agreement entered into between them and the grand-nephews, whether that agreement was based on correct or on mistaken recognition of an existing right in the grand-nephews. [p. 358, col. 1.]

Bhagwant Singh v. *Rajja Singh*, 9 Ind. Cas. 415, referred to.

Appeal from the decree of the District Judge, Fyzabad, dated 16th September 1912, reversing that of the Subordinate Judge, Bara Banki, dated 30th March 1912.

Babu *Piarey Lal*, for the Appellants.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The dispute in this case related to the property left by Umed Singh, who died on the 1st April 1894, leaving three daughters and certain nephews and grand nephews. The allegation of the nephews and grand-nephews was that the daughters were excluded by custom. The nephews were not, however in a position to fight out the matter singly. They consequently entered into an agreement with the grand-nephews on the 21st Septemer 1894, whereby they agreed to unite and claim the entire property from the daughters and to divide it among themselves *per stirpes*. They jointly sold a half share of the property to Parbhu Dayal, who had agreed to supply money to meet the expenses of the litigation. A suit was, therefore, filed jointly by the nephews and grand-nephews, who were parties to the agreement, for possession of the disputed property, and a decree was obtained by virtue of which possession was recovered on the 28th May 1900. Some other grand-nephews, who were not parties to the agreement of the 21st September 1894, thereafter appeared and filed suits for possession of their shares in the said property and obtained decrees against the parties to the present suit. The present suit was filed afterwards by the nephews against the grand-nephews, who were parties to the agreement of the 21st September 1894, to oust them from the share of the property decreed in their favour, on the allegation that they were the nearest collaterals of Umed Singh and were entitled to inherit his estate in preference to the grand-nephews.

The Court of first instance decreed the claim. The lower Appellate Court, however, held that the plaintiffs-appellants were estopped by the agreement of the 21st September 1894 and the proceedings taken in pursuance thereof from impugning the title of the defendants-respondents. Both the Courts held that the possession of the defendants dated from the 28th May 1900. But while the Court of first instance was of opinion that the claim of the plaintiffs was within time, the lower Appellate Court held that it was barred by limitation, inasmuch as the possession of the daughters of Umed Singh could be added to the possession of the defendants to defeat the plaintiffs' claim. The decision of the lower Appellate Court on the latter point is obviously erroneous, because a decree for possession having been obtained by the nephews against the daughters, the possession of those daughters could not be set up by the grand-nephews to make up the period of twelve years necessary to establish an adverse title.

The plea of estoppel taken by the defendants, however, operated as an effective bar to the plaintiffs' claim, because as held

in *Bhagwant Singh* v. *Rajja Singh* (1) under circumstances somewhant similar to the present case, it is unlikely that the defendants would have joined the present plaintiffs in the suit for possession against the daughters of Umed Singh and incurred expense, trouble and risk of liability in connection therewith, had they not been assured that they would get a share in the disputed property, as entered in the agreement, if they got a decree. Assuming that most of the expenses of the suit were supplied by Parbhu Dayal, there were still many ways in which the defendants could have suffered pecuniarily by joining in the suit, had it been unsuccessful, inasmuch as every attendance of theirs to prosecute the suit or to obtain evidence or to attend at the hearings must have cost them money in addition to loss of time, inconvenience and discomfort, and their co-operation rendered them liable to any decree which the Court may have passed for costs in favour of the daughters. The assistance and co-operation of the defendants must also have been a material consideration for the agreement which the plaintiffs have voluntarily executed. The agreement was based on the recognition of an existing right, and whether that recognition was correct or mistaken, it is not open to the plaintiffs-appellants now to go behind it or to resile from the position taken up by them in the suit which resulted in the decree. The appeal has, moreover, abated in regard to the claim put forward by Fateh Bahadur Singh, whose heirs have not been brought on the record. The appeal of Fateh Bahadur Singh will be accordingly declared to have abated while that of the other plaintiffs-appellants dismissed with costs.

Appeal dismissed.

(7) 9 Ind. Cas. 415

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1445 OF 1913.

February 8, 1915.

Present:—Mr. Justice Rafique.

RAMJAS MAL—DEFENDANT—APPELLANT

versus

ZAHARYA SINGH—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 118—Partition—Site of house belonging to one co-sharer given to another—Step to get rent fixed not taken—Owner of site, right of.

Where the site of a house belonging to one co-sharer is given to another co-sharer at the time of partition and no step is taken under section 118 of the U. P. Land Revenue Act to enable the occupier of the house to retain possession of the house on payment of rent, the co-sharer to whom it is allotted at the partition can recover possession of the site by removal of the materials of the house. [p. 359, col. 1.]

Nandan Pat Tewari v. *Radha Keshan Kalwar*, 5 Ind. Cas. 664, referred to.

Second Appeal from the decision of the Subordinate Judge of Meerut, dated 7th July 1913.

The Hon'ble Mr. *Gokul Prosad*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUGDMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for the recovery of possession of *abadi* plot No. 53/1 and the house situate on it. The facts as found by the Courts below are that Sonehra, Hardeo and *Musammat* Indraoti were the owners of the house in suit and co-sharers in the village. In 1870 the ancestors of Sonehra, Hardeo and *Musammat* Indraoti mortgaged their *zemindari* as also the house in suit to Ram Lal, the grandfather of the plaintiff-respondent. The mortgage was with possession, but the mortgagors took the house on lease from the mortgagee. In 1897 Sonehra and his father, Moti, sold their equity of redemption to the defendant-appellant in respect of their *zemindari* share, who redeemed the mortgage. In 1904 there was a partition effected through Court between the co-sharers of the village under which *abadi* plot No. 53/1 was allotted to the plaintiff-respondent. At the time of the partition Sonehra and *Musammat* Indraoti were occupying the house in suit. They did not ask the Collector to make an order under section 118 of the Land Revenue Act enabling them to retain possession of the house on

payment of rent. Subsequently in 1909 Sonehra and *Musammat* Indraoti executed a sale-deed in respect of the house situate on plot No. 53/1 in favour of the defendant-appellant. The vendors, after selling the house, left the village. The plaintiff-respondent, after their departure finding the defendant-appellant in possession of the house in question, brought the suit out of which this appeal has arisen for the possession of the house and its site, on the allegation that he was the proprietor of the site under the partition of 1904 and of the house because Sonehra and *Musammat* Indraoti, whom he described as tenants, had left the village. The claim was resisted on the ground among others that Sonehra and *Musammat* Indraoti were not tenants in the village, but were co-sharers who had proprietary rights in the house in suit. The learned Munsif in whose Court the suit was filed dismissed the claim for possession, but declared the plaintiff to be the owner of the site. On appeal the learned Subordinate Judge reversed the decree of the first Court and decreed the claim of the plaintiff for actual possession of the site giving the defendant an option to remove the materials within a specified time. The defendant has come up in second appeal to this Court and contends that as the plaintiff has failed to prove that Sonehra and *Musammat* Indraoti were mere tenants on whose departure the house and its site escheated to him, his claim for possession must fail. The defendant admits the title of the plaintiff to the site and is willing either to pay rent for it or to give other land of equal value in exchange to the plaintiff. I think that the decree passed by the lower Appellate Court is a correct decree in view of the decision of this Court in *Nandan Pat Tewari* v. *Radha Keshun Kalwar* (1). At the time of partition in 1904 Sonehra and *Musammat* Indraoti should have taken steps under section 118 of the Land Revenue Act. They failed to do so, and the plaintiff's suit for possession of the site by removal of the materials of the house cannot be resisted. The appeal, therefore, fails and is dismissed with costs. The defendant-appellant is allowed two months from this date to remove the materials of the house.

Appeal dismissed.

(1) 5 Ind. Cas. 664.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 240 OF 1911.

January 15, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

DAMODAR MOHOLAL GINNING & MANUFACTURING COMPANY, LTD.,—APPLICANTS

versus

NAGINDAS MAGANLAL—OPPONENT.

Companies Act (VI of 1882), s. 254—Power to make rules limited to certain proceedings—Costs in other proceedings regulated by rules under the High Courts Act.

The power of the High Court to make rules specially relating to Company applications is conferred by section 254 of the Companies Act (VI of 1882), and that power is limited to making rules concerning the mode of proceeding to be had for winding-up a Company, and for giving effect to the provisions contained as to the reduction of capital and the sub-division of the shares of the Company. For the purpose of regulating the costs in other proceedings in Company matters, recourse must be had to rules framed by the High Court under its rule-making power under the High Courts Act. [p. 360, col. 1.]

Civil extraordinary application from an order passed by the District Judge of Ahmedabad, in Miscellaneous Application No. 235 of 1913.

Mr. *T. R. Desai*, for the Applicants.

Mr. *K. N. Koyajee*, for the Opponent.

JUDGMENT.—The opponent in November 1913 applied by Miscellaneous Application No. 235 of 1913 to the District Judge of Ahmedabad for an order that he should be registered as a share-holder in the Damodar Moholal Ginning and Manufacturing Company, and his application was allowed with costs. The Pleader for the opponent thereafter presented a bill of costs prepared as if it were an attorney's bill on the original side of the High Court, and that bill has been referred by the District Judge to the Taxing Master of his Court for taxation, the learned District Judge being of opinion that the High Court's rules had authorized a charging of costs of Pleaders at the rates specified by Rule 704 in respect of all proceedings under the Indian Companies Act. It has been pointed out to us by the Pleader for the applicant Company that

the power of the High Court to make rules specially relating to Company applications is conferred by section 254 of the Indian Companies Act (VI of 1882), and that power is limited to making rules concerning the mode of proceeding to be had for winding up a Company, and for giving effect to the provisions contained as to the reduction of capital and the sub-division of the shares of the Company. If this proceeding does not fall under any of those categories, it could not have been a proceeding regulated by those rules made by the High Court under its powers under the Indian Companies Act. For the purpose of regulating the costs in other proceedings in Company matters, recourse must be had to rules framed by the High Court under its rule-making power under the High Courts Act. Those rules will be found in Chapter VIII of the Manual of Circulars of the Bombay High Court for the guidance of Civil Courts and Officers subordinate to it (Edition of 1912). We set aside the order of the District Judge and remand the case to him for disposal on the question of costs. No costs on either side of this application.

Order set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 100 OF 1912.

September 9, 1912.

Present:—Mr. Stuart, A. J. C.

Musammat JAGDEI—PLAINTIFF—APPELLANT

versus

SOHAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Sale-proclamation notifying charge on property, effect of—Sale subject to mortgage—Prior mortgagee, title of, to question validity of subsequent mortgagee—Vendee at Court-sale, right of, to contest validity of encumbrance on property sold—Evidence on both sides—Burden of proof—Court, duty of.

The mere fact that notice of an alleged mortgage is given in the sale-proclamation, does not mean that the property is sold subject to that mortgage. [p. 361, col. 2.]

A prior mortgagee is entitled to contest the validity of a subsequent mortgage. [p. 361, col. 2; p. 362, col. 1.]

The vendee in a sale in execution has a right to contest the validity of the encumbrances with which the property sold is charged. [p. 362, col. 1.]

Izzat-un-nisa Begam v. *Kunwar Partab Singh*, 3 Ind. Cas. 793; 10 C.L.J. 313; 13 C.W.N. 1143; 6 A.L.J.817; 11 Bom. L. R. 1220; 6 M.L. T. 277; 31 A. 583; 36 I. A. 203, referred to.

Ram Charan Misir v. *Bhagwan Das*, 5 Ind. Cas. 874; 7 A. L. J. 199, dissented from.

Where both parties adduce evidence upon a certain point, no question of burden of proof arises, and the Court has simply to decide that point on the whole evidence as lies before it. [p. 362, col. 1.]

Appeal from the decree of the Subordinate Judge, Gonda, dated 1st May 1912.

Babu *Salig Ram*, for the Appellant.

Mr. *Mumtaz Husain*, for the Respondents.

JUDGMENT.—*Musammat* Jagdei instituted a suit on the 7th August 1911 in the Court of the Subordinate Judge of Gonda on the basis of a registered deed of mortgage, dated 10th August 1896, executed by her husband, Sohan Lal, for a consideration of Rs. 4,000. The amount due according to the terms of the deed had risen to Rs. 18,389-5-0 on the date of institution, but the plaintiff relinquished nearly half of this amount, and sued for Rs. 9,500 and costs with a declaration of lien upon the 2-annas 8-pies share in the village of Surwar in the Gonda District, which was hypothecated by the deed. She joined as defendants Sohan Lal, the executant, Mahadeo Prasad, a nephew of Sohan Lal, who lived jointly with Sohan Lal at one period and subsequently separated from him, Sheikh Umrao, who purchased from Mahadeo Prasad a share of 10½-pies in the mortgaged property, Parmeshar Das Bairagi, who purchased a 1-anna 4-pies share in the mortgaged property from defendants Nos. 2 and 3, the detail being that he purchased a 5½-pies share from defendant No. 2 and a 10½-pies share from defendant No. 3, and Mahabir Das Bairagi, who in addition to holding a prior mortgage over the property purchased a 1-anna 4 pies share in the mortgaged property at a Court-sale in execution of a simple money-decree. Defendants Nos. 4 and 5 agree that the purchase of the 1-anna 4-pies share by defendant No. 4 was in reality on behalf of the defendant No. 5. Defendant No. 5 thus has title as purchaser over the whole 2-annas and 8-pies share,

in addition to title as prior mortgagee over a 1-anna 4-pies share. The learned Subordinate Judge dismissed the suit on a finding that the deed had been executed to defraud creditors. The present appeal is preferred.

The transactions in connection with this property are as follows: Udit Narain, the deceased father of Sohan Hal, executed on the 15th of July 1884 a registered deed of mortgage, by which he mortgaged with possession the whole of the 2-annas 8-pies share in favour of Mahabir Das, defendant No. 5, for Rs. 1,300. As possession was not given under the terms of this deed, Mahabir Das sued to obtain possession, and obtained on the 22nd December 1893 a decree for possession over the 2-annas 8-pies share at a declared redeemable value of Rs. 1,300 principal and Rs. 1,355 interest (making a total of Rs. 2,655). He has remained in possession of the whole share since 1893. On the 21st July 1896 Sohan Lal, after the death of Udit Narain, executed a registered deed of mortgage in favour of Rameshar Das, by which he purported to mortgage with possession the same share of 2 annas 8 pies for Rs. 4,000. Possession could not, of course, be given under the terms of this deed until the mortgage created by the deed of 15th July 1884 had been redeemed. On the 10th August 1886, Sohan Lal executed the deed in suit in favour of his wife. The nominal consideration was Rs. 4,000 but no cash passed. The consideration is stated to be made up of three items, one of Rs. 2,200 representing separate amounts previously borrowed by the executant from his wife and secured by unspecified promissory notes, a second item of Rs. 800 which the mortgagee was to retain to pay to a certain Guptar Lal, and a third item of Rs. 1,000 which the mortgagee was to retain to pay to a certain Bhairon Prasad. By the terms of this deed, a simple mortgage was created over the share of 2 annas 8 pies. On the 24th December 1896, a certain Raghubans Das in execution of a simple money-decree for Rs. 1,347, which he had obtained against Sohan Lal, attached and brought to sale 1-anna 4-pies share of the morgaged property. This share was purchased in execution by Mahabir Das. The existence of the mortgage of the 10th August 1896 was mentioned in the sale-certificate, and in addition the existence of the mortgages of 15th July 1884 and 21st July 1896 was also mentioned. But it does not appear that the property was sold subject to the mortgages. I find that only notice of the existence of the mortgages was given on the proclamation of sale. On the 16th August 1909 Rameshar Das obtained a decree to redeem the mortgage of the 15th July 1884, and on the 17th August 1909 Mahabir Das obtained a decree to redeem the mortgage of the 21st July 1896. Mahabir Das subsequently redeemed the mortgage of 21st July 1896, and now is, as prior mortgagee, in possession of the whole share unencumbered by the existence of the mortgage of the 21st July 1896.

The first point that is raised in the appeal is, that Mahabir Das, having purchased the right to redeem the mortgage in suit at the Court-sale of 24th December 1896, is not now entitled to dispute its validity. Reliance is placed on behalf of the appellant on the decision of *Ram Charan Misir* v. *Bhagwan Das* (1). I do not find that that decision assists her, as it applies to a case where property was sold subject to a mortgage and not to a case in which notice of an alleged mortgage was given in the proclamation of sale. But even if that decision were held to operate in her favour, the position of the respondent, Mahabir Das, cannot, in my opinion, be held possibly to be affected by the fact that he made the purchase in question. Granting for the sake of argument that his purchase on the 24th December 1896 gave him a position no better than that of a holder of the right to redeem under the mortgage in suit, he has an independent position as a prior mortgagee and a creditor, which entitles him, irrespective of any title that he obtained by his purchase at the Court-sale, to contest the validity of a subsequent mortgage, and further the decision of their Lordships of the Privy Council in *Izzat-un-nisa Begam* v. *Kunwar Partab Singh* (2) lays down a

(1) 5 Ind. Cas. 874; 7 A. L. J. 199.
(2) 3 Ind. Cas. 793; 10 C. L. J. 313; (P. C.); 13 C. W. N. 1143; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 31 A. 583; 36 I. A. 203.

JAGRITDAS v. BHAGISAO.

proposition, that the vendee in a sale in execution has a right to contest the validity of encumbrances with which the property sold is charged. Their Lordships state at page 589 of their judgment: "On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the encumbrances turn out to be invalid, the vendor has nothing to complain of." This last sentence clearly countenances the proposition that the vendee may challenge the validity of the encumbrances, and in so far appears to overrule the proposition of law laid down in *Ram Charan Misir* v. *Bhagwan Das* (1). I, therefore, find that Mahabir Das is entitled to question the validity of the deed of mortgage in suit.

The point remaining for decision is whether the mortgage in suit is or is not a genuine transaction. Both parties called evidence, and no question of burden of proof arises. It is for the Court to decide upon the facts what was the nature of the transaction. I find on the evidence that the appellant-mortgagee was the daughter of a certain Drigpal Lal, and that Drigpal Lal was a man of no means. The suggestion made is that the large sum of money which the mortgagee alleges that she advanced to her husband, was derived by her from her father. There is nothing to support such a conclusion on the evidence as properly interpreted, and I find further that the mortgagee has been unable to show that she had private means of any kind. With regard to the sum of Rs. 2,200 there is no attempt to give any details, and there is a strong improbability that, even if the mortgagee had any money, the transactions referred to under this head were real transactions at all. With regard to the item of Rs. 800 Guptar Lal, who I find upon the evidence is the own brother of the mortgagee, alleges that he advanced Rs. 350 to Udit Narain, father of Sohan Lal in 1891, on behalf of a certain Munni Lal upon a simple deed. The deed was not produced and is alleged to have been torn up. The evidence of Guptar Lal, Munni Lal, Imdad Ali and Chhedi is, I find, undeserving of credit. The last item referred to is of Rs. 1,000 alleged to have been paid to Bhairon Prasad on account of debt due to Udit Narain. Here again the evidence is unreliable. Thus the evidence to support the genuineness of the transaction cannot be trusted in any way, and I find that the appellant has been unable to prove the genuineness of the transaction. But the evidence goes further than this. The conclusion at which I arrive is not negative but positive. There is other evidence which goes to show that Sohan Lal admitted at the time that he executed the deed that the transaction was fictitious and intended to save the property. This latter evidence I believe to be true. Looking at the facts as a whole it is opposed to all probabilities that, when Sohan Lal was indebted, as he himself admits, to the extent of Rs. 10,000 at the time that the document in suit was executed, and when the 2-annas 4-pies share was mortgaged to an extent of Rs. 6 655, his wife, even if she had any money, would have advanced it to her husband in order to pay off simple debts due from his father. I find that the transaction was purely fictitious and intended to defraud creditors. Upon these findings the appeal must fail. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 644-A OF 1913.

October 22, 1914.

Present:—Mr. Batten, A. J. C.

JAGRITDAS—DECREE-HOLDER—APPELLANT

versus

BHAGISAO—JUDGMENT-DEBTOR—RESPONDENT.

Joint Hindu family—Money-decree against one member—His interest not attached—Property in the hands of the survivor, whether liable.

The property of a joint Hindu family is not liable for the debt of a deceased member where the debt is a simple unsecured debt, unless a charge has been created by the attachment of the debtor's interest during his life-time. [p. 364, col. 1.]

JAGRITDAS *v.* BHAGISAO.

Where, therefore, *J* obtained a money decree against *N* and applied for attachment of *N*'s interest in the family property and also for rateable distribution between him and another-decree holder on whose application *N*'s interest had already been attached, and the Court transferred the execution of both decrees to the Collector, but while the proceedings were pending before that officer, *N* died and *J* applied that *N*'s father, *B*, should be substituted as his representative in the execution proceedings:

Held, that as no steps had been taken to enforce the debt in the life-time of *N*, his interest in the property survived on his death to his father and could not be reached by the creditor as assets in his hands. [p. 364, col. 2.]

Appeal against the order of the District Judge, Raipur, dated the 18th August 1913, reversing that of the Munsif, Dhamtari, dated the 31st January 1912.

Mr. *G. L. Subhedar*, for the Appellant.
Mr. *F. W. Dillon*, for the Respondent.

JUDGMENT.—In Suit No. 393 of 1911 in the Court of the Munsif, Dhamtari, the appellant Jagritdas got a simple money decree for Rs. 453-3-6 against Nandusao, son of Bhagisao. On the 11th March 1912 the decree-holder applied for execution. In the 10th column of his application of which the heading is, "Mode in which the assistance of the Court is required," the prayer runs as follows: " Warrant of attachment may be issued for principal and costs, total Rs. 463-3-6, together with execution costs, of a 5-anna 4-pie share of *Mouza* Batrel, Tahsil Dhamtari, with all rigts, which share has already been attached by Nanhulal Tiwari in execution of his decree, dated 31st August 1910, in Civil Suit No. 388 of 1910, against Nandusao; this claim may be included and proceedings started."

It is urged on behalf of the appellant, and it is undoubtedly the case, that the decree-holder was asking for two reliefs, the first being that the judgment-debtor's property should be attached in the manner provided by Order XXI, rule 54, of the 1st Schedule of the Civil Procedure Code, *viz*, by the issue of a prohibitory order to the judgment-debtor and others, and the second being that the assets realised in execution should be rateably distributed between the applicant and the decree-holder in Suit No. 388 of 1910, on whose application the property had already been attached. At the hearing of the 25th March 1912 the Munsif passed the following order, in the presence of the decree-holder's agent: "The property attached in Civil Suit No. 388 of 1910 is a share in the village, so the Case No. 388 of 1910 is to be sent to the Collector. Decree-holder shall get out of the proceeds of the sale the amount in proportion to the amount of this decree along with decree-holder in Civil Suit No. 388 of 1910. Send this case to Collector along with Case No. 388 of 1910." On the 13th April 1912 the papers were sent to the Collector in accordance with section 68 of the Civil Procedure Code.

It is evident that the Munsif took action, under section 73 of the Civil Procedure Code, on the second prayer only, but took no action on the first prayer for attachment.

Nandusao died while the proceedings were pending before the Collector, and the decree-holder applied that his father, Bhagisao, should be substituted as his representative in the execution proceedings, in order that further steps might be taken against the property which was now in the hands of the father.

It has, throughout the proceedings, been the common ground of both parties that Nandusao and Bhagisao were members of a joint Hindu family. The learned Munsif, who was not the same officer who passed the order of the 25th March 1912, ordered that Bhagisao should be substituted in place of the late Nandusao for the purposes of the execution proceedings pending in the Court of the Collector, "though he was not Nandusao's heir or legal representative." His reasons are given in the following passage: "Following the view taken by the Hon'ble Judges of the Calcutta High Court in the case of *Peary Lal Singh* v. *Chandi Charan Singh* (1) I come to the conclusion that the non-applicant can be brought on the record before the Collector for the sale of the property under attachment, as the said property was attached in the life-time of Nandu who had a share in it as a member of the joint Hindu family, and, therefore, the decree-holder has a charge upon it for the satisfaction of the sum due on the decree in question."

On Bhagisao's appealing, the learned District Judge remarked: " The share in *Mouza* Batrel of which the respondent sought attachment was not as a matter of fact attached. The record of the execution proceedings

(1) 5 C. L. J. 80; 11 C. W. N. 163.

on the respondent's application for attachment of the share leaves no doubt on the point." He applied the law as laid down in *Bithal Das* v. *Nand Kishore* (2), held that the respondent had no remedy in respect of his decretal debt and set aside the order of the Munsif. Against the District Judge's order the decree-holder appeals to this Court. The learned Counsel for the decree-holder admits that if the property was attached in the life-time of Nandusao the order of the Munsif was correct, while the learned Counsel for the appellant admits that if no steps had been taken to enforce the debt in the life-time of Nandusao, his interest in the property would survive on his death to his father, so that it cannot be reached by the creditor as assets in his hands. The only question before this Court is whether the execution proceedings had gone so far in the life-time of Nandusao as to constitute, in favour of the judgment-creditor, a valid charge upon the joint estate to the extent of the undivided interest of the deceased.

That the admissions of the learned Counsel contain a correct view of the law is undoubted. In *Ramprasad* v *Deokaran* (3), Stevens, O. J. C., quoting among other cases the Privy Council ruling in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4), said: "It appears to me that none of these rulings go the length of laying down that where a charge has been created by a member of an undivided Hindu family during his life-time for the payment of a debt, the property of the family is not liable for that debt after his death, though they are authority for the proposition that the family property is not so liable where the debt is a simple unsecured debt, unless a charge has been created by attachment of the debtor's interest during his life-time."

In *Bithal Das* v. *Nand Kishore* (2), Strachey, C. J., also applied the above-cited Privy Council ruling and held: "That in the absence of any attachment the undivided share of the judgment-debtor passes on his death to his co-parceners by survivorship, and thenceforth there is nothing which can be regarded as assets of the judgment-debtor in the hands of his legal representatives against which execution could be enforced. The creditor's loss of remedy, in other words, is the necessary result of the principle of survivorship, as distinguished from succession, applicable under the Hindu Law to a joint Hindu family." The same view was taken in the case cited by the learned Munsif. The principle of Hindu Law is thus stated by Mayne (Hindu Law and Usage, 8th Edition, paragraph 331): "The result is that if the deceased debtor is an ordinary co-parcener, who has left neither separate nor self-acquired property, the creditor, who has not attached his share before his death, is absolutely without a remedy."

It is argued on behalf of the appellant decree-holder that the decree-holder applied for attachment and that the action of the Munsif in sending the case for execution to the Collector involved a granting of the prayer for attachment. As to this, I consider that the view taken by the learned District Judge is correct. For action to be taken under section 73, Civil Procedure Code, it is not necessary for there to have been an actual attachment, all that is essential is that there should have been an application for execution. If Nandusao had not died, the decree-holder would have been entitled to a rateable share of the results of the attachment made at the instance of the decree-holder in Suit No. 388 of 1910, a relief, it may be noted, to which he would have been entitled under the provisions of the 3rd Schedule of the Civil Procedure Code even if he had made his application for rateable distribution to the Collector for the first time. The decree-holder did not contemplate Nandusao's death, and hence failed to press his execution application. In so far as it was an application for attachment, he was satisfied with the order passed under section 73. But Nandusao did die, and the creditor has lost his remedy. All the rulings cited show that for the creditor to have a claim against the debtor's share of the joint family property, execution proceedings must have gone as far as actual attachment of his undivided share in the family property. Nothing short of attachment will suffice. In *Peary Lal Singh* v. *Chandi Charan Singh* (1) the underlying principle was enunciated, that property under attachment must be

(2) 23 A. 106; A. W. N. (1901) 4.
(3) 6 C. P. L. R. 6.
(4) 5 C. 148; 4 C. L. R. 226; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome's L. R. 242.

considered as in the custody of the law: an attachment does not abate on the death of the judgment-debtor, and his death does not render it necessary for the decree-holder to take any steps to keep in force an attachment made in the life-time of the judgment-debtor; as the property is in the custody of the law, it is only reasonable to hold that persons who claim to take it, should first satisfy the demand for the ultimate satisfaction of which it has been seized by the Court at the instance of the judgment-creditor.

In this case there was no attachment at the instance of the appellant, and the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 299 OF 1912.

December 16, 1914.

Present:—Sir John Edward Power Wallis, Chief Justice, and Mr. Justice Hannay.

SABAPATHY CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PONNUSAWMY CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Gift by managing member in favour of his daughter and sister—Conveyance (sister benami *for daughter—Marriage of daughter a consideration for gift—Intention—Recital about property being self-acquired, effect of—Gift.*

Where the managing member of a joint Hindu family, in order to obtain a husband for his daughter executed a deed of gift in favour of his daughter and his sister, the mother of his future son-in-law and thereby conveyed certain properties to them:

Held (1) that the conveyance to the sister was intended to be *benami* for the daughter; [p. 365, col. 2.]

(2) that in adjudicating upon such gifts all the circumstances of the family should be looked into; [p. 366, col. 1.]

(3) that the donor intended to part with all the interest he possessed in any capacity in the property and that the recital in the deed that the properties were purchased with his self-acquired money did not in the circumstances of the case negative his intention of exercising any power of disposition he might have as managing member of the family. [p. 366, col. 2.]

Balwant Singh v. *Rev. Rockwell Clancy*, 14 Ind. Cas. 629; (1912) M. W. N. 462; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 175; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422; 34 A. 296, distinguished,

Bijraj Nopani v. *Sreemutty Pura Sundary Dassee* 24 Ind. Cas. 296; 1 L. W. 555; (1914) M. W. N. 679; 16 M. L. T. 338; 12 A. L. J. 1185; 16 Bom. L. R. 796; 20 C. L. J. 368; 27 M. L. J. 93; 18 C. W. N. 1313; 42 C. 56, followed.

Appeal against the decree of the District Court of Chingleput, in Original Suit No. 11 of 1909.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—In this case the 1st defendant who inherited a very small business as a grocer prospered during many years and accumulated a sum of Rs. 17,000, according to the finding of the District Judge with which we agree, and in addition derived a sum of Rs. 2,000 and probably considerably more as profit from the business. He was unfortunate in his daughters, and there were difficulties in the way of getting them married. In order to obtain a husband for the younger daughter, whom he married to his sister's son, he executed the deed, Exhibit A, in favour of his daughter and of his sister, the mother of his prospective son-in-law, at the time of the marriage, and thereby conveyed to his daughter, Rukmani Ammal, and to his sister, Annammal, two shops and a house worth Rs. 1,500 which, it is recited in the deed, he had purchased with money acquired by himself in 1901 and was enjoying. It was contended both in the lower Court and here that this conveyance was not what it purported to be, but was intended as a security to the 2nd defendant, the father of the bridegroom, in respect of certain money which the 2nd defendant had deposited with him. We agree with the District Judge that this is not made out. As to the terms of the deed conveying the property to Annammal, the sister, as well as to the daughter, we think that the conveyance to Annammal was intended to be *benami* for the daughter. Annammal was not only the aunt of the bride, but she was the mother of the bridegroom; and the intention probably was that property, as is often done, should stand in the name of an elder and responsible person as well as in the name of the girl so as to make it impossible for the husband to bring influence to bear on his wife later and get her to dispose of it.

The next contention raised is that, assuming this to be joint family property as found by the District Judge, the gift was of an excessive amount and should be disallowed on that ground. The cases show that all the circumstances of the family are to be looked to. In this case, the father, as we have already said, had acquired for the family properties worth Rs. 17,000 and a business bringing in Rs. 2,000 annually and he had a daughter who was not well favoured to dispose of in marriage. Taking these circumstances into consideration, we are not prepared to differ from the opinion of the District Judge that the gift, assuming it to be a gift, to the daughter was not excessive in amount.

The last objection taken is that the gift is bad, because it was made by the father on the basis that it was his self-acquired property whereas it was really joint family property and the decision of the Privy Council in *Balwant Singh* v. *Rev. Rockwell Clancy* (1) has been cited. In that case the elder brother who claimed to be solely entitled to the *zamindari* executed a mortgage of that property and got his younger brother to join him, as was expressly recited, in token of his assent. It afterwards turned out that at the time he signed the deed, the younger brother was a minor. The Privy Council held, of course, that it was void as against the younger brother and also that its execution by the elder brother could not in any way be relied upon as binding the share of the younger brother. As we have already mentioned it was clear in that case that the elder brother repudiated any claim to act in that transaction on behalf of the minor brother and merely got him to execute it as evidence of his assent to the transaction. On the other side the respondents rely on a more recent decision of the Privy Council in *Bijraj Nopani* v. *Sreemutty Pura Sundary Dassee* (2), a case in which certain members of a family who were interested in a certain property in their own right and as executors transferred the property without any references to their character of executors. Their Lordships say: "But even in the absence of such direct evidence that the conveyance was by him in his capacity as executor as well as beneficial owner (if and to the extent that he was such owner), the deed makes it clear that all the vendors convey all the title and right that they possessed in the property, and that would undoubtedly include the right and title which one of them possessed as executor". In the circumstances of the present case the gift was made by the father in the performance of his duty as managing member of the family to get his daughter married. The recital that the house in question was purchased with his self-acquired money was probably inserted with a view of strengthening his daughter's title to the property, and does not in the circumstances of the case negative his intention of exercising any power of disposition he might have as managing member of the family. We think it is clear that he intended to part with all the interest he possessed in any capacity in the property, and that the insertion of the recital is not sufficient to invalidate the transaction, if otherwise proper. We have already held that having regard to the circumstances of the family, the gift was not an improper one; and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 14 Ind. Cas. 629; 34 A. 296; (1912) M. W. N. 462; 11 M. L. T. 314; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 23 M. L. J. 18; 14 Bom. L. R. 422.

(2) 24 Ind. Cas. 296; 27 M. L. J. 93; 1 L. W. 555; 18 C. W. N. 1313; (1914) M. W. N. 679; 16 M. L. T. 338; 12 A. L. J. 1185; 16 Bom. L. R. 796; 20 C. L. J. 368; 42 C. 56.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 262 OF 1913.

November 23, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

DIN DAYAL—DEFENDANT—APPELLANT

versus

RAMESHAR—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 12 (3)—Appeal from decree—Computation of period of limitation—Exclusion of time spent in obtaining copies of both judgment and decree.

Where after a copy of the judgment had been obtained, an application for a copy of the decree based upon that judgment was made beyond the period of limitation allowed for appeal from that decree, but within such period, if the time taken in obtaining the copy of the judgment was excluded in

computing that period, and an appeal was filed on obtaining the copy of the decree:

Held, that the appeal was filed within time.

Raman Chetti v. *Kadirvalu*, 8 M. L. J. 148, referred to.

Appeal from the decree of the District Judge, Sitapur, dated 22nd May 1913, upholding that of the Munsif, Sitapur, dated 21st September 1912.

Babu *Basdeo Lal*, for the Appellant.

Mr. *H. C. Dut*, for the Respondent.

JUDGMENT.—In this case an appeal filed by the defendant was dismissed by the Court below on the ground that it was barred by time.

It appears that the judgment of the Court of first instance was delivered on the 21st September 1912. On that very day the defendant made an application for a copy of the judgment. The Court thereafter closed for the Dasehra vacation and re-opened on the 23rd October 1912. The copy of the judgment became ready on the 25th October 1912, from which date the defendant could file an appeal within thirty days. The defendant subsequently applied for a copy of the decree on the 12th November 1912 and obtained it next day. He filed his appeal, to which he appended the above copies of the judgment and the decree on the 23rd November 1912. The Court below was of opinion that the copy of the decree having been applied for after the expiry of the period of limitation, the appeal was barred by time and the time spent in obtaining a copy of the judgment was of no avail. But section 12, clause (3), of the Indian Limitation Act provides that where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall be excluded. In *Raman Chetti* v. *Kadirvalu* (1) it was accordingly held that under section 12 of the Limitation Act, in computing the period of limitation prescribed for an appeal, the time taken in obtaining a copy of the decree and the time taken to obtain a copy of the judgment must both be excluded except where those two overlapped each other, and, where they overlapped, the time overlapped shall be excluded only once. Having regard to the time spent in obtaining a copy of the judgment, the copy of the decree filed in the Court below was applied for within time and the learned Judge was not justified in dismissing the appeal as barred by limitation.

The appeal is, therefore, allowed and the case remanded to the Court below with a direction to re-admit the appeal under its original number and to dispose of it in accordance with law.

The costs will abide the result.

Appeal allowed.

(1) 8 M. L. J. 148.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 102 OF 1913.

February 2, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

C. V. VENUGOPAL MUDALI—PLAINTIFF—APPELLANT

versus

C. VENKATASUBBIAH CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 11, 13—Order on claim petition by single Judge on original side—Appeal—Suit to set aside order—Starting point of limitation—"Order," meaning of—Civil Procedure Code (Act V of 1908), O. XX, r. 63—Civil Procedure Code (Act XIV of 1882), ss. 283, 591—Letters Patent, s. 15.

Where the order on a claim petition passed by a single Judge of the High Court sitting on the original side was appealed against and was confirmed and where within one year from the date of the appellate order but more than one year from the order of the first Court, a suit to set aside that order was filed:

Held, that the suit was within time under Article 11, Schedule I of the Limitation Act and that Article 13 of the Limitation Act had no application to such a case. [p. 369, col. 1; p. 371, col. 2.]

Neither section 283 nor section 591 of the old Civil Procedure Code takes away the right of appeal conferred by section 15 of the Letters Patent. [p. 369, col. 2.]

Sabapathi Chetti v. *Narayanasami Chetti*, 11 M. L. J. 340; 25 M. 555; *Phul Kumari* v. *Ghanshyam Misra*, 12 C. W. N. 169; 35 I. A. 22; 7 C. L. J. 36; 35 C. 202; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1; *Krishnappa Chetty* v. *Abdul Khadir Sahib*, 25 Ind. Cas. 11; 26 M. L. J. 449; *Cochrane* v. *Heera Lal Seal*, 7 W. R. 79; *Bhyrub Chunder Surmah Chowdhry* v. *Madhub Ram Surmah*, 20 W. R. 84; 11 B. L. R. 423 (F. B.); *Ittiachan* v. *Velappan*, 8 M. 484, followed.

The word "order" used in Article 11 of Schedule I of the Limitation Act refers only to a subsisting order. Where, therefore, there was an appeal against the order of a single Judge, it is the date of the order of the

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Appellate Court, that gives the starting point of limitation. [p. 371, cols. 1 and 2.]

Kristnama Chariar v. *Mangammal*, 26 M. 91; *Brij Narain* v. *Tejbal Bikram Bahadur*, 6 Ind. Cas. 669; 7 A. L. J. 507; 11 C. L. J. 560; 12 Bom. L. R. 444; 8 M. L. T. 57; 20 M. L. J. 587; 32 A. 295; 14 C. W. N. 667; (1910) 1 M. W. N. 392; 37 I. A. 70, *Asama Bibi* v. *Ahmad Husain*, A. W. N (1908) 109; 5 A. L. J. 584; 30 A. 290; *Phul Kumari* v. *Ghanshyam Misra*, 12 C. W. N. 169; 35 I. A. 22; 7 C. L. J. 36; 35 C. 202; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1, *Krishnappa Chetty* v. *Abdul Khadir Sahib*, 25 Ind. Cas. 11; 26 M. L. J. 449, followed.

Appeal from the following Judgment of the Hon'ble Mr. Justice Bakewell, dated 3rd December 1913, in the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 14 of 1912:—

"On the 27th August 1909, the claim of the 2nd defendant for the release of certain property attached by the plaintiff in execution of his decree was allowed by this Court, and on 21st December 1910 the Appellate Court refused to disturb this order on the ground that the claimant had made out a *prima facie* case, and the plaintiff had a remedy by way of suit in which the question raised could be more satisfactorily dealt with. The order in appeal is expressed to be "without prejudice to the appellant attacking the said" order on points of law in any suit he may institute, and reserves all questions of costs to be dealt with in the decree in such suit. I am of opinion that the Appellate Court has expressly reserved the right of the plaintiff to institute this suit, and that it is not competent to this Court to question this decision.

It has been argued on behalf of the 2nd defendant that the order of 27th August 1909 was conclusive under Order XXI, rule 63, and that this provision overrules the clause of the Letters Patent which gives a right of appeal against every judgment of a single Judge of this Court. It is true that this argument was not dealt with in the judgment of this Court in *Sabapathi Chetti* v. *Narayanasami Chetti* (1), but nevertheless that decision is binding upon me since it is an express authority that an appeal lies

It was also argued that the suit should have been brought within one year from the order of 27th August 1909 and is barred under Article 11 of the 1st Schedule of the Limitation Act, 1908. That Article deals with orders under the Code of Civil Procedure 1908, that is, under Order XXI, rules 60 to 62. The appellate order was made under the Letters Patent and, therefore, does not fall within this Article; it is an order of a Civil Court in a proceeding other than a suit, and this suit is brought to set it aside, and for these reasons I think that Article 13 applies which prescribes one year from the date of the order.

The present suit was instituted on 16th December 1911. The plea of limitation, therefore, fails and the suit must be heard on the merits. Adjourned to 12th instant for trial."

Mr. V. V. *Sreenivasa Aiyangar*, for the Appellant.

Mr. C. *Venkatasubbaramiah*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The 2nd defendant is the appellant. The suit was brought on the Original Side of the High Court for the establishment of the plaintiff's right to attach the plaint properties in execution of the decree, which the plaintiff had obtained against the 1st defendant in Original Suit No. 13 of 1905. The 2nd defendant put in a claim petition when the properties were attached by the plaintiff in execution of that decree on the allegation that the properties did not belong to the 1st defendant (the judgment-debtor) but to his wife (the 3rd defendant), and that the 2nd defendant had a mortgage right over the properties, the mortgage having been created by the 3rd defendant in favour of the 2nd defendant's transferor. His (2nd defendant's) claim petition was allowed in August 1909 by a single Judge of this Court sitting on the Original Side. The plaintiff (the decree-holder) appealed against that order and that order was confirmed by a Division Bench of this Court on the 21st December 1910. Thereupon the plaintiff brought this suit on the 16th December 1911 just within one year of the order of the Appellate Court, but more than one year after the date of the order passed by the single Judge.

The 2nd defendant raised a preliminary contention that the suit was barred by limitation under Article 11 of the 2nd Schedule of the Limitation Act. His contentions were:

(1) 25 M. 555; 11 M. L. J. 340.

(*a*) The order of the Division Bench dated December 1910 dismissing the appeal from the order dated August 1909, passed on the claim petition, was passed without jurisdiction, as no appeal lay against the latter order,

(*b*) Even if such an appeal lay, the one year's period mentioned in the third column of the Article 11 of the second Schedule of the Limitation Act commenced in August 1909 (the date of the original order allowing the claim petition), and not from the date of the appellate order (December 1910),

(*b*1) as the appellate order did not interfere with the original order, it could not be held to have superseded the original order,

(*b*2) as, even if it superseded the original order, the order mentioned in the third column of Article 11 means the original order, the Legislature not having in Article 11 used the words "final decision or order" (as the Legislature did in Article 13) and not having expressly postponed the commencement of the limitation period to the date of the final order (as it did in clause 2 of Article 182).

On this preliminary question of limitation, Mr. Justice Bakewell decided against the 2nd defendant for the following reasons:— (1) that the Division Bench, who decided the appeal in the claim petition case, had jurisdiction to entertain and decide the appeal on the authority of *Sabapathi Chetti* v. *Narayanasami Chetti* (1), (2) that Article 11 of the Limitanion Act does not apply to the suit, as it was not a suit to establish any right denied to the plaintiff by the original order on the claim petition but it was a suit to set aside the appellate order passed in the Letters Patent Appeal and hence, Article 13 of the Limitation Act was the Article applicable.

I might at once say that, with very great deference, I am unable to agree with the opinion of the learned Judge that the proper Article applicable is not Article 11 of the Limitation Act, but Article 13. The proceedings in an appeal against an order passed in a petition case are a continuation of the proceedings commenced by the petition and hence the appellate order is also an order on the same claim petition and as Article 11, clause 1, specifically deals with a suit which is allowed to be brought by the Legislature to contest the order on a claim, Article 13 cannot be applied. Their Lordships of the Privy Council have held that the suit itself so brought is in the nature of a review of the order passed in the claim petition and that it is a mistake to treat the action brought under section 283, Civil Procedure Code, as an original action [see *Phul Kumari* v. *Ghanshyam Misra* (2) and *Krishnappa Chetty* v. *Abdul Khadir Sahib* (3)].

There remain then for consideration the other contentions which I have referred to as (*a*) & (*b*).

As regards contention (*a*), there can be no doubt that in *Sabapathi Chetti* v. *Narayanasami Chetti* (1) it was held by Sir Arnold White, C. J., and Mr. Justice Bhashyam Iyengar that an appeal under the Letters Patent lay from the order of a single Judge of this Court passed on the original side in a claim petition. It is, however, urged that though there was a preliminary objection raised by the respondent in that case that no appeal lay and that contention was overruled, that contention was supported only by the argument that section 591 of the old Civil Procedure Code prohibited an appeal and that the respondent's Vakils did not put forward the argument in that case that by section 283 of the old Civil Procedure Code the order passed on the claim petition by the single Judge was "conclusive." Having regard to the eminence of the learned Vakils who appeared for the respondent in that case and to the eminence of the Judges who decided that case, I feel diffident to hold that if the objection based on section 283 (present Order XXI, rule 63) was a stronger objection than the objection put forward under section 591, the stronger objection would not have been separately put forward, noticed and dealt with. I take it that as the word "conclusive" cannot possibly mean more than "shall not be set aside by way of an appeal, review or revision," the prohibition under section 283 cannot, where an objection is taken to the competency of an appeal, be

(2) 35 C. 202; 12 C. W. N. 169; 35 I. A. 22; 7 C. L. J. 36; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1.

(3) 25 Ind. Cas. 11; 26 M. L. J. 449 at p. 456.

stronger than the objection taken under section 591. As regards the maintainability of a review of such an order, see *Cochrane* v. *Heera Lal Seal* (4) and *Bhyrub Chunder Surmah Chowdhury* v. *Madhub Ram Surmah*(5): as regards revision, see *Ittiachan* v. *Velappan* (6). The reasoning by which it was held in *Sabapathi Chetti* v. *Narayanasami Chetty* (1) that the appeal granted by section 15 of the Letters Patent was not intended to be taken away by section 591 of the Civil Procedure Code, applies also to the contention that by section 283 the said right of appeal is taken away. That reasoning is that "when the Legislature has already given its attention to a particular subject and provided for it, it is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention is manifested in explicit language", and also that the provisions of the Civil Procedure Code referring to appeals are intended to apply to appeals from one Court to a higher Court, and not from one Judge of the same Court to the other Judges of that Court. The long-standing practice also has been to allow such appeals under the Letters Patent. I dot think that it is advisable to re-open the question or to scrutinise minutely whether the reasons alleged in the older decisions supported by such a long-standing practice can be entirely sustained. [*Kari Veeraraghavulu* v. *Venkata Narasimha Naidu Bahadur* (7)] I would, therefore, follow *Sabapathi Chetti* v. *Narayanasami Chetti* (1) and hold that the appeal against the order in the claim petition case was decided with jurisdiction by the Division Bench.

Coming to the question of limitation, Mr. Justice Bhashyam Iyengar in his judgment in *Kristnama Chariar* v. *Mangammal* (8) says that from a judicial point of view, "the mere fact that a matter is litigated both in the Court of first instance and again, though only in part, in the Court of appeal, cannot convert or split the suit into two and there can be only one final decree in that suit, *viz.*, the decree of the Court of appeal. There cannot be two final decrees in such a suit, one by the Court of first instance and the other by the Court of appeal." "The Court of appeal is really seized of the whole suit, though the relief given by it will be limited," *its decree is the only subsisting decree in the suit.* In *Brij Narain* v. *Tejbal Bikram Bahadur* (9) their Lordships of the Privy Council have held that a Subordinate Judge had no jurisdiction to amend his decree under section 206, Civil Procedure Code, after it has been affirmed by the High Court on appeal. I think that except to the extent to which the Statute Law treats the judgment of the first Court as existing for certain purposes, the Appellate Court's judgment on general principles of jurisprudence supersedes the judgment of the first Court even when the appellate judgment is a judgment confirming the lower Court's decision. [See *Asma Bibi* v. *Ahmad Husain* (10)].

Their Lordships of the Privy Council have decided that though the plaint in a suit under section 283, Civil Procedure Code, (Order XXI, rule 63) is not described in that section as a suit to set aside the order passed on the claim petition, it is in the eye of the law a suit of that character and that it "is merely verbal or formal difference" to describe it as a suit to establish the right, etc. [see *Phul Kumari* v. *Ghanshyam Misra* (2) and *Krishnappa Chetty* v. *Abdul Khadir Sahib* (3).] Now it is clear that the present suit is a suit not to set aside the order passed on the claim petition by the single Judge, which order has merged in the order of the Division Bench, and hence the one year's period should be calculated from the date of the latter order which is the only *subsisting* order in the claim petition case.

It was, however, urged that because in two or three other Articles of the Limitation Act, special provision is made for counting the period from the date of the appellate order when there has been an appeal and no such special provisions are found in Article 11, therefore, the Legisla-

(4) 7 W. R. 79.

(5) 20 W. R. 88; 11 B. L. R. 423 (F. B.).

(6) 8 M. 484.

(7) 25 Ind. Cas. 305; 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 779; 27 M. L. J. 451; 20 C. L. J. 375; 37 M. 443; 19 C. W. N. 97; 16 Bom. L. R. 853.

(8) 26 M. 91.

(9) 6 Ind. Cas. 669; 20 M. L. J. 587; 14 C. W. N. 667; (1910) 1 M. W. N. 392; 37 I. A. 70; 32 A. 295; 7 A. L. J. 507; 11 C. L. J. 560; 12 Bom. L. R. 444; 8 M. L. T. 57.

(10) 30 A. 290; A. W. N. (1908) 109; 5 A. L. J. 584.

ture intended the date of the original order to be the starting point so far as the suits mentioned in Article 11 are concerned, even when there has been a Letters Patent Appeal. It appears to me that there are at least two answers to this argument. One answer is that the fact that the Legislature, in order to remove all doubts and with abundant caution, has specifically made provision in some cases for the contingency of an appeal, namely, that the order passed in the appeal was to be the starting point in those cases, that fact is not a sufficient reason for not construing the word "order" found in Article 11 as the only subsisting order passed on the claim petition (where there has been an appeal) in accordance with recognised principles of jurisprudence. Secondly, there seems to be at least one other Article in the Limitation Act in which there is no express reference to the contingency of an appeal and to the decree passed on such an appeal, but the Legislature must have intended that the starting point must be the date of the final appellate decree (in case there had been an appeal) and not the original decree. I refer to Article 175, which says that an application for payment of the decree amount by instalments under the Civil Procedure Code should be made within six months from the date of "the decree." Such an application is made under Order XX, rule 11, clause 2, and it cannot surely be held that where the Original Court passes a decree for a certain sum of money and the plaintiff appeals to the Appellate Court on the ground that he ought to have been decreed a larger sum but his appeal is dismissed, an application under that Order and rule cannot be made by the judgment-debtor after six months from the date of the original decree but within six months of the date of appellate decree, even though the decree-holder consented to such an order being made.

I need not say that where the order on a review petition as distinguished from an appeal petition merely refuses to interfere with the judgment or order sought to be reviewed or where an appeal is not entertained at all, though filed, the original decree or order is and continues to be the subsisting and final decree or order. In this respect an order rejecting a review petition stands on a different footing from a decision passed on appeal confirming the lower Court's judgment and dismissing the appeal. If the decision on review or revision *does* interfere with the original decision, the former decision becomes the only subsisting order and stands on the same footing as the decision in a competent appeal. It will in that case become the starting point for limitation.

In the result, I would dismiss this appeal with costs.

NAPIER, J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3353 OF 1912.

December 22, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

SARODA PROSAD BHATTACHARJEE —DEFENDANT—APPELLANT

versus

Rai MANMOTHO NATH MITTER *Bahadur*— PLAINTIFF—RESPONDENT.

Landlord and tenant—Dispossession of tenant by landlord—Rent, suspension of

Where a landlord dispossesses his tenant from a part of his lease-hold lands, the landlord's right to claim rent is suspended in respect of the entire lease-hold. [p. 372, col. 1.]

Dhunput Singh v. *Mahomed Kazin Ispahain*, 24 C. 296; *Rani Lalita Sundari* v. *Rani Surnamoyee Dasi*, 5 C. W. N. 353; *Rai Charan Sar Mazumdar* v. *The Administrator-General of Bengal*, 2 Ind. Cas. 169; 13 C. W. N. 853; 9 C. L. J. 578; 36 C. 856; *Chandra Kanta Das* v. *Ramanath Barman*, 6 Ind. Cas 478; 11 C. L. J. 591; *Ashutosh Dhar* v. *Joy Lal Sardar*, 18 Ind. Cas. 621; 17 C. L. J. 50; *Godai Molla* v. *Aminuddi Howladar*, 21 Ind. Cas. 957; 18 C. L. J. 509, referred to.

Kali Prasanna Khasnabish v. *Mathura Nath Sen*, 34 C. 191, distinguished.

Annada Prosad Mukhopadhya v. *Mathura Nath Nag*, 2 Ind. Cas. 123; 13 C. W. N. 702; 9 C. L. J. 585, followed.

Appeal against the decree of the Sub-Judge, 3rd Court of 24-Parganas, dated the 31st July 1912, modifying that of the Munsif, 1st Court, Baruipur, dated the 28th April 1911.

Babu *Tarkeswar Pal Chowdhury*, for the Appellant,

SARODA PROSAD BHATTACHARJEE v. MANMOTHO NATH MITTER BAHADUR.

Babus *Narendra Chandra Bose* and *Satyendra Nath Mitra*, for the Respondent.

JUDGMENT.—The predecessor-in-title of the plaintiff leased 100 *bighas* of land within certain boundaries to defendant No. 1 in 1308, and established a *hat* on some portion of the demised land and realised from the Government the rent for a portion of the said land on which the salt office was situated. Defendant No. 1, therefore, did not get possession of the lands occupied by the salt office and the *hat*, but he continued paying the full rent and when in 1313 the plaintiff investigated the assets of the lessor's interests in view of purchasing the same defendant No. 1 made a declaration that he held 100 *bighas* of land at a rental of Rs. 100. The plaintiff then purchased the lessor's interest and brought the present suit for arrears of rent from 1313 to 1316 against defendants Nos. 1 and 2. Defendant No. 1 did not appear but defendant No. 2 pleaded that as he was dispossessed of the lands covered by the salt office and the *hat*, the plaintiff was not entitled to any rent.

The Courts below have held that the salt office and the *hat* lands were parts of the lease-hold lands of the defendant and he had been dispossessed of the same, but they held that the defendant was not entitled to a suspension of the entire rent but to an abatement and as the plaintiff gets Rs. 5 from Government as the rent of the salt office and as there was no evidence of the area or the assets of the *hat* lands, gave an abatement of Rs. 5 per annum only.

It is contended in second appeal before us that upon the findings as to dispossession no decree should have been passed.

It has been held in a series of cases in this Court that when the landlord dispossesses his tenant from a part of his lease-hold lands, the landlord's right to claim rent is suspended in respect of the entire lease-hold. See the cases of *Dhunput Singh* v. *Mahomed Kazim Ispahain* (1), *Rani Lalita Sundari* v. *Rani Surnomoyee Dasi* (2), *Rai Charan Sar Mazumdar* v. *The Administrator-General of Bengal* (3), *Chandra Kanta Das* v. *Ramanath Barman* (4), *Ashutosh Dhar* v. *Joy Lal Sardar* (5) and *Godai Molla* v. *Aminuddi Howladar* (6).

There are some cases, however, in which the Court has granted an apportionment of rent instead of ordering entire suspension.

The case of *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (7) is not in point, as there the lower Appellate Court found as a matter of fact that the dispossession was not by the landlord. The decree, therefore, for the proportionate rents of the lands actually held did not sound any note of dissent from the general principle established in the cases first enumerated. The case of *Annada Prosad Mukhopadhya* v. *Mathura Nath Nag* (8) bears a closer resemblance to the present case.

The lower Appellate Court in that case found that the plaintiff had dispossessed the defendant of about half of the land demised, but the learned Judges repelled the plea of suspension and allowed an abatement. In arriving at this conclusion they held there had been no eviction by the landlord, as the tenant had never obtained actual possession and had paid some rent after the grant of the lease to a third party which resulted in his dispossession. It is true that the tenant was found to be in possession of the 800 *bighas* given as the estimated area of lands in the lease, but on the findings the land actually demised was over 1500 *bighas*.

In the present case also the tenant had not been put in actual possession of the lands covered by the salt office and the *hat* and the dispossession was more or less constructive, and the predecessor of defendant paid full rent notwithstanding that the plaintiff's predecessor was in *khas* possession of the said lands. The resemblance of the two cases, therefore, is very close and under the circumstances of the present case we are inclined to take the same course.

The defendants, therefore, are entitled to a deduction of rent in respect of the *hat* lands also, but there is no evidence of their area. In fact the plaintiff excluded that land and the salt-*gola* lands from the scope of the suit and we were inclined to make a remand for the purpose of ascertaining the actual

(1) 24 C. 296.
(2) 5 C. W. N. 353.
(3) 2 Ind. Cas. 169; 13 C. W. N. 853; 9 C. L. J. 578; 36 C. 856.
(4) 6 Ind. Cas. 478; 11 C. L. J. 591.
(5) 18 Ind. Cas. 621; 17 C. L. J. 50.
(6) 21 Ind. Cas. 957; 18 C. L. J. 509.
(7) 34 C. 191.
(8) 2 Ind. Cas. 123; 13 C. W. N. 702; 9 C. L. J. 53

rea of these lands. That is, however, unnecessary, as the learned Vakil for the appellant has agreed that for the purpose of the present case we should make a deduction of Rs. 25 for the excluded lands and award rent at the rate of Rs. 75 per annum. It is clearly understood, however, that this will not affect the right of either party to work out his rights in future in due course of law on the findings arrived at in this case. Each party will bear its own costs in all Courts.

Order accordingly.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 2 OF 1913.

February 8, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Hannay.

PILLALAMARRI VENKATAPATHI SOMAYAJULU--PLAINTIFF—APPELLANT

versus

PILLALAMARRI PUNNAMMA AND OTHERS —DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Consent of next reversioner —Refusal on personal grounds—Refusal, whether proper.

In giving or refusing his consent to an adoption, a *sapinda* is not entitled to proceed upon grounds personal to himself but must act with a deliberate consideration of what is for the benefit of the family. [p. 374, col. 1.]

Where in answer to a request for his consent to an adoption by a widow, the next reversioner refused his consent, stating that the widow was actuated by a desire to prevent her property from devolving on him and his heirs, that he was ready to perform duties which would secure heavenly bliss and that the widow should wait till he got a son:

Held, that the consent was improperly refused. [p. 373, col. 2.]

Subrahmanyam v. *Venkamma* 26 M. 637; 13 M. L. J. 239; *Kallepalli Venkatarama Raju* v. *Kallepalli Bapamma*, 26 Ind. Cas. 888; (1914) M. W. N. 911; 27 M. L. J. 638, referred to.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Original Suit No. 33 of 1910.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Mr. *S. Swaminadhan*, for the Respondents.

JUDGMENT.—The question in this appeal s whether the next reversioner improperly refused his consent to the adoption. In reply to a request for his consent he wrote Exhibit VI, in which he stated that the widow was actuated by a desire to prevent the property from devolving on him and his heirs, that he was a proper person and was ready to perform the duties which would secure heavenly bliss, and he then went on, "there is no necessity to adopt now only without waiting till I get a son. For these and other reasons it is not possible to grant you permission to adopt." It is contended before us by Mr. Venkatrama Sastriar that this was a reasonable ground of refusal. It is said that the next reversioner who was only 32 had already had six children, some of whom were alive and three of them sons who had died shortly after their birth, and therefore had a reasonable expectation of having a male child. On the other hand it is shown that the widow who is now about 35 had waited for a great many years subsequent to her husband's death for making the adoption, and was at the time in bad health. In these circumstances Mr. T. R. Venkatarama Sastriar relies upon a dictum of Bhashyam Iyengar, J., in *Subrahmanyam* v. *Venkamma* (1) where the learned Judge observes: "Assuming, as the first defendant says, that some five years before the adoption the plaintiff wanted her to take one of his sons in adoption, there is nothing improper in a *sapinda* proposing to give his assent to the widow adopting his own son, if such son be the nearest *sapinda*, and refusing to give his assent to her adopting a stranger or a distant *sapinda* if there be no reasonable objection to the adoption of his own son." Assuming this to be so the circumstances of the present case are very different, because here the next reversioner has no son and if a son were born to him, the widow would be entitled to object that the adoption of an only son was improper and, therefore, it would be necessary to wait for a second to be born to him before he could with propriety insist upon this condition. We think that, even assuming that refusal under the circumstances mentioned by Bhashyam Iyengar, J., is justified, it cannot be said in the circumstances of the present case the refusal was justified. The ground for the reasonableness of the refusal in that case appears to be the fact that according to Hindu notions an adoption of a near *sapinda* is preferable to the adoption of one more remote. But we think it would

(1) 26 M. 627 at p. 637; 13 M. L. J. 239.

be going too far to say that a widow should be required to wait until the nearst *sapinda* has two sons, a possibility which may never occur. The most recent case which has been quoted to us, *Kallepalli Venkatarama Raju* v. *Kallapelli Bapamma* (2), lays down that in giving or refusing his consent a *sapinda* is not entitled to proceed upon grounds personal to himself but must act with a deliberate consideration of what is for the benefit of the family. We do not think that the ground put forward in the present case is a proper one ; and we, therefore, agree with the lower Court and dismiss the appeal with costs.

Appeal dismissed.

(2) 26 Ind. Cas. 888 ; 27 M. L. J. 638 ; (1914) M. W. N. 911.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 576 OF 1912.

December 17, 1914.

Present:—Mr. Justice Holmwood and Justice Sir Herbert Carnduff.

BAMA CHARAN GOSAIN—DEFENDANT—APPELLANT

versus

RAM KANAI DUBEY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Rent Recovery Act (VIII of 1865), s. 16—Mokarari right, extinguishment of—Occupancy right, acquisition of.

Where a *mokarari* right, which a party had obtained, is extinguished by operation of section 16 of Act VIII of 1865, there is nothing in law to prevent him from acquiring and retaining an occupancy right. [p. 374. col. 2.]

Nil Madhub Kurmokar v. *Shiboo Paul*, 13 W. R. 410; 5 B. L. R. App. 18, followed.

Emam Ali Mestory v. *Ator Ali Khan*, 22 W. R. 133, referred to.

Jogeshwar Mazumdar v. *Abed Mahomed Sirkar*, 3 C. W. N. 13, (followed in an unreported ruling of Ghose and Pargiter, J.J.), distinguished.

Appeal against the decree of the District Judge of Manbhoom-Sambalpur, dated the 4th of January 1912, reversing that of the Munsif, Raghunathpur, dated the 31st of August 1911.

Babus *Bepin Behari Ghose* (Junior), and *Bankim Chandra Mukherjee*, for the Appellant.

Babu *Karunamoye Bose*, for the Respondents.

JUDGMENT.—This second appeal raises a simple question of law, namely, whether the defendant has acquired an occupancy right and retained it even although the *mokarari* right, which he has also obtained, is extinguished by operation of section 16 of Act VIII of 1865. The learned Munsif was perfectly right in saying that the case of *Nil Madhub Kurmokar* v. *Shiboo Paul* (1) was clear authority for the proposition that he did, and the learned District Judge in the lower Appellate Court refers to a later case in which this was followed. That case is the case of *Emam Ali Mestory* v. *Ator Ali Khan* (2), and in the case of *Nil Madhub Kurmokar* v. *Shiboo Paul* (1) the learned Judges had referred to a still earlier case reported as *Purceag Singh* v. *Purtap Narain Singh*(3). As far as we have been able to ascertain these authorities have never been dissented from. The learned District Judge thinks that the case of *Jogeshwar Mazumdar* v. *Abed Mohamed Sirkar* (4) lays down a principle which, as it has been followed in an unreported ruling of Ghose and Pargiter, JJ., and applied to Act VIII of 1865, must govern his decision in the present case.

As to this we have in the *first* place to point out that the decision in *Jogeshwar Mazumdar* v. *Abed Mahomed Sirkar* (4), being under Regulation VIII of 1819 which did not recognize occupancy rights not then in existence, cannot be any authority in respect of the present case where occupancy right could have been and was acquired under Act X of 1859. The learned Judges based their decision on the express finding that the property was lease-hold property and, therefore, the lease was an incumbrance. They nowhere say that an occupancy right is an incumbrance; and on looking to the unreported decision upon which the learned Judge relies, we are surprised to find that it is a summary dismissal of an appeal on the ground that there was no sufficient room to interfere. The then Judicial Commissioner

(1) 13 W. R. 410; 5 B. L. R., App. 18.
(2) 22 W. R. 133.
(3) 11 W. R. 253 ; 5 B. L. R. App. 20.
(4) 3 C. W. N. 13.

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of Chota Nagpur had decided a case of a somewhat similar nature to the present case on the principle laid down in *Jogeshwar Mazumdar* v. *Abed Mohamed Sirkar* (4) but he had not had his attention drawn to any of the cases which we have cited in the Weekly Reporters. It cannot, therefore, be said that the Judges of this Court in summarily dismissing the appeal had those authorities before them or that they ever considered them or dissented from them. The weight of authority, therefore, is absolutely on the side of the defendant in this case.

The judgment and decree of the lower Appellate Court must, therefore, be set aside and that of the learned Munsif restored with costs in both Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 77 OF 1914.

January 19, 1915.

Present:—Mr. Justice Shah Din.

THAKAR DAS—PLAINTIFF—APPELLANT

versus

Musammat NANDI BAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Post diem *interest—Fixed rate—Improvements, nature of—Interest on costs of improvements—Interpretation of deed.*

Where from the terms of a mortgage-deed the intention of the parties appears to be that on redemption the mortgagor would have to pay interest on the mortgage money not merely for the period for which the mortgage is made but also for the period during which the mortgage would remain unredeemed, the mortgagee is entitled to get full interest upto the time of redemption at the agreed rate. [p. 375, col. 2, p. 376, col. 1.]

Mathura Das v. *Raja Narindar Bahadur*, 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; *Sardar Umrao Singh* v. *Sardar Thakar Singh*, 77 P. R. 1898, followed.

Where a mortgage-deed provided that before redemption takes place the mortgagor would be liable to pay to the mortgagee the entire cost of improvements, of whatever nature, and that the money thus expended on improvements would carry interest:

Held, that the intention of the parties was that reasonable interest should be charged, and not at the rate at which it was to be paid on the principal. [p. 376, col. 1.]

Where under the terms of a mortgage-deed the mortgaged house is re-built, the price of the old materials should be deducted from the costs of improvements allowed to the mortgagee. [p. 376, col. 1.]

Second appeal from the decree of the Divisional Judge, Multan Division, dated the 14th August 1913, affirming that of the order of the District Judge, Multan, dated the 21st November 1912, decreeing the claim on payment of Rs. 3,278.

Mr. *Nand Lal*, for the Appellant.

Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgment of the learned Divisional Judge and it is unnecessary to repeat them here. The questions for decision in this appeal are (1) whether the Courts below were right in allowing *post diem* interest to the defendants-mortgagees on the principal mortgage money, Rs. 450, for a period of 23 years, *i.e.*, from the year 1888, when the mortgage was made, to the year 1911, when the suit for redemption was filed, and (2) whether the defendants-mortgagees were entitled to receive from the plaintiffs-mortgagors the entire cost of the improvements effected by them in the mortgaged house together with interest thereon at the rate of 12 per cent. per annum, at which rate the mortgage money had been borrowed by the mortgagors. Upon the first point, the leading authorities are *Mathura Das* v. *Raja Narindra Bahadur* (1) and *Sardar Umrao Singh* v. *Sardar Thakar Singh* (2). I have referred to the terms of the mortgage-deed, dated the 9th November 1888, and in my opinion they have been correctly construed by the learned Divisional Judge. The extracts from the mortgage-deeds which are given in the judgment of the Divisional Judge make it clear that the intention of the parties was that on redemption the mortgagors would have to pay interest on the mortgage money not merely for the period

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52.
(2) 77 P. R. 1898.

of five years for which the mortgage had been made, but also for the period during which the mortgage would remain unredeemed. I, therefore, agree with the Courts below that the mortgagees were entitled to receive *post diem* interest on the mortgage money for a period of 23 years.

Upon the second question, the mortgage-deed explicitly lays down that before redemption takes place the mortgagors would be liable to pay to the mortgagee the entire costs of improvements of whatever nature (*jis qadar lagat makan marhuna par lagawe*), and that the money thus expended on improvements would carry interest. It is not quite clear from the deed what the rate of interest would be in this latter case, the words of the deed being *zar-i-rahn wa lagat masudjaiz shuda*. It seems to me, upon a careful consideration of the terms of the deed, that the intention of the parties was that reasonable interest should be charged on the cost of improvements, and not interest at the rate at which it was to be paid on the mortgage money, *viz.*, 12 per cent. per annum. As regards the nature of improvements, there is no limitation placed upon the discretion of the mortgagee, he being at perfect liberty to effect any improvements that he considered desirable. When the mortgagee began to pull down the old house in order to build a new one in its place, a notice was sent to him by the mortgagors in 1906 protesting against the mortgaged house being demolished, but this notice was not followed up by any definite action on the mortgagor's part, and the mortgagee admittedly built a new house, the cost of which has been estimated in the present suit to have been about Rs. 1,732. In my opinion the Courts below were justified, in view of the terms of the mortgage-deed, in allowing to the mortgagee the full cost of the improvements. But they have omitted to give credit to the mortgagors for the value of the materials of the old house which were used by the original mortgagee in building the new house in its place, and they are also in error in allowing interest on the cost of improvements at the rate of very nearly 12 per cent. per annum.

There is no definite evidence on the record as to what the value of the materials of the old house was, and Ladha Mal, whose evidence has been referred to by the District Judge on this point, does not say at all that Rs. 300 was the value of the old house. In my opinion the ends of justice will be met by allowing to the mortgagors a sum of about Rs. 200 as the value of the materials of the old house, and by allowing to the mortgagees interest on the cost of improvements at the rate of 9 per cent. per annum, and the total amount of interest, roughly speaking, might be put down at Rs. 78.

The result is that the amount on payment of which the mortgagors are entitled to redeem the house is Rs. 3,000 instead of Rs. 3,278 as allowed by the Courts below. I accordingly accept this appeal and modify the decree of the Divisional Judge in so far as to fix the redemption money at Rs. 3,000. In the circumstances of the case, I think that the parties should pay their own costs in all the Courts and I order accordingly.

Appeal partly accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 45 OF 1913.

February 11, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

LADD GOVINDOSS KRISHNA DOSS—PETITIONER—APPELLANT

versus

RAMDOSS VISHNADOSS—COUNTER-PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Adjustment of decree—Transactions, which amount to adjustment, which not—Enquiries in suits or proceedings, nature of.

The adjustment of a decree referred to in Order XXI, rule 2, of the Civil Procedure Code, 1908, is a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree. [p. 377, col. 1.]

Therefore, a transaction by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realized in execution in that suit or

the time when the decree becomes executable, is not an adjustment of the decree within the meaning of Order XXI, rule 2, of the Civil Procedure Code, but is a transaction which attempts to vary the terms of the decree, leaving the altered terms to stand in the place of the terms of the decree so as to constitute a new executable decree and a decree, cannot be varied by such transactions. [p. 377, col. 1.]

Enquiries in a suit or in execution proceedings should be confined to matters the decision with reference to which matters could be taken advantage of by the parties in the proceedings in the suit or the execution itself. [p. 377, col. 2.]

Appeal from the judgment and order of Mr. Justice Bakewell, dated 24th April 1913, in the Ordinary Original Civil Jurisdiction of the High Court in the matter of the Indian Arbitration Act and the arbitration between Ladd Govindoss Krishnadoss of Madras and Vishnudoss Chaturbhuja Doss of Mysore.

Mr. *V. C. Seshachariar*, for the Appellant.

Mr. *T. R. Venkatrama Sastri*, with him Mr. *V. Purushothama*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The only questions for decision in this appeal are, (*a*) whether the compromise agreement put forward by the judgment-debtor (appellant) is an adjustment of the decree in whole or in part under Order XXI, rule 2 of the Code of Civil Procedure, and (*b*) whether the learned Judge was right in declining to decide the question whether the terms of the agreement were as alleged by the appellant.

I am clear that the adjustment referred to in Order XXI, rule 2 (old section 258) of the Code of Civil Procedure, is a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree. A transaction by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution in that suit or the time when the decree becomes executable, is not an adjustment of the decree but is a transaction which attempts to vary the terms of the decree, leaving the altered terms to stand in the place of the terms of the decree so as to constitute a new executable decree [see the observation of Turner, C. J., in the Full Bench decision in *Mallamma* v. *Venkappa* (1). bottom of page 282, as to the meaning of the word "adjustment."] To allow such a variation is clearly against the policy of the Civil Procedure Code as shown by the Privy Council decision in *Kotagkiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (2). It is only under the provisions of Order XX, rule 11, and the provisions relating to appeals and reviews that the terms of a decree could be varied. Order XXIII, rule 4, also makes it clear that compromises after decree cannot be recorded and cannot form the foundations of orders affecting the rights of parties under the decree. The argument of of Mr. Seshachariar (the appellant's learned Vakil), that the terms of section 47 of the Code of Civil Procedure give jurisdiction to executing Courts to inquire into the terms of agreements varying the stipulations in a decree, ignores the consideration that enquiries in a suit or in execution proceedings should be confined to matters the decision with reference to which matters could be taken advantage of by the parties in the proceedings in the suit or execution itself.

As regards the case in *Sham Lal* v. *Hazari Mal* (3) while the decision on the findings of fact in that case seems to be correct, I dissent with great respect from the observations as to the scope of Order XXI, rule 2, found in the judgment of Coxe, J., in that case. I, therefore, concur in the conclusions of Bakewell, J., and would dismiss the appeal with costs.

NAPIER, J.—I concur.

Appeal dismissed.

(1) 8 M. 277.

(2) 24 M. 1 (P. C.); 4 C. W. N. 725; 27 I. A. 197

(3) 13 Ind. Cas. 326 15 C. L. J. 451.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 231 OF 1914.

January 15, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

T. V. RAJA RAM RAO—PLAINTIFF—PETITIONER

versus

ARUMUGAM KARUPUTTI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Amendment—Application to amend decree pending an appeal—Petition directed to be posted at hearing of appeal—Appeal disposed of—Application not disposed of at time of judgment—Power of Court to deal with petition after delivery of judgment

PERUMA GOWNDAN v. RAMA GOWNDAN.

On an application made for amendment of the schedule to a decree, the Subordinate Judge, before whom an appeal therefrom was pending, directed that the application should be heard with the appeal. At the time of the disposal of the appeal it was not brought to his notice. Before a second appeal was preferred against his judgment he was asked to dispose of the petition but he refused to do so on the ground that he had no power to dispose of the petition:

Held, that he had jurisdiction to dispose of the petition notwithstanding he had delivered the judgment in the appeal.

Brijratan v. *Jaynarain*, 7 Ind. Cas. 876; 37 C. 649; *Barhamdeo Singh* v. *Harmanoge Singh*, 26 Ind. Cas. 946; 18 C. W. N. 772, referred to.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Tanjore in Interlocutory Appeal No. 1273 of 1912 in Appeal Suit No. 26 of 1912, preferred against the decree of the Court of the District Munsif of Tanjore in Original Suit No. 210 of 1910.

Mr. *T. R. Venkatarama Sastri*, for the Petitioner.

Mr. *N. Swaminatha Aiyar*, for the Respondents.

JUDGMENT.—The petition for the amendment of the decree schedule was pending before the Subordinate Judge when he disposed of the appeal. I find that he passed an order that the petition should be heard along with the appeal: apparently the Pleader for the respondent did not bring it to the notice of the Subordinate Judge at the time of delivering the judgment in the appeal that the petition was still undisposed of. No second appeal was preferred against the judgment at the time that the Subordinate Judge was asked to dispose of the petition. Under these circumstances, I cannot agree with the Subordinate Judge in holding that he had no power to deal with the question. In *Brijratan* v. *Jaynarain* (1) it was held that such power did remain in the lower Court even after judgment. In *Barhamdeo Singh* v. *Harmanoge Singh* (2) it was held that the pendency of an appeal before the Privy Council did not deprive the High Court of jurisdiction to amend the decree. In the present case a second appeal was preferred while the petition for amendment was pending, but was rejected. Having regard to the language of section 151 and to the decisions referred to by me, I am of opinion that the Subordinate Judge has jurisdiction to dispose of the petition, notwithstanding that he had delivered judgment in the appeal. The order must be set aside and the petition should be remanded for disposal on the merits. Costs will abide the result.

Order set aside.

(1) 7 Ind. Cas. 876; 37 C. 649.
(2) 26 Ind Cas. 946; 18 C. W. N. 772.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1572 OF 1913.

December 7, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

PERUMA GOWNDAN—DEFENDANT No. 1—APPELLANT

versus

RAMA GOWNDAN AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 2 AND 3—RESPONDENTS.

Limitation, plea of, whether can be raised in second appeal—Admissibility of document not proved—Court justified in refusing to consider it.

A plea of limitation can be allowed to be raised in second appeal only if it is certain that its legitimacy can be determined on the pleadings and that it depends on no possible question of facts regarding which the party adversely affected might have adduced evidence. [p. 379, col. 1.]

Doraisami v. *Nondisami Saluvan*, 21 Ind. Cas. 410; 14 M. L. T. 401; 25 M. L. J. 405, followed.

A Court is justified in refusing to consider a document when there is neither evidence on the record to justify its admission nor is any application made to take fresh evidence as to its admissibility. [p. 379, cols. 1 & 2.]

Second appeal against the decree of the District Court of Coimbatore in Appeal Suit No. 212 of 1912, preferred against that of the Court of the District Munsif of Erode in Original Suit 1360 of 1911.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Respondents.

This second appeal coming on for hearing on 1st April 1914, the Court delivered the following

JUDGMENT.—The appellant's first contention is one of limitation. This plea was not taken in either of the lower Courts or even in the original second

appeal petition ; but only in a memorandum of supplementary grounds of appeal. In such circumstances we should only allow it to be raised, if we are certain that its legitimacy can be determined on the pleadings, and that it depends on no possible question of fact regarding which the party adversely affected might have adduced evidence. The appellant relies on the recent Full Bench ruling in *Doraisami* v. *Nondisami Saluvan* (1) and contends that as it is clear from the plaint that the plaintiff's elder brother (3rd defendant) attained majority more than three years before the institution of the suit, section 7 of the Indian Limitation Act will apply and the plaintiff's suit will be time-barred. There is no allegation in the pleadings that the 3rd defendant was the managing member of the family and as such in a position to give a discharge on behalf of the plaintiff ; and the 1st respondent's Vakil does not admit so much. The appellant points out that in the Full Bench case the status of managing member appears to have been inferred from the relationship ; but under the special circumstances of this case and in view of the danger of the plaintiff's being prejudiced by a technical plea raised at so late a stage we are not disposed to proceed on such an assumption here. Moreover the plaint specifically alleges that the 3rd defendant had been colluding with the 1st defendant and this is also a matter which might have to be taken into consideration in determining the applicability of section 7 of the Indian Limitation Act. After careful consideration, we do not think we should be justified in allowing the plea of limitation and we, therefore, disallow it.

It is next argued that the finding of the District Judge on the 1st issue is vitiated by his refusal to consider Exhibit V. A reference to the evidence shows that the evidence on record was not sufficient to justify the admission of this document ; on the other hand the 1st respondent does not seem to have objected to its admissibility in the District Munsif's Court. The objection was, however, specifically put forward by the 1st respondent in his appeal petition to the District Court, and it does not appear that any application was made to the District Judge to take fresh evidence as to its admissibility. We cannot say that in these circumstances the District Judge's refusal to consider it was illegal [*vide* also *Kanto Prashad Hazari* v. *Jagat Chandra Dutta* (2) and section 165 of the Indian Evidence Act] ; and we refuse to interfere with his finding.

* * * * *

Appeal dismissed.

(1) 21 Ind. Cas. 410; 25 M. L. J. 405; 14 M. L. T. 401.

(2) 23 C. 335.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 42 OF 1914.

February 2, 1915.

Present:—Mr. Stuart, A. J. C.

Thakur GAYA BAKHSH SINGH—DECREE-HOLDER—APPELLANT

versus

TILAK SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Pre-emption—Appeal from order passed on application for payment of pre-emptive money—Civil Procedure Code (Act V of 1908), s. 47, O. XXII, r. 14 (1) —Deposit of pre-emptive money after fixed period, when good—Court's error, effect of.

An order passed on an application for payment of pre-emptive money in compliance with a decree under Order XXII, r. 14 (1), Civil Procedure Code, is not appealable under section 47, Civil Procedure Code, but can be set aside in revision. [p. 380, cols. 1 & 2.]

Ganga Dhar v. *Anrudh Singh*, 11 O. C. 144 referred to.

Where an application for payment of pre-emptive money was made on the last day of the period fixed by the Court, and the Court permitted the money to be accepted, but the money could not owing to the laxity of the Court be deposited until after the expiry of the fixed period:

Held, that the deposit of the money was good, as the applicant could not be prejudiced by an error of the Court. [p. 380, col. 2.]

Appeal from the decree of the Subordinate Judge, Unao, dated 3rd July 1914, upholding that of the Munsif, Safipur, date 24th January 1914.

Babu *Ishwari Prasad*, for the Appellant.

Babu *Basdeo Lal*, for the Respondents.

JUDGMENT.—A decree was passed in the Court of the Munsif of Safipur, District Unao, on the 17th June 1913, which directed possession over certain

RASUL MAHMED BEPARI *v.* ABUL FAZAL CHOWDHURI.

property to be delivered to *Thakur* Gaya Bakhsh Singh, if in exercise of a right of pre-emption he deposited Rs. 600 within two weeks of the date of the decree. On the 1st July 1913, the fourteenth day after the passing of the decree, *Thakur* Gaya Bakhsh Singh brought Rs. 600 to the Court of the Munsif and requested that the sum should be accepted. The Munsif permitted the sum to be accepted, but the formal tender was not made till the following day and the money was not received in the treasury till the 3rd July 1913. On the 4th July 1913 the other side refused to receive the money. The Munsif did not decide the question on its merits, but passed an order which shelved the dispute. His order ran:—"This application with the tender will remain on the file. The plaintiff can take back his deposit." *Thakur* Gaya Bakhsh Singh appealed against the order of the 4th July 1913 to the Court of the Subordinate Judge of Unao, who decided that no appeal lay against the order. He relied in support of his conclusion on the authority of the decision in *Ganga Dhar* v. *Anrudh Singh* (1). *Thakur* Gaya Bakhsh Singh did not apply to have the order of the 4th July set aside in revision. He apparently treated it as an order which was null and void and which could not prevent him obtaining possession of the property, and applied on the 17th of November 1913 for possession of the property in the execution department. He obtained possession. The other side then applied to be restored to possession, and on their application, the successor of the Munsif who had passed the original order decided on the 24th January 1914 that the parties were bound by the order of the 4th July 1913 and restored the other side to possession. *Thakur* Gaya Bakhsh Singh appealed to the Court of the Subordinate Judge, who by an order, dated the 3rd July 1914, upheld the order of the Munsif.

A second appeal has been preferred against this order and an application in revision has also been filed. I agree with the Courts below that the order of the 4th of July 1913 is binding on the parties until it is set aside, and that according to that order possession cannot be given to *Thakur* Gaya Bakhsh Singh. The Second Execution of Decree Appeal No. 42 of 1914, therefore, fails and is dismissed. The appellant will pay his own costs and those of the respondents, as he has in so far as those proceedings are concerned sought a wrong remedy. But on the merits I accept his application in revision. The order of the learned Munsif refusing to receive Rs. 600 passed on the 4th July 1913 is insupportable. *Thakur* Gaya Bakhsh Singh complied with the terms of the decree. He deposited the amount required in Court within the stipulated period. It was owing to the laxity of the Court that the money was not received at once and paid into the treasury, and *Thakur* Gaya Bakhsh Singh cannot be prejudiced by an error of the Court. I, therefore, in revision, set aside the order of the 4th July 1913, and direct that Rs. 600, which have been paid into Court and which, I am informed, are still in depsit, be retained for re-payment to the other side, and that possession of the property in question be delivered to *Thakur* Gaya Bakhsh Singh as soon as he applies for it. The opposite party will pay their own costs and those of *Thakur* Gaya Bakhsh Singh in revision.

Appeal dismissed;
Revision accepted.

(1) 11 O. C. 144.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 157 OF 1913.
December 8, 1914.
Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.
RASUL MAHMED BEPARI—PLAINTIFF—APPELLANT
versus
ABUL FAZAL CHOWDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 20 (7)—Proof of eleven years' possession before enhancement—Presumption.

Where possession of a land for eleven years prior to the date of enhancement of rent is proved, there is a presumption of possession for 12 years under sub-section (7) of section 20 of the Bengal Tenancy Act. [p. 381, cols. 1 & 2.]

Appeal against the decree of the District Judge of Rangpur, dated the 29th of August 1912, modifying that of the Munsif, first

Court, at Gaibandha, dated the 18th of December 1911.

Babu *D. N. Bagchi*, for the Appellant.

Babu *Bepin Behari Ghose* (Senior), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for rent. Plaintiff claimed rent at the rate of Rs. 44-14-0. The defence was that the rent payable was Rs. 32-4-0. It appears that the rent was enhanced in 1892 from Rs. 32-4-0 to Rs. 39-14-0 and subsequently to Rs. 44-14-0. The lower Appellate Court has held that the plaintiff cannot recover rent at the rate of Rs. 44-14-0, but has decreed rent at the rate of Rs. 39-12-0.

It appears that the *jama* of Rs. 32-4-0 consisted of several smaller *jamas*. One of them bore a rental of Rs. 17-8-0 and was held under a *kabuliat*, dated *Chait* 1288. That *jama* together with four others were consolidated into one *jama* of Rs. 32-4-0 and the rent was enhanced in 1299 to Rs. 39-12-0.

The enhancement was more than two annas in the rupee and if the defendant was an occupancy *raiyat*, the enhancement was void under the provisions of section 29 of the Bengal Tenancy Act. The *kabuliat* was executed in the year 1288, and that enhancement having been effected in 1299 the defendant could not have held the land for 12 years. It is stated in the *kabuliat* that the defendant was in occupation of the holding bearing a rental of Rs. 17-8-0 from before the date of the *kabuliat*. The learned Judge has found "there is nothing on the record to show that the period of his occupation of the land was 12 years before the *jama* was enhanced in the year 1299 from Rs. 32-4-0 to Rs. 39-14-0." It is contended on behalf of the appellant that, in arriving at this finding, the learned Judge has laid the onus of proof upon the defendant, ignoring the povisions of sub-section 7 of section 20 of the Bengal Tenancy Act. We think that this contention must prevail. It is no doubt true that the question to be decided is not whether the defendant is now in possession of the land for 12 years, but whether at the date of enhancement, namely, in 1892, he was in possession for over 12 years. The defendant's possession of the land for 11 years prior to the date of enhancement is found to be proved by the learned Judge. Under sub-section (7) of section 20 of the Bengal Tenancy Act, therefore, there was a presumption that the defendant had held the land for 12 years. This presumption was apparently lost sight of by the learned Judge.

The case must accordingly go back to the lower Appellate Court so that that Court may take the presumption into consideration and then come to a finding whether the defendant had been in possession of the land for 12 years prior to 1299, the date of enhancement. It will be open to both the parties to adduce evidence on the point.

Another question has been raised and that is this. Even if the defendant was not a settled *raiyat* and was merely a non-occupancy *raiyat* at the date of enhancement, it has not been found by the lower Appellate Court that rent was paid at the rate of Rs. 39-12-0 for a continuous period of not less than three years immediately preceding the period for which rent was claimed. The Court of first instance says:—"The collection papers proved by the plaintiff in this case no doubt show that defendant subsequently paid rent at the increased rates of Rs. 39-14-0 and Rs. 44-14-0, though this is denied by the defendant." The learned Judge has not come to any finding, and he should come to a finding upon the point, if the first question is decided against the defendant.

The decree of the lower Appellate Court is set aside and the case remanded to that Court to be dealt with and disposed of in accordance with the above observations. Costs will abide the result.

Case remanded.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 828 OF 1914.

February 17, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

IBRAHIMJI—DECREE-HOLDER—APPELLANT

versus

HASANUDDIN KHAN—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution—Step-in-aid of execution—Date of application or date on which Court takes step - Time from which limitation runs—Agreement not to arrest judgment-debtor validity of—Agreement, whether stops running of time

IBRAHIMJI v. HASANUDDIN KHAN.

Under Article 182 (5) of the Limitation Act, the period of limitation begins to run from the date on which application is made to take a step-in-aid of execution and not from the date on which the Court actually takes the step. [p. 383, col. 1.]

A judgment-debtor applied to be declared an insolvent. In the course of the proceedings the Pleader for the decree-holder, who was one of the creditors, stated that if the judgment-debtor would withdraw his application in insolvency he would guarantee not to apply for his arrest in execution of his decree for a period of two years. To this the judgment-debtor consented and the application was struck off. A warrant of arrest was, however, issued by the Court, but was returned unserved as the necessary diet money was not paid:

Held, that the agreement could not save the period of limitation from running against the judgment-debtor, inasmuch as the decree-holder did not abide by the agreement and neither there was any order suspending the execution or injunction nor did the agreement prevent the decree-holder from applying for execution. [p. 383, cols. 1 & 2.]

Execution second appeal from the decision of the District Judge of Shahjahanpur, dated the 6th March 1904.

FACTS.—The appellant obtained a decree on the 30th of November 1908. He applied for execution of the decree on the 17th of February 1909 and again on the 11th of March 1910. The prayer in the latter application was for the arrest of the judgment-debtor. On this, the judgment-debtor applied to the District Judge for being declared an insolvent. During the insolvency proceedings the decree-holder's Pleader stated that if the judgment-debtor would withdraw his application, he would not apply for two years for his arrest in execution of his decree. The judgment-debtor consented to this and the insolvency petition was struck off. The decree-holder applied for execution of the decree on May 3rd, 1913, and the judgment-debtor resisted execution on the plea that it was barred by time. The first two Courts dismissed the application and the decree-holder appealed to the High Court

Mr. *Agha Haider*, for the Appellant:—The present application should be deemed to be in continuation of the application of the 11th of March 1910. Moreover, in the Insolvency Court both the decree-holder and the judgment-debtor consented not to do anything in execution of the decree for two years and this mutual agreement is binding on the judgment-debtor. The agreement was made on the 14th of May 1910 and the decree could not be executed up to the 14th of May 1912. This time would thus be excluded and an application would then be clearly within time.

The application of the 11th of March 1910 was not finally disposed of, but remained suspended on account of the insolvency proceedings.

On the 18th of May 1910, the Munsif passed an order for the arrest of the judgment-debtor and the present application is within three years of that order and under Article 182, clause (5), of the first Schedule to the Limitation Act time should be reckoned from that date.

Mr. *Iqbal Ahmed*, for the Respondents, was not called upon.

JUDGMENT.—The decree in the present case was obtained on November 30th, 1908. The first application for execution was made on February, 17th 1909. It was dismissed for default of prosecution. On March 11th, 1910, a second application was made by the decree-holder for execution by arrest of the judgment-debtor. Thereupon the judgment-debtor applied to the District Judge to be declared an insolvent. In the course of the insolvency proceedings on May 14th, 1910, the Pleader for the decree-holder, who was one of the creditors, stated that if the judgment-debtor would withdraw his application in insolvency he would guarantee not to apply for his arrest in execution of his decree for a period of two years. To this the judgment-debtor consented and the District Judge struck off the application for insolvency. This was on May 14th, 1910. The execution application of March 11th, 1910, was still pending and on May 18th, 1910, the decree-holder's Pleader again attended Court and the Munsif directed that a warrant of arrest should issue. It is clear that a warrant of arrest was issued, but that it was returned unexecuted by the Nazir because the decree-holder failed to pay the necessary diet money. It will be noted also that the decree-holder's Pleader on this date called the attention of the Court to the fact that the necessary fees for the arrest of the judgment-debtor were in deposit in Court. The present application for execution was made on May 3rd, 1913. It has been held by the Courts below to be out of time and the

decree-holder comes here in second appeal. The first plea raised is that the application of March 11th, 1910, is still pending and that this is merely a continuation of those proceedings. This in view of the order of the Munsif, dated June 2nd, 1910, striking off the application by reason of the decree-holder's default of payment of the necessary diet money and of the contents of the present application itself, can have no force whatsoever. The present application is an application for execution. It is not an application tendering diet money and asking the Court to go on with the former proceeding.

The next plea raised is that the present application is within three years of May 13th, 1910, the date on which the Munsif directed the issue of a warrant of arrest. It is urged somewhat lamely that the decree-holder's Pleader must on that day have orally asked the Court to issue a warrant of arrest and, therefore, an oral application must have been made to take a step-in-aid of execution. There is no evidence on the record at all to prove that any such oral application was made and we cannot presume it.

It is next sought to persuade us to hold that the meaning of Article 182, clause 5, of the Schedule to the Limitation Act is that the time from which the period begins to run is not the date of the application to the Court to take a step-in-aid of execution, but the date on which the Court actually takes the step. We fail to see that this clause means anything else but what the plain language thereof shows it to mean. The wording is, "where the application next hereinafter mentioned has been made, the date of applying etc., etc." Lastly it is said that by reason of the agreement of May 14th, 1910, the decree-holder is entitled to credit for the two years following that date. In the first place the decree-holder did not abide by that agreement, for on the 18th of May the Court issued a warrant of arrest. Moreover section 15 of the Limitation Act does not apply, for there was no order for suspension nor was there any injunction; there was no reason why the decree should not have been executed in any other manner than by the arrest of the judgment-debtor; and lastly that agreement did not prevent the decree-holder from applying within the period of limitation for execution. In our opinion the orders of the Courts below are perfectly correct. There is no force in this appeal. It is, therefore, dismissed with costs, including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1313 OF 1912.

January 14, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

CHULHAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MADHO SINGH AND OTHERS—DEFENDANTS RESPONDENTS.

Bengal Land Registration Act (VII of 1876), s. 78—Suit dismissed for non-production of succession certificate—Appeal—Succession — Certificate, filing of, in appeal—Usufructuary mortgage and lease with premium, distinction between.

Where a suit failed by reason of the non-production of the succession certificate in the Court of first instance, the succession certificate may be obtained and filed in the Appellate Court on the appellant paying the cost of the previous proceeding. [p. 384, col. 1.]

The term "*zurpeshgidars*" is an ambiguous one. Where it is found that no interest is chargeable and that a premium merely was paid at the inception of the lease in law, it may be considered a lease with premium and not a usufructuary mortgage. [p. 384, col. 1.]

Appeal against the decree of the District Judge of Gaya, dated the 15th of March 1912, affirming that of the Munsif of Aurangabad, dated 11th of September 1911.

Babu *Chandra Sekhar Prosad Singh*, for the Appellants.

Babu *Kulwant Sahay*, for the Respondents.

JUDGMENT.—This second appeal arises out of a rent suit, which has been dismissed on the ground that the plaintiffs, being usufructuary mortgagees of the share for which the rent is claimed, have not registered their names under section 78 of Act VII of 1876. The suit was dismissed by the Munsif, *firstly*, on the finding that the plaintiffs are mortgagees and not *thekadars* and *secondly*, that before the Munsif they had not obtained registration of their names under section 78 of Act VII of 1876. Pending the appeal to the District Judge they got

their names registered and on the authority of numerous cases of this Court with respect to such proceedings, of which the one most in point is the unreported case Second Appeal No. 137 of 1911, where it was held that where a suit failed by reason of the non-production of the succession certificate in the Court of first instance, the succession certificate might be obtained and filed in the Appellate Court on the appellant paying the cost of the previous proceeding. We think that this principle might fairly be applied in this case, and we are of opinion that the decree which is to be made should be drawn by the Munsif in the first Court on the basis of his findings as to the area under paddy and *rabi* and the area which is *nagdi* and *bhowli* respectively and as to the kinds and quantities of crops produced and the selling rates. The defendants will then have a right of appeal upon the plea of payment and the selling rates which have been found in favour of the plaintiffs.

We also think that the finding of the learned Judge in the Court below as regards the plaintiffs being mortgagees is not sufficient. He says they are *zurpeshgidars*. That term is quite ambiguous. On the finding of the Munsif it is extremely doubtful as a question of law whether they are mortgagees. The findings that no interest was chargeable and that a premium merely was paid at the inception of the lease, go far to show that in law it might be considered a lease with premium and not a usufructuary mortgage. This is a question on which the plaintiffs will have a further right of appeal to the learned Judge as well as on other points not dealt with by him in this appeal.

The judgment and decree of both the lower Courts are set aside and the Munsif will be directed to draw up a decree in favour of the plaintiffs in accordance with his findings, it being admitted that no portion of the claim was barred on the day when the land registration was really taken.

As regards costs the plaintiffs will have to pay the defendants the costs in the Munsif's Court of the first hearing and the plaintiffs will get no costs in either Court in appeal.

Decree set aside.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 31 OF 1914.

February 17, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

THE GANGES SUGAR WORKS LTD.,—PLAINTIFF—APPELLANT

versus

NURI MIAH—DEFENDANT—RESPONDENT.

Companies Act (VII of 1913), s. 96—Agreement to refer all disputes between parties to arbitration—Contract not under seal of Company, legality of.

A contract to refer to arbitration any dispute which might arise between a Company and an individual is not illegal because it is not under the seal of the Company. [p. 385, col. 1.]

First appeal from the decision of the Subordinate Judge of Cawnpore, dated December 22nd, 1913.

Mr. *Wallach*, for the Appellant.

Mr. *S. C. Banerji*, for the Respondent.

JUDGMENT.—The facts connected with the case out of which this appeal arises are shortly as follow. The plaintiff Company entered into a contract with the defendant in connection with the working of a certain portion of the Company's property or business. One clause of this contract was that in the event of disputes or differences arising, they should be referred to the arbitration of a gentleman named Hazari Lal, and that his decision should be binding and conclusive between the parties. This contract was not under seal. Disputes having arisen the Company made an application under Schedule II, rule 17, of the Code of Civil Procedure to file the contract as a submission to arbitration in order that the matter should be settled in accordance with the provisions of the Code. This application was refused by the Court below on the sole ground that the contract which contained the submission to arbitration was not under the seal of the Company. At present we have nothing to do with the merits of the dispute between the parties. We have only to decide whether or not the Court below was wrong in refusing the application on the ground mentioned above. Section 67 of the Indian Companies Act, VI of 1882, (which was in force at the time), provides for the manner in which contracts can be entered into by Companies. It is admitted by both sides that the present contract, save the particular clause which refers to

arbitration), was a contract which the Company was entitled to enter into without its being under seal. It it quite clear that if section 67 stood alone, the contract to refer to arbitration also did not require to be under seal. It is contended, however, that it necessarily follows from the provisions contained in section 96 and the subsequent sections down to section 123 that an agreement to refer disputes to arbitration by a Company to be legal must necessarily be under seal. Section 96* is as follows : "Any Company under this Act may from time to time, by writing under its common seal, agree to refer, and may refer, to arbitration any matter whatsoever in dispute between itself and any other Company or person ; and the Companies, parties to the arbitration, may delegate to the person or persons, to whom the reference is made, power to settle any terms or to determine any matter capable of being lawfully settled or determined by the Companies themselves, or by the Directors or other managing body of such Companies".

This section (96) is largely taken from the English Companies Act (25 and 26 Victoria, Chapter 89), section 72* of which is as follows : "Any Company under this Act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with the Railway Companies Arbitration Act, 1859, any existing or future difference, question or other matter whatsoever in dispute between itself and any other Company or person, and the Companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the Companies themselves or by the Directors or other managing body of such Companies".

Section 73* is as follows : "All the provisions of the Railway Companies Arbitration Act, 1859, shall be deemed to apply to arbitrations between Companies and persons in pursuance of this Act ; and in the construction of such provisions the Companies shall be deemed to include Companies authorised by this Act to refer disputes to arbitration".

The Railway Companies Arbitration Act, 1859, was an Act providing for the settlement of disputes between Railway Companies *inter se* It contains more or less elaborate provisions for the manner in which such arbitrations should be carried out. The provisions, to which we have referred, of the English Companies Act incorporated these provisions and made them applicable not only to disputes between different Companies, but also to disputes between a Company and *an individual*. It was evidently the intention of the Indian Legislature to do much the same thing by the Indian Companies Act of 1882. Sections 97-122 are for the most part adaptations of the Railway Companies Arbitration Act to which we have already referred. It was neg'ected, however, to expressly make these sections applicable to disputes between Companies and individuals. It seems as if there was an example of clumsy drafting, but the matter is no longer of any very great importance because under the present Indian Companies Act, VII of 1913, provision is made for Companies entering into arbitration in accordance with the Indian Arbitration Act. It seems to us that the question resolves itself into the proposition, do the provisions of section 96 necessarily imply that a Company cannot, save under seal, enter into a contract to refer, a contract which but for the provisions of the section it could have entered into, namely, to submit its possible future disputes to the arbitration of a named arbitrator? It seems to us that there is no such necessary implication. The words are that "the Company *may* from time to time" etc. It was probably the intention of the Legislature when providing for the method in which a particular arbitration should be carried out to give the parties the option of having the arbitration in accordance with the Act, if they thought fit. It is, however, unnecessary now to speculate as to what was the real intention from the change that has been made in the law; the provisions of the Act of 1882 evidently were found to be inapplicable to the conditions of this country. We think that the contract in the present case

* See section 119 of the Companies (Consolidation) Act, 1908.—*Ed.*

to refer to arbitration any future disputes which might arise between the Company and the defendant was not an illegal contract but a contract which can be given effect to in the ordinary way. It is quite clear that section 123 only applies to submissions to arbitration which have been made in accordance with the provisions of the Act.

We accordingly allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it upon its original number in the file and to proceed to hear and determine the same according to law, having regard to what we have said above. Costs here and heretofore will be costs in the cause and will include fees on the higher scale. The record may be sent down so that the Court below may dispose of the case as soon as possible.

Appeal allowed; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2564 OF 1913.

December 1, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

MULLA VEETTIL SEETHIKUTTI—DEFENDANT No. 1—APPELLANT

versus

K. KUNHI KOYAMUTTI NAHA AND OTHERS—PLAINTIFF No. 2 AND DEFENDANTS Nos. 2 TO 7—RESPONDENTS.

Mortgage, suit on—Auction-purchaser of the rights of mortgagor party to suit—Original mortgagor, whether necessary party—Marshalling—Property not mortgaged—Mortgagee, whether compelled to realise his mortgage money from such property first.

A puisne encumbrancer cannot, on the principle of marshalling, compel a prior encumbrancer to proceed against properties not mortgaged to the former, when the latter could not, by the conduct of the puisne encumbrancer himself, include it in the suit and obtain an order for sale as against it.

Where an auction-purchaser of the rights of an original mortgagor effectively represents him in a mortgage suit and when the opposite party cannot show how his interest can be affected by the absence of the original mortgagor from the suit, the original mortgagor is not a necessary party to the suit.

Mulla Veetil Seethi v. *Achuthan Nair*, 9 Ind. Cas. 513; 21 M. L. J. 213, 9 M. L. T. 431; (1910) 1 M. W. N. 105, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 49 of 1913, preferred against that of the Court of the District Munsif of Parappanangadi in Original Suit No. 111 of 1906.

FACTS of the case appear from 9 Ind. Cas. 513.

Mr. *K. P. M. Menon*, for the Appellant.

Mr. *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The appeal is argued, *first* on the ground that the original mortgagor should have been made a party to the litigation, and that the decision under appeal is vitiated by his absence. The positions of plaintiff and the original mortgagor were clearly laid down by the High Court in an earlier stage of this case in *Mulla Veetil Seethi* v. *Achuthan Nair* (1), with the result that we must treat 2nd plaintiff, the auction-purchaser of the rights of the mortgagor, as his representative and successor-in-interest for the present purpose. The 1st defendant has not in fact shown how his interests can be prejudiced by this course. We do not hold that the original mortgagor is a necessary party.

Next, it is urged that the 1st defendant should have been allowed the benefit of marshalling; that is, that the 2nd plaintiff should have been compelled to recover the amount of his first mortgage primarily from a third item of property, Etoorathil Paramba, and to resort to the two items actually in suit only after the proceeds of that third item have proved insufficient. It is fatal to this claim that the third item, not being the subject of the suit, cannot be sold under any decree in it and that it is not the subject of the suit owing to the 1st defendant's own objection to its inclusion in it, which was allowed when plaintiffs sought to include it in connection with the amendment permitted by the High Court. The 1st defendant has not shown any valid reason for exempting him from this consequence of the success of his own objection. His claim to marshalling, therefore, cannot be allowed.

(1) 9 Ind. Cas. 513; 21 M. L. J. 213; 9 M. L. T. 431; (1910) 1 M. W. N. 105.

The second appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 731 OF 1914.

January 27, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MOHAMMAD AHMAD SAID KHAN—DEFENDANT—APPELLANT

versus

MASIH-UL-LAH KHAN—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 43—Judgment not inter partes, *when admissible.*

Z was in possession as mortgagee of a six-annas share belonging to *R* in a certain village. During the continuance of the mortgage *Z* executed a lease of the property in favour of *A*. Subsequently *R* executed a simple mortgage in favour of *A* and covenanted that the usufructuary mortgage in favour of *Z* should be paid out of its consideration. This was done and the mortgage in favour of *Z* was redeemed. Nevertheless *A*'s name continued to be recorded as lessee in respect of the property. On the strength of the entry in the papers, *A* brought a suit for profits against *M*, the *lambardar*, and obtained a decree. *M* thereupon sued *A* for a declaration that the mortgage of *Z* having been redeemed, *A* was not entitled to the decree for profits and that the entry of his name as lessee was erroneous. *A* defended the suit on the ground that by an arrangement between him and *R*, he was left in possession of the propery as lessee for the remaining period of the lease and that he had been made to account to *R* in a suit between them on the simple mortgage for the very year for which he had obtained the decree for profits against *M*. He produced the judgment between himself and *R* to prove his allegation:

Held, that the judgment produced by *A* was admissible in evidence under section 43 of the Evidence Act. [p. 388, col. 2.]

Second appeal from the decree of the District Judge of Aligarh reversing that of the Assistant Judge of that plce.

Mr. *Iqbal Ahmed*, (with him Mr. *Moti Lal Nehru*), for the Appellant.

Dr. *S. M. Sulaiman*, (with him Mr. *B. E. O'Conor*), for the Respondent.

JUDGMENT.—These are two connected second appeals arising out of the same series of transactions. They may be disposed of by a single judgment, the facts in both cases being substantially the same. The respondent, Mohammad Masih-ul-lah Khan, who is the plaintiff in both suits, is the *lambardar* of a certain *mahal*. In that *mahal* there was a share of six annas belonging to one Rafaat Khan and a share of two annas belonging to *Musammat* Zohra Begam. At one time Zohra Begam was also in possession as sub-mortgagee of the six-annas share belonging to Rafaat Khan. While thus in possession she leased out to the defendant-appellant, Ahmad Said Khan, the right to receive the profits of the entire share of eight annas, that is to say, of her own share of two annas *plus* Rafaat Khan's share of six annas. Subsequently Rafaat Khan executed a simple mortgage of his own six annas share to Ahmad Said Khan aforesaid, making it part of the covenant, that the existing usufructuary mortgage should be redeemed out of the consideration for the said simple mortgage. This was done, and in consequence of this redemption the rights of Zohra Begam over Rafaat Khan's six-annas share terminated. Nevertheless Ahmad Said Khan continued to be recorded as lessee in possession of the entire eight-annas share. He brought suits for profits in the rent Court on the strength of this entry, and the matter was litigated up to this Court, terminating in a decision which will be found reported as *Ahmad Said Khan* v. *Masi-ullah Khan* (1). This Court held that, inasmuch as the Revenue Records showed Ahmad Said Khan to be the person entitled to receive the profits claimed by him during the years in suit, a decree must be passed in his favour. The suits now before us are brought in consequence of this decree. Muhammad Masih-ul-lah Khan claims that he is in a position to prove that the entries in the papers which showed Ahmad Said Khan as lessee of the six-annas share belonging to Rafaat Khan, were incorrect. He seeks relief by way of a declaration to this effect, a further declaration that Ahmad Said Khan was not entitled to receive the profits decreed in his favour by the Rent Court, and also that the decrees obtained by Ahmad Said Khan are incapable of execution. With regard to the form of the reliefs claimed, it is perhaps open to argument that the last relief sought should rather have been a perpetual injunction restraining Ahmad Said Khan from executing those decrees, but this is a matter of form rather than of substance, and in the view we take of the

(1) 13 Ind. Cas. 975; 9 A. L. J. 152; 34 A. 250.

MOHAMMAD AHMAD SAID KHAN v. MASIH-UL-LAH KHAN.

case as a whole it is not necessary for us to go into it. The Court of first instance dismissed the claim on various grounds, but it has been decreed by the learned District Judge in appeal. Coming to this Court in second appeal Ahmad Said Khan principally contends that the decision of the learned District Judge has been arrived at by excluding important evidence tendered by him as defendant, and practically by preventing him from establishing the defence which he set up on the merits. When the usufructuary mortgage on Rafaat Khan's six-annas share was redeemed, the right of Ahmad Said Khan to continue in possession as a lessee undoubtedly terminated, but it was for the proprietor, that is to say, for Rafaat Khan, to take whatever steps were necessary in order to enforce his right to possession over his own share. Now the case for Ahmad Said Khan is that, so far from doing this, Rafaat Khan entered into an arrangement with him by which he was allowed to continue in possession as lessee for the unexpired portion of his lease, on condition that whatever sums he received from the *lambardar* on account of the profits of his share should be credited towards payment of the money due to him from Rafaat Khan on the simlpe mortgage. This is a defence which it was clearly open to Ahmad Said Khan to set up, and it appears to us that the learned District Judge has misconceived the nature of the defence and has excluded the evidence by which that defence is fairly proved.

We find that there has been a litigation between Rafaat Khan and Ahmad Said Khan in respect of the simple mortgage, which litigation terminated in a judgment and decree of this Court dated May 24th 1911. The result of that litigation was that Ahmad Said Khan was held to have been in possession and enjoyment of the profits of this six, annas share during the years in question in the present suit, and was made to account for the profits of the share to Rafaat Khan, that is to say, in the decree which was given to Ahmad Said Khan on his mortgage as against Rafaat Khan these profits were credited in part payment of the mortgage-debt. The judgment in question was not a judgment *inter partes* so far as the present suit is concerned and, therefore, the District Judge thought that it was altogether inadmissible. Now under section 43 of the Indian Evidence Act a judgment not *inter partes* may be admissible if its existence is otherwise a fact in issue or a relevant fact under some other provision of the Indian Evidence Act. In the present case Ahmad Said Khan's whole defence was tha the was left in possession as lessee by the only person who had a right to eject him, and further that he was made to account to that person for the very profits decreed in his favour by the Revenue Court in the decrees which it was the object of the present suit to set aside. The judgment in the suit between Ahmad Said Khan himself and Rafaat Khan was just as much relevant for the purpose of proving these facts as would have been a receipt in favour of Ahmad Said Khan signed by Rafaat Khan. It was positive evidence of the most conclusive kind that Ahmad Said Khan did actually pay those profits to Rafaat Khan. It seems to us on these grounds that the finding of the learned District Judge cannot be sustained, and that the Court of first instance was right in dismissing these suits.

It has been contended before us that, as a matter of fact, if further enquiries were made into the question in issue, it would be found that Masih-ul-lah Khan as *lambardar* has actually paid these profits, or some portion of them, to Rafaat Khan direct. This argument is sought to be based on certain passages in the judgment of the lower Courts in the litigation between Ahmad Said Khan and Masih-ul-lah Khan, which terminated in this Court's decree awarding Ahmad Said Khan the profits claimed by him. There is, however, on the record of this present suit no evidence whatever to show that Masih-ul-lah Khan really paid Rafaat Khan any profits on account of the years now in question. It seems to us highly improbable that he did so. According to the Revenue Records the person entitled to these profits was Ahmad Said Khan, and we should require cogent evidence to convince us that while the record stood thus, the *lambardar* went out of his way to pay the profits to Rafaat Khan. In any case if there has been dishonesty on the part of Rafaat Khan in recovering these profits, or some portion thereof, twice over, that is

to say, once from the *lambardar* direct and again from Ahmad Said Khan, that is a matter which may be put right by a further litigation to which Rafaat Khan would be a necessary party. We are, therefore, of opinion that these appeals must prevail. We set aside the decree of the lower Appellate Court in each case and restore that of the Court of first instance. The plaintiff must pay the defendant's costs in all Courts.

Appeal allowed.

S. N. DAR, B. A. LL. B.
Vakil High Court
SRINAGAR (Kashmir)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 256 OF 1913.

December 8, 1914.

Present:—Mr. Justice Spencer and Mr. Justice Tyabji.

THIRUVATIYIL VATTATH KUNCHU MENON—DEFENDANT No. 1—APPELLANT

versus

VISHNU BARATHIKAL *alias* PAKARAVUR SWAMIAR AVERGAL—PLAINTIFF—RESPONDENT.

Malabar Compensation for Tenants' Improvements Act (I of 1900), ss. 3 (3), 4, 9, 10, 19—*Increase in net annual value of land, after mortgagee was let into possession—Presumption — Improvements — Compensation, when allowed.*

Where the net annual value of a mortgaged land has increased since the mortgagee came into possession, it may be inferred that it was due to such works or products of works as are referred to in sections 3 (3) and 4 of the Malabar Compensation for Tenants' Improvements Act, unless referable to some other causes. [p. 390, col. 1.]

To entitle a person to compensation for improvements under section 9 of the Malabar Compensation for Tenants' Improvements Act, he must show that either he or his predecessors-in-title effected the improvements. [p. 389, col. 2.]

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 944 of 1910, preferred against that of the Court of the District Munsif of Alathur, in Original Suit No. 187 of 1909.

Messrs. *J. L. Rosario* and *K. Govinda Marar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Respondent.

This second appeal and the respondent's memorandum of objections coming on for hearing on 23rd March 1914, the Court delivered the following

JUDGMENT.—The questions involved in this appeal arise out of the operation of section 9 of the Malabar Compensation for Tenants' Improvements Act, 1900.

The first point taken before us was that the District Judge has erred in assessing the amount of the compensation payable for the lands marked A to I series in the Commissioner's plan and that this error arose from his erroneous finding as to the genuineness of Exhibit XXIX. The Judge has considered all the reasons for and against the genuineness of Exhibit XXIX in paragraph 2 of his judgment and though all his reasons may not commend themselves to us we cannot reconsider his finding of fact, as we are unable to say that there were no grounds on which he could have come to the conclusion that Exhibit XXIX was not genuine. We consider ourselves bound by the finding that Exhibit XXIX was not genuine and cannot reconsider it.

Next it was argued for the appellant that the Judge has not approached the question of the valuation of the improvements on the said lands in the manner required by section 9 of the Malabar Compensation for Tenants' Improvements Act. We agree with this contention. Though the Judge has carefully considered the evidence, we see great difficulty in extracting any finding out of the learned Judge's consideration of this question in paragraph 2 of his judgment and must ask him to return findings on the following questions :—

(1) Whether the appellant or his predecessors-in-title have effected any improvements on the lands A to I series ?

(2) If the first question is answered in the affirmative, then what compensation is due to the appellant for the improvements effected by the appellant or his predecessors-in-title ?

We wish to draw the attention of the learned Judge to the terms of section 9. In doing so we desire to point out that in a case like the present, where the mortgagee has been in occupation since 1845, if it is shown that the value of the net annual produce of

the holding has in fact increased since the mortgagee came into possession, it may be inferred that the increase is owing to such works or products of works as are referred to in section 3 (3) and section 4 of the Act, unless it appears that the increase in the value of the produce is referrable to some other cause. The inference need not necessarily be drawn in every case, but there may be cases where it would not be proper to insist on the tenant proving definitely the exact time when the improvements were made.

The third point taken before us on behalf of the appellant was that there is no proper finding on the question, what compensation the appellant is entitled to receive in respect of the lands L and P series. This question is dealt with by the learned District Judge in paragraph 3 of his judgment. His finding might, it is true, have been more explicit and might have had more direct reference to the point actually arising for decison, *viz.*, what the present yield of the lands is. We are unable to say, however, that he has not found as a fact that the present produce of the land is the same as it was at the time of Exhibit XIV. We will, therefore, accept that finding.

There are cross-objections against the District Judge's decision. One of these refers to the compensation for the timber trees allowed under section 10 of the Act. It is argued that by the terms of Exhibit A the appellant is prevented from claiming any compensation and that Exhibit A is not precluded from having operation with reference to the timber trees by reason of section 19 of the Act, as section 19 refers to *making* improvements and it cannot be said that the improvement caused by the spontaneous growth of trees is *made* by the tenant. It is unnecessary to express any opinion as to the suggested construction of section 19, as we are of opinion that Exhibit A must be construed as offering no restriction to the right to claim compensation in respect of timber trees. The words of Exhibit A relied upon by the respondent, when they are read with the preceding portions of Exhibit A, seem to us to mean that the provisions about the compensation for improvements contained in Exhibit A shall not apply to trees. There is no agreement that trees shall not be compensated for at all.

Next it is contended that the compensation of 250 *fanams* referred to in paragraph 3 of the District Judge's judgment ought to be disallowed, as it refers to improvements on lands already fully compensated for by the decree. It is argued on the other hand that these 250 *fanams* were allowed in respect of improvements on items J and K in respect of which no other compensation is allowed. We are unable to say whether it is so and we will ask for a finding on the following question:—

(3) In respect of what lands is the compensation of 250 *fanams* referred to in the District Judge's judgment, paragraph 3, allowed?

The findings should be submitted within six weeks from the re-opening of the District Court after recess: ten days will be allowed for filing objections.

[In compliance with the order contained in the above judgment the District Judge of South Malabar submitted a negative finding on the first issue and on the third issue found that the compensation of 250 *fanams* is allowed for the lands A to I series.

This second appeal and the respondent's memorandum of objections coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following]

JUDGMENT.—We accept the findings and dismiss the second appeal and the memorandum of objections with costs. Time for redemption is extended to six months from this date.

Appeal and Memo. of objections dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 257 OF 1914.

February 8, 1915.

Present:—Mr. Justice Rafique.

KISHEN BALLABH—DEFENDANT—APPELLANT

versus

GHURE MAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881)—Hund

KISHEN BALLABH *v.* GHURE MAL.

—*Consideration—Plaintiff giving evidence for consideration—Presumption, whether arises.*

Under the Negotiable Instruments Act it must be presumed that when a *Hundi* was drawn some consideration did pass, unless rebutting evidence is given as to its failure. But if the plaintiff himself chose to give evidence at the first instance as to consideration which was disbelieved by the Court, no such presumption arises. [p. 392, col. 1.]

Second appeal from the decision of the Subordinate Judge of Muttra, reversing that of the Munsif of Mahaban.

Mr. *Kailas Nath Katju*, for Mr. *S. K. Dar*, for the Appellant.

Mr. *K. N. Laghate*, for Mr. *Benode Behari*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Ghure Mal, the plaintiff-respondent, for the recovery of Rs. 565-13-4 on the basis of a *hundi* dated August 23rd, 1910. It was alleged in the plaint that one Kanhaiya Lal had drawn the *hundi* in suit on a Bombay firm in favour of Kishen Ballabh and his son Baldeo for Rs. 500, who had sold it to the plaintiff for the same amount. The plaintiff presented the said *hundi* to the Bombay firm and it was dishonoured. Subsequent to the dishonour of the *hundi* by the Bombay firm the plaintiff called upon Kishen Ballabh and Baldeo to discharge it, who made promises from time to time but failed to pay the money due on it. Hence the plaintiff sued both father and son for the recovery of Rs. 500 principal and Rs. 65-15-4 interest at six per cent per annum. The claim was decreed *ex parte* on April 16th 1913, against Kishen Ballabh but was dismissed against Baldeo. On May 3rd, 1913, Kishen Ballabh applied to have the *ex parte* decree against him set aside and his application was allowed on May 24th, 1913. He denied the claim and pleaded that Kanhaiya Lal had not drawn the *hundi* in suit in his favour and that he, Kishen Ballabh, had not endorsed the *hundi* to the plaintiff and had received no consideration on it.

The learned Munsif of Mahaban, in whose Court the suit was filed, yielded to the pleas in defence. He held that it had not been proved that Kanhaiya Lal had drawn the *hundi* in suit or that Kishen Ballabh had endorsed it to the plaintiff or had received any consideration on it. The claim was accordingly dismissed. The plaintiff preferred an appeal which was disposed of by the learned Subordinate Judge of Muttra. The latter disagreed with the first Court as to the sale of the *hundi* in suit to the plaintiff by Kishen Ballabh. He held that the evidence before him proved the sale of the *hundi*. He agreed with the first Court that the plaintiff had failed to prove the passing of full consideration, but in his opinion some consideration did pass on it, probably Rs. 125, but could not say for certain how much. However, as under the Negotiable Instruments Act it must be presumed that the *hundi* in suit was transferred for consideration and no rebutting evidence was given by Kishen Ballabh as to the failure of part of the consideration, the claim of the plaintiff must prevail. The learned Subordinate Judge accordingly accepted the appeal and decreed the claim, Kishen Ballabh in his appeal to this Court challenges the decree against him on three grounds. He says that it has not been proved that Kanhaiya Lal drew the *hundi* in suit or that the appellant sold it to the plaintiff. Under the circumstances of the present case, as found by the lower Appellate Court, no presumption arises in favour of the passing of consideration. Moreover it was not necessary for the appellant to give evidence in rebuttal on the question of consideration, as the plaintiff had himself led the evidence on the point and it was disbelieved. In support of the first objection it is said that the finding of the lower Appellate Court is that Kanhaiya Lal is a wealthy spendthrift in whose service the appellant has enriched himself with the help of the plaintiff, who holds many *hundis* from Kanhaiya Lal. The *hundi* in suit was possibly fabricated by the plaintiff to cheat Kanhaiya Lal. And if the appellant was perhaps a party to the fraud in endorsing it to the plaintiff, no decree should be awarded on such a *hundi*. The appellant did not state in his defence that he and the plaintiff had fabricated the *hundi* in suit to cheat Kanhaiya Lal. The suggestion thrown out in the argument now cannot be accepted. It is true that he did not admit that the *hundi* in suit was drawn by Kanhaiya Lal, but he gave no evidence in support of it. If he himself fabricated the *hundi* without the knowledge of the plaintiff and sold it to the latter, he, the appellant, is liable under it. He, however, denies the sale of the *hundi* to the plaintiff

and contends that there is no legal proof in support of the alleged sale. The plaintiff went into the witness-box and swore that the *hundi* in suit had been sold to him by the appellant. He produced two witnesses who gave evidence to the same effect. A letter was also produced purporting to be written by Baldeo, the son of the appellant, asking Kanhaiya Lal to pay the *hundi* in suit. The learned Munsif disbelieved the plaintiff and his witnesses and while admitting the genuinenesss of the latter, explained it by saying that the plaintiff had procured it "on some pretence." The learned Subordinate Judge, however, accepted the evidence for the plaintiff in view of the letter of Baldeo and the resemblance of the admitted signatures of the appellant to his signature on the endorsement on the *hundi*. I think that the learned Subordinate Judge acted on legal evidence and his finding, being one of fact based on evidence, cannot be questioned.

The third objection for the appellant in my opinion must prevail. If no evidence had been given by the plaintiff, the presumption that arises in favour of a negotiable instrument with regard to the passing of consideration would have held good. But plaintiff chose to open the case and lead evidence as to the passing of consideration. Both the Courts have disbelieved that evidence. The learned Subordinate Judge holds that some consideration must have passed, because in the *ex parte* trial one of the witnesses for the plaintiff said that Rs. 125 had been paid to Kanhaiya Lal. In the present case the evidence of that witness cannot be taken into consideration and an inference drawn that some consideration passed on the *hundi* in suit to the appellant. Besides the assumption that some consideration passed on the *hundi* in suit to the appellant would not warrant a decree for the full amount. As the amount paid to the appellant, if any, has not been proved the claim of the plaintiff must fail. I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the first Court. Costs are allowed to the appellant against the plaintiff-respondent.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 1 OF 1913.

February 8, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

RAO RAMA RAO, MINOR, BY ADOPTIVE MOTHER AND NEXT FRIEND, RAO ACHAMMA GARU, AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NARASIMHA NAYANINI VARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Adoption—Reversioner—Consent of divided members, if necessary—Managing member refusing consent—Absence of consent of majority of co-parceners—Validity of adoption—Long delay—Adoption made to enable widow to alienate property outside family—Refusal of consent, propriety of.

Where a Hindu dies issueless leaving behind him divided and undivided brothers, the consent necessary to enable his widow to adopt a son to him must be obtained from the undivided members of the family, that of the divided brothers being immaterial. [p. 393, col. 2.]

Where the managing member refuses his consent and the widow does not obtain the consent of the majority of the co-parceners, an adoption made by her is invalid. A managing member cannot be said to have acted from improper motives if he declines to sanction an adoption made, after long delay of nearly 30 years, to enable the widow to alienate the property outside the family. [p. 394, col. 2.]

Appeal against the decree of the District Court of North Arcot in Original Suit No. 41 of 1910.

FACTS.—One Lakshmipathi died about 30 years ago, leaving behind him his widow (2nd plaintiff), a daughter, an undivided brother, the 1st defendant, and his two undivided sons, the 2nd and 3rd defendants, and two divided *sapindas*, Venkatramana Rao and Venkata Rao. Sometime in or about 1908 the widow applied through her son-in-law to the 1st defendant to pay her a sum of Rs. 10,000 to make suitable provision for her daughter and her grand-children. The 1st defendant offered to pay Rs. 6,000, which, however, she did not accept. She then applied to him for permission to adopt a son to her deceased husband and on his refusal, obtained the consent of the 2nd defendant and alleging also that she had the consent of the 3rd defendant, adopted the 1st plaintiff in 1908, arranging with the natural father of the 1st plaintiff to her taking absolutely a fourth part of her husband's share. The District Judge

held that the adoption was invalid. The plaintiffs, thereupon, preferred this appeal.

Mr. *L. A. Govindaraghava Iyer*, for the Appellants :—It is not necessary to obtain the consent of the divided members. In the case of an undivided family, the consent is to be sought within that family alone. *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro*(1), *Subrahmanyam* v. *Venkamma* (2). The refusal of consent by the 1st defendant is arbitrary and illegal. The consent of the 2nd and 3rd defendants having been obtained, the adoption is quite valid. The motive operating on the mind of the widow is immaterial. The co-parceners are only entitled to consider whether the widow wishes to make the adoption in the proper and *bona fide* performance of a religious duty and not capriciously. Once the expediency or the propriety of the course is established, the motive of the widow is not a factor to be considered at all.

Mr. *C. V. Anantakrishna Iyer*, for the 1st Respondent :—The consent of all the members of the undivided family is required to validate the adoption. See (*Ramnad Case*) *Collector of Madura* v. *Muttu Vijaya Rangunada Muttu Ramalinga Sethupati* (3), (*Travancore Case*) *Ramasami Iyer* v. *Bhagati Ammal* (4), and (*Berhampore Case*) *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro*(1). Again the motive of the widow being to alienate the property outside the family, the refusal of the 1st defendant to give his consent to the adoption is perfectly justifiable. The consent of the 2nd defendant has been obtained by misrepresentation and the 3rd defendant never consented at all.

JUDGMENT.—The question for decision is whether the 1st plaintiff is the adopted son of the deceased Lakshmipathi Nayanini Varu.

Lakshmipathi died about 30 years ago. His widow, the 2nd plaintiff, adopted the 1st plaintiff on 2nd November 1908. The District Judge finds that she failed to obtain the consent of Venkatramana Rao and Venkata Rao, two *sapindas* of the deceased, who were divided from him. He finds further that the 1st defendant, who was the undivided brother of the deceased and who admittedly refused to give his consent to the adoption, did not withhold it from improper motives. He also holds that the 2nd defendant, who gave his consent in writing (Exhibit B), did so probably on account of some misrepresentation and that the 3rd defendant never gave his consent He was, therefore, of opinion that the adoption was invalid. All these findings are disputed in appeal.

In the absence of any authority from her husband, the 2nd plaintiff was bound to obtain the consent of the *sapindas*. As her husband died a member of an undivided family, the requisite authority must be obtained from the members of that undivided family. The question, therefore, whether she obtained the consent of Venkata Rao and Venkatramana Rao, is immaterial. We have also no hesitation in holding that the Judge has arrived at the right conclusion. We think the Judge is also right in deciding that the 3rd defendant did not give his consent and that the letter (Exhibit A) alleged to be written by him is not proved. The story told by the plaintiffs' witness No. 9 of his having gone to the house of the 3rd defendant where he found one Subbiah writing a letter, which was afterwards signed by the 3rd defendant, who told the witness, when he was asked what the letter was about, that "he was writing about an adoption to be made" by the 2nd plaintiff is improbable. The 3rd defendant (defendant's witness No. 1) denies that he gave his consent or wrote the letter, Exhibit A. He admits, however, that plaintiff's witness No. 2 asked him to give his consent which he refused. He was not asked to state his reason.

The 2nd defendant gave his consent (Exhibit B). We are unable to find that there was any misrepresentation. There is no evidence in support of that plea. The evidence of the 1st defendant and of his 2nd witness proves that the plaintiff's witness No. 2, the son-in-law of the 2nd plaintiff, wanted the 1st defendant to give her Rs. 10,000, as the maintenance which she was receiving was inadequate and she wanted to make some provision for her daughter and grand-children. It was also

(1) 3 I. A. 154; 1 M. 69 (P. C.); 11 Mad. Jur. 188; 25 W. R. 291; 3 Sar. P. C. J. 583; 3 Suth. P. C. J. 263.
(2) 26 M. 627; 13 M. L. J. 239.
(3) 2 M. H. C. R. 206.
(4) 8 Mad. Jur. 58.

alleged that the 1st defendant had appropriated her jewels. The 1st defendant denied the appropriation and offered to pay Rs. 6,000 to the 2nd plaintiff, which she declined. Some months afterwards she sought his consent to the adoption which was refused. Thereupon she made this adoption in accordance with an arrangement with the natural father of the 1st plaintiff, the adopted boy, under which she was to get absolutely one fourth of her husband's property. There is little doubt, therefore, that she made the adoption to get some property for herself to give to her daughter and grand-children.

It is contended on behalf of the respondent that the consent of all the co-parceners, the first defendant and his sons, the 2nd and 3rd, is necessary to validate the adoption and reliance is placed on the observation of the Judicial Committee in the *Ramnad* case (3) that it would be unjust to allow the widow to defeat the interest of the brothers of the deceased husband by introducing a new co-parcener against their will. Reference is also made to the Travancore judgment, *Ramasami Iyer* v. *Bhagati Ammal* (4), which has apparently received the approval of the Judicial Committee in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro* (1). It is also urged that the widow's motive was improper and that consent was rightly refused. On the other hand, it is urged that all that the co-parceners are entitled to consider is whether the widow proposes to make the adoption in the proper and *bona fide* performance of the religious duty of substituting an heir by adoption to her deceased husband, and once the expediency or propriety of an adoption is established, the motive operating on the mind of the widow in making an adoption is immaterial, and no weight should be attached to the defendant's refusal on improper grounds to consent to an adoption.

We think it unnecessary to decide the questions.

It may be that in an undivided family the consent of the manager, to whom the regulation of all the concerns of the family is delegated by law or by the members, may be sufficient to validate an adoption. See *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro* (1). Mr. Justice Bhashyam Aiyangar was apparently of that opinion. *Subrahmanyam* v. *Venkamma* (2). In the case before us the 1st defendant, the managing member, has refused his consent. Nor has the 2nd plaintiff obtained the consent of the majority of the co-parceners, which in certain circumstances might be binding on the joint family. It is only the 2nd defendant who has given his consent. Whether the 3rd defendant gave any reason or not does not appear. The 1st defendant cannot be said to have acted from improper motives in declining to sanction an adoption made after long delay to enable the widow to alienate the property outside the family. We agree with the Judge, therefore, that the adoption was made without the requisite authority. We dismiss the appeal with costs. The appellant will pay to Goverment the Court-fee payable on the appeal memorandum.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 857 OF 1912.

January 19, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

P. M. GOVINDAN NAIR—PLAINTIFF—APPELLANT

versus

M. ATCHUTHA MENON—DEFENDANT—RESPONDENT.

Defamation—Act committed outside British India—Jurisdiction of British Courts—Liability, when arises—Publication, if requires communication to more persons than one—Tort—Law applicable to torts in India—Superior officer, direction of, when available as plea—Absolute privilege, if available to servants of independent Sovereign, acting under his orders and in course of their official duties.

Publication in regard to libel and slander does not require communication to more persons than one. There need be nothing like 'publication' in the common acceptance of the term. [p. 397, col. 1.]

Pullman v. *Hill & Co.*, (1891) 1 Q. B. 524; 60 L. J. Q. B. 299; 64 L. T. 691; 39 W. R. 263, followed.

In a suit for damages for defamation the fact that the alleged defamation was committed outside British India will not necessarily take away the jurisdiction of British Indian Courts, though it may affect the law to be administered. [p. 397, cols. 1 & 2.]

According to sections 19 and 20, Civil Procedure Code, the residence of a defendant within the territorial limits of a Court is sufficient to give jurisdiction to it, even in respect of torts committed outside the local limits of the jurisdiction of such Court. [p. 397, col. 2.]

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Halley v. *Henry Benham*, 2 P. C. 193; 7 Moore P. C. (N. S.) 263; 37 L. J. Adm. 33; 18 L. T. 879; 16 W. R. 998, followed.

The law of torts not having been codified in India and there being no determinate law delivered to the Courts by the Sovereign as to the law that has to be administered in adjudicating upon a personal tort committed outside the local limits of a Court's jurisdiction, the Court ought to be guided by the rules of justice, equity and good conscience. Consequently a person should not be held liable in tort for an act which would be justificable by the *lex loci*, or the law of the place where the act was done; nor should he be held liable unless the act is wrongful by the *lex fori*, or the law of the country where the Court is situated [p. 398, col. 1.]

The M. Moxham, (1876) 1 P. D. 107 at p. 111; 46 L. J. Adm. 17; 34 L. T. 559; 24 W. R. 650; 3 Asp. M. C. 191, *Carr* v. *Fracis, Times and Co.*, (1902) A. C. 176 at p. 184; 71 L. J. K B. 361; 85 L. T. 144; 50 W. R. 257; 17 T. L. R. 657 and *Hart* v. *Gumpach*, 4 P. C. 439; 9 Moore P. C. 241 (N.S.); 42 L. J. P. C. 25; 21 W. R. 365; 17 E. R. 505, followed.

Rogers v. *Rajendro Dutt*, 8 M. I. A. 103 at pp. 130, 131; 2 W. R. (P. C.) 51; 19 E. R. 469; 15 E. R. 78; 132 R. R. 82; 3 L. T. 160; 9 W. R. 149 (Eng.); 1 Suth. P. C. J. 413; 1 Sar. P. C. J. 755; 13 Moore P. C. J. 209, considered.

Where an act is wrongful *per se*, a plea that the act was done under the directions of a superior officer, not subject to the jurisdiction of the Court, is of no avail, though the result of the action will give rise to a moral claim of indemnity as against such superior officer. [p. 400, col. 2.]

Where under the authority of the Rajah of Cochin an inquiry was held touching an improper intimacy alleged to exist between the plaintiff and a certain woman, and as the result thereof the plaintiff was ordered to be ex-communicated and this order was communicated by the *sarvadhikariakar* or the general agent of the Rajah to the superintendent of the temple who communicated it to the 2nd defendant (respondent) in his official capacity, and the latter in his turn handed over a copy of the said letter to the *pattamali* or manager of the temple which he was bound to do as a part of his official duties:

Held, that the act of the Rajah was absolutely privileged and that the defendant was not liable for the publication of the libel. [p. 400, col. 1; p. 401, col. 2.]

Second appeal from the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 627 of 1910, preferred against that of the Court of the District Munsif of Chowghat, in Original Suit No. 319 of 1914.

FACTS.—The Rajah of Cochin, having satisfied himself from an inquiry held by him that the plaintiff had committed adultery with a certain woman, ordered his ex-communication. This order was communicated for information and guidance of and necessary action by the *sarvadhikariakar*, or the general agent of the Rajah, to various officers of the State and to the superintendent of the temple. The latter sent it on to the 2nd defendant in the usual course, and he in turn communicated it to the *pattamali* of the temple, as he was bound to do in the course of his official duties. Thereupon the plaintiff sued the 2nd defendant for defamation. Both the lower Courts held that the 2nd defendant was not liable. The plaintiff thereupon preferred this second appeal.

Mr. *K. P. M. Menon* for the Appellant :—The lower Courts erred in holding there was no publication. Vide *The King* v. *Burdett* (1) and *Vallabha* v. *Madusudanan* (2). The investigation being not in accordance with natural justice and no opportunity having been afforded to the plaintiff of defending himself and clearing his character and he having been ex-communicated on the bare statement of the woman, the proceedings are not privileged and the publication is, therefore, libellous. The mere fact of the offence being committed outside British India does not take away the jurisdiction of British Indian Courts to deal with the matter. Sections 19 and 20, Civil Procedure Code, are significant. The residence of the defendant is the test. See also *Halley* v. *Henry Benham*(3). The issues are not clear. Even granting that the offence should be wrongful both according to the law of Cochin and British India, the issues whether the Rajah authorised the *sarvadhikariakar* to publish the libel and whether the publication is actionable in Cochin ought to have been framed. The Cochin law is a question of fact and the Court below erred in not taking any evidence as to it. The plea of the defendant is utterly useless. Vide *Rogers* v. *Rajendro Dutt* (4). The defendant had no business to hand over a copy of Exhibit B to the *pattamali*. That act was not authorised.

(1) 4 B. & Ald. 95; 106 E. R. 873; 22 R. R. 539; 1 St. Tr. (N. S.) 1.

(2) 12 M. 495.

(3) 2 P. C. 193; 7 Moore P. C. (N. S.) 263; 37 L. J. Adm. 33; 18 L. T. 879; 16 W. R. 998.

(4) 8 M. I. A. 103 at pp. 130, 131; 2 W. R. (P.C.) 51; 19 E. R. 469; 15 E. R. 78; 32 R. R. 82; 3 L. T. 160; 9 W. R. 149 (Eng.); 1 Suth. P. C. J. 413; 1 Sar. P. C. J. 755; 13 Mos. P. C. J. 209.

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Mr. *C. V. Anantakrishna Iyer*, for the Respondent :—The defendant's act is perfectly *bona fide* and done in course of his official duties. The British Indian Courts have no right to dictate to the Rajah of Cochin how he should conduct his inquiries. His act was absolutely privileged. That privilege extends to the acts of his servants also in carrying out his orders. The question whether the investigation is according to natural justice or not is quite immaterial. The act complained of must be wrongful both according to the law of Cochin and British India and unless both requisites are fulfilled, the action does not lie. See *The M. Moxham* (5) and *Carr* v. *Fracis, Times & Company* (6). The act is justifiable even according to British Law. Vide *Chatterton* v. *Secretary of State for India* (7), *Jenoure* v. *Delmege* (8) and *Narasimha* v. *Balwant* (9). Upon the findings the issues suggested are unnecessary. The act being authorised by the law of Cochin no action lies in British India. See *Carr* v. *Fracis, Times and Company* (6). The report is justified. See *Allbutt* v. *General Council of Medical Education and Registration* (10). *Rogers* v. *Rajendro Dutt* (4) has reference only to the facts of that case. The case in *Hart* v. *Gumpach* (11) is nearer the present case. There is no evidence that the 2nd defendant was actuated by malice. He is, therefore, protected.

JUDGMENT.

TYABJI, J.—One Sridevi Anterjanam of the Thazhakolam Illom was suspected of having committed adultery. In accordance with a custom which is referred to in some detail in *Vallabha* v. *Madusudanan* (2), an inquiry was held in the matter presided over by the Rajah of Cochin within his own territory. The inquiry was ceremonious, but hardly in accordance with natural justice inasmuch as it consisted in effect of a bare statement by the suspected woman giving the names of persons whom she charged with having committed adultery with her. On this statement, without any opportunity being given to the persons named of defending themselves or rebutting the accusation, they were declared to be ex-communicated. The plaintiff was one of the persons purported to be so ex-communicated.

Subsequently an officer of the Cochin State, styled *sarvadhikariakar* (literally general agent), addressed a letter, Exibit B, to the Dewan to the effect that the woman "was caused to be brought here after the *vicharani* (investigation).....and as a decision has been pronounced regarding her real state, it has been decided to lodge the above-said *sadhanam* (suspected woman) in a place near the Chalakudy *ottupura* (choultry). As it has been ordered to arrive at once at a conclusion regarding the following.....that as soon as the suspected woman (*sadhanam*) is brought to Chalakudy she ought to be made to reside at a place in its neighbourhood, if available, if not, she ought to be made to reside in a house constructed with mud walls and with beams, frame-work, door and bolt made of bamboos: proper precaution ought to be taken so that she may not have an opportunity to hold intercourse with any. She ought to be provided with expenses at the rate of 9 *edangalis* of paddy and sundries *per diem* from the *ottupura* at Chalakudy till the end of her time. And that as.....were implicated when the trial of the suspected woman (*sadhanam*) was conducted, arrangements should be made to ex-communicate the houses and the *illoms* to which they belong so that they may not frequent the temple, *illom*, etc., frequented by stainless persons and that they may not touch tanks and wells, etc. This matter is reported for information. Thus (written by) Gopala Desikachariar, the *sarvadhikariar* (agent for all things) of your honour." Exhibit B bears endorsements to the effect that copies were forwarded to various officers of the State of Cochin "for necessary action and report" or for "information and guidance."

The plaintiff sued in defamation. As against the 1st defendant it was alleged

(5) (1876) 1 P. D. 107 at p. 111; 46 L. J. Adm. 17; 34 L. T. 559; 24 W. R. 650; 3 Asp. M. C. 191.

(6) (1902) A. C. 176 at p. 184; 71 L. J. K. B. 361; 85 L. T. 144; 50 W. R. 257; 17 T. L. R. 657.

(7) (1895) 2 Q. B 189; 64 L. J. Q. B. 676; 14 R. 504; 72 L. T. 858; 59 J. P. 596.

(8) (1891) A. C. 73; 60 L. J. P. C. 11; 63 L. T. 814; 39 W. R. 388; 55 J. P. 500.

(9) 27 B. 585; 5 Bom. L. R. 664.

(10) 23 Q. B. D. 400; 58 L. J. Q. B. 606; 61 L. T. 585; 37 W. R. 771; 54 J. P. 36.

(11) 4 P. C. 439; 9 Moor P. C. 241 (N. S.); 42 L. J. C. 25; 21 W. R. 365; 17 E. R. 505.

that he had announced, in the course of the investigation to which I have referred, that the plaintiff had committed adultery with the said woman. The 1st defendant is no more before the Court, the suit having been dismissed against him, and the dismissal upheld by a decision of this Court in Second Appeal No. 210 of 1906. His legal position need not, therefore, be further referred to.

The cause of action alleged against the 2nd defendant is that he delivered a copy of the order, Exhibit B, to an officer (styled the *pattamali*), who is in charge of the Triprayer *Devaswom* or temple. It is not denied that Exhibit B is defamatory [*Cuppusawmi Chetty* v. *Doraisawmy Chetty* (12)] and it has been found that the 2nd defendant, knowing its contents, delivered a copy of it to the *pattamali*. The decision of the lower Courts that there was no publication by the 2nd defendant of the libel is, therefore, clearly wrong [*The King* v. *Burdett* (1)]. Publication in regard to libel and slander does not require communication to more persons than one. There need not be anything like publication in the common acceptance of the term [*Pullman* v. *Hill & Co.* (13)]. The fact that the investigation above referred to was opposed to natural justice [*Vallabha* v. *Madusudanan* (2) and *Krishnasami* v. *Virasami* (14)] is not at present relevant, for we are concerned, not with the question whether the plaintiff's rights or status can, in the Courts of Britisht India, be deemed to have become altered by the proceedings of a *quasi*-judicial tribunal, such as caste meeting, or under the authority of a person recognised by custom, as the head or patron of a caste. We have to deal solely with the question whether the plaintiff is entitled to claim damages from the 2nd defendant for publishing or communicating a defamatory statement concerning the plaintiff.

In the decision of this question whether the plaintiff is entitled to damages for defamation, the fact that the alleged defamation was committed outside British India will not necessarily take away the jurisdiction of the Courts of British India though it may affect the law to be administered.

With reference to the jurisdiction of the Courts, the sections of the Code of Civil Procedure that need be considered are sections 9—20. Section 9 gives jurisdiction to the Courts to try all suits of a civil nature excepting suits of which cognisance is either expressely or impliedly barred. Section 10 prevents a contemporaneous trial in several Courts. Sections 11 to 14 bar suits on the ground of *res judicata*. These sections are not relevant.

Sections 15 to 20 contain provisions about the place of suing. These provisions are based on five considerations: (1) the grade of the Court, section 15; (2) the situation of the property to which the suit refers, sections 16 to 18; (3) the place where a wrong is done to the person or to moveable property, Section 19; (4) the residence or place of business of the defendant, section 20 (*a*), (*b*); (5) the place where the cause of action has arisen, section 20 (*c*).

The grade of the Court is not in dispute, nor does the suit relate to any property; so that sections 15 to 18 do not furnish any aid. Section 19 deals with suits for compensation for wrong done to the person, or to moveable property, where it is evident that "the relief sought can be entirely obtained through the personal obedience of the defendant" (proviso to section 16). The wrongs contemplated may, therefore, be referred to as 'personal torts'. Section 19, however, assumes that the tort is committed within British India; in such a case, if (*a*) the tort is committed within the local limits of the jurisdiction of one Court and (*b*) the defendant resides or carries on business or personally works for gain within the local limits of another Court, then, both Courts have jurisdiction. Section 19 is not directly applicable, as the tort here was not committed within the local limits of any Court in British India. But it indicates that the fact that the defendant resides in British India, is sufficient to give the Court, within whose local limits he resides, jurisdiction over suits in tort of the nature referred to, though the tort may have been committed outside the

(12) 3 Ind. Cas. 955; 33 M. 67; 6 M. L. T. 290; 19 M. L. J. 714.

(13) (1891) 1 Q. B. 524; 60 L. J. Q. B. 299; 64 L. T. 691; 39 W. R. 263.

(14) 10 M. 133 at p. 143.

local limits of the jurisdiction of the Court in which the suit is brought. This indication is strengthened by section 20 (*a*), which fixes the residence of the defendant as one of the determining factors for the choice of the Court in a suit on a personal tort: and this ground is independent of the place where the cause of action arises, clause (*c*).

The omission in the Code to provide specifically for a case where the defendant resides in British India but is alleged to have committed a personal tort beyond the limits of British India does not, however, take away the general jurisdiction of the Courts in British India under section 9. To assume jurisdiction where a person residing within the local limits of the jurisdiction of the Court is alleged to have committed a tort beyond such limits, is in accordance with the principles of Private International Law recognised in England [*Halley* v. *Henry Benham* (3)]. The Code of Civil Procedure indicates that the same rule is to be followed by the Courts in British India.

The question of jurisdiction is distinct from the question, which law will be administered by the Court adjudicating upon a personal tort alleged to be committed outside the local limits of that Court's jurisdiction. The Civil Courts Act, III of 1873, section 16, was not cited to us, and is obviously not applicable; and there seems to be no other legislative direction to the British Courts in Madras as to the law that they have to administer, except such directions as are impliedly contained in the preliminary sections of most Acts, fixing the limits within which those Acts shall have effect or be enforceable. The law of torts has not been codified in India, and we have, therefore, no determinate law delivered to the Courts by the Sovereign that sets the question of the choice of law at rest. The choice of law being thus open to the Courts, it is obviously in accordance with justice, equity and good conscience not to hold a person liable in tort for an act which would be justifiable in accordance with the law of the place where it is done; nor will the Courts hold a person liable unless the act is wrongful by the law of the country in which the Court is situated, and by which the parties would have been governed if the act had been done within the local limits of its own jurisdiction. The law is thus stated by Lord Justice Mellish in the *The M. Moxham* (5): "Now, the law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled, that no action can be maintained in the Courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful of the law of the country where it is committed and also wrongful of the law of this country. The cases of *Halley* v. *Henry Benham* (3) and *Phillips* v. *Eyer* (15), together with other cases in conformity with them, seem to be conclusive upon the subject."

This judgment is referred to with admiration by Lord Lindley in *Carr* v. *Francis Time & Co.* (6).

The argument for the respondent, therefore, that there was no cause of action, that the occasion was privileged and that there was justification for the acts of the 2nd defendant, may be conveniently considered under two main heads: (1) whether the acts complained of would have been justifiable if they had been committed in British India; (2) whether they were justifiable in Cochin under the law prevalent there.

With reference to the first head, the cases of *Chatterton* v. *Secretary of State for India* (7), *Jenoure* v. *Delmege* (8) and *Narasimha* v. *Balwant* (9) have been cited. These decisions and the principles enunciated in them are not very helpful in the decision of the present question. The 2nd defendant can justify his act only on the basis of his official position; and as I have already indicated, if he had in his private capacity done in British India the acts he is found to have done in Cochin, he would have been liable for defamation.

Was the 2nd defendant, then, justified in accordance with the law of Cochin in publishing the libel, as he did in Cochin, by handing a copy of Exhibit B to the *pattamali*? It was suggested that on this question two issues should be framed for findings by the lower Court.

(1) Was there any order by the Rajah of Cochin that the *sarvadhikariakar* should publish the libel?

(15) 6 Q. B. 1; 10 B. & S. 1004; 40 L. J. Q. B. 28.

(2) Is the act of publication actionable in Cochin ?

These issues, no doubt, raise definitely the points on which the ultimate decision of the case depends, and they have, perhaps, not been considered with as great a clearness as the appellant desires. But the Subordinate Judge finds that the initial inquiry was authorised by His Highness the Rajah of Cochin, that Exhibit B is the copy of the Rajah's order communicated to the temple, that in the usual course the Dewan sent it to the Superintendent of the temple, that the 2nd defendant received it in his official capacity and gave it (as he was bound to give) to the *pattamali*, the manager of the temple. It is expressly found that the 2nd defendant did nothing more. We are bound by these findings. But a perusal of Exhibit B itself indicates its official nature and supports the view that the 2nd defendant was doing what his office required him to do in transmitting it from his superior officer to the *pattamali*.

In these circumstances it would be useless to call for any fresh finding on the first of the two questions just mentioned. The Subordinate Judge has already answered it in the affirmative.

Then it is argued that the act of the 2nd defendant might be actionable in Cochin, and that whether it is so or not, should be determined by specific issue, on which the parties may be permitted to adduce evidence, and that the law of Cochin should be determined in British India as a question of foreign law, and, therefore, of fact. The appellant's contention is supported by the omission of the Subordinate Judge to determine as a question of fact what the law of Cochin is. But the respondent relies on the case of *Carr* v. *Fracis Times and Company* (6) for the proposition that if the act is authorised by the Rajah of Cochin, as the Subordinate Judge holds, then inasmuch as he is the Sovereign authority in Cochin and his will must prevail, this is sufficient to show that the act was justified in Cochin. The question in *Carr's* case (6) was whether the seizure of certain ammunition by an officer of the British Navy, acting under the orders of the British Government, was lawful. The seizure had taken place in the territorial waters of Muscat. It was justified on the ground that it was authorised by a proclamation issued by the Sultan, the Sovereign Ruler of Muscat, and pronounced to be lawful by a Court of Enquiry in Muscat, whose decision was confirmed by the Sultan. Lord Halsbury said in that case : "My Lords, the argument on behalf of the respondents comes to this, that the Sultan of Muscat is not entitled within his own territory to say what shall and what shall not be the subject of traffic.....Here the Sultan has pronounced what his law is ; and I may say at once that, looking at these two documents, upon the true construction of which, as it appears to me, the whole question turns, the Sultan himself has pronounced, by an authoritative declaration, that what was done was lawful."

Lord Macnaghten said that the real question was whether the documents (consisting of a proclamation by the Sultan authorising the seizure, the certificate of a Muscat Court countersigned by the Sultan stating that the actual seizure was authorized and legal) showed that the act complained of was an act done by the Sultan's authority as his act, which he adopted as his own, and declared to be legal. He, therefore, answered the question in the affirmative. Lord Lindely also considered the documents as proving that the act was legal according to the law of Muscat.

It is true that, in the present case, we have nothing equivalent to the subsequent declaration by the Sultan of Muscat that the seizure was lawful. But when Exhibit B is looked at and the nature of the suit considered, it seems clear that the absence of such a subsequent declaration is immaterial. For here, as I have already said, no question arises whether the proceedings in Cochin ought to prevail or to have effect in British India. All that has to be determined is whether the 2nd defendant was justified in transmitting a copy of the document to his official subordinate : his act would be justifiable if it appears that the Rajah of Cochin authorised the transmission. Exhibit B itself leaves no doubt on this point. It is in effect the decree of the Court of Enquiry presided over by the Rajah. To hold that the 2nd defendant was liable in damages for defamation for

performing his official duty of handing over Exhibit B to his subordinate, would be to dictate to the Rajah of Cochin the method of procedure in his own territory. This the British Courts cannot do. All that they can do is to refuse to recognise the inquiry as a judicial proceeding affecting the rights of a person whose rights or status have been purported to be adjudicated upon. As the right of the Rajah of Cochin to hold the inquiry in the way he chooses has to be conceded, a fair report of the proceedings would be justified, *Allbutt* v. *General Council of Medical Education and Registration* (10). Much more, therefore, would an order based on such an inquiry be privileged.

Much reliance was placed by the appellant on the following statement in *Rogers* v. *Rajendro Dutt* (4): "On this state of facts it does not appear to their Lordships material to consider whether the demand made on the part of the plaintiffs was exorbitant or not, nor whether the opinion expressed by the defendant, and on which he subsequently acted, was founded in good policy, or otherwise. Neither does it seem to them to conclude the question in the action, that the act complained of is to be considered as the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the plaintiffs. For if the act which he did was in itself wrongful, as against the plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorised, or whether it were done by the order of the superior power. The civil irresponsibility of the supereme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action: an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet, if any damage, even in legal contemplation, be the consequence, an action will lie."

These words, however, expressly referred to the "state of facts" before their Lordships; the facts consisted of an allegation that the defendant had, wrongfully and unjustly and with the intention of injuring the plaintiffs, prohibited the officers of the Bengal pilot service from allowing the plaintiffs, steam tug to be employed. The Privy Council held that the act of the defendant was not wrongful, that he merely instructed his own subordinate as to those whom they should employ under them and that this was quite lawful.

They point out that no malice was alleged. (135).

In the present case also, the question would be whether the second defendant's act was wrongful in itself. It is only if the act itself is wrongful: that it will not avail the 2nd defendant to allege that he acted on the directions of a superior whose person is not subject to the jurisdiction of the Court: in such a case the responsibility of the 2nd defendant may be enforced in the Courts and then there may (as pointed out by the Privy Council) arise in his favour a moral claim of indemnity from his superior.

In the consideration of this point the plaintiff cannot put his case higher than on the assumption that by handing over a copy similar to Exhibit B, the defendant himself made the representations contained in Exhibit B, *i. e.*, stated that an inquiry into the plaintiff's conduct had been held and that it had been ordered in consequence of the inquiry that certain steps should be taken on the assumption that the plaintiff had committed adultery. The 2nd defendant's liability in transmitting a copy of the original of Exhibit B cannot be greater than if he had himself communicated its contents to the *pattamali*,

though the repetition of a slanderous rumour is actionable as well as its original invention [*Watkin* v. *Hall* (16), *Tidman* v. *Ainslie* (17)]. Hence a case which is more nearly applicable than *Rogers* v. *Rajendro Dutt* (4) is *Hart* v. *Gumpach* (11).

There the plaintiff alleged that the appellant, who was Inspector-General of Customs invested with the general superintendence of a College at Peking, had made certain false representations relating to the plaintiff, who was a professor of the College. Their Lordships say at pages 458, 459, 460, 461: "The representations made by the Inspector-General were privileged communications in the ordinary sense in which those words are understood; that is to say, communications, so far justified by the occasion on which they are made, that the inference of malice which *prima facie* arises from defamatory statements is rebutted, and the burden of proving express malice thrown on the plaintiff.

"The appellant was entrusted by the Government with the general superintendence of the College and its Professors, and it was his duty to make reports to the *Tsung-li-Yamen* upon matters relating to its management and welfare. The resignation of Professor, his absence from Peking, and any avowed disinclination or refusal to perform the duties for which he was engaged, were matters which it would be within his province to report. Reports so made, although defamatory, are *prima facie* justifiable, and the duty of making them rebuts the malice which the law implies, and renders proof of actual malice, that is, of some wrong and improper motive, necessary to the maintenance of an action.

* * * *

"The Judge ought, therefore, to have explained to the Jury the relation and position of the parties, and (assuming for the present the existence of a limited privilege only) he should have told them that the action would not lie if the statements were made honestly, and in a belief of their truth, and that the burden was on the plaintiff to prove they were not so made."

* * * *

"The question is, whether the statements are so groundless that they afford evidence that the appellant knew and believed they were untrue, and acted from malicious motives in making them. Their Lordships think that the appellant might have honestly believed he was reporting what was substantially true, and that there is no evidence from which it can be reasonably inferred that he was acting otherwise than in the *bona fide* discharge of what he conceived to be his duty. But it is enough to say that it is consistent with the evidence that such were his belief and motives, in the absence of any proof that he really entertained hostile or unfriendly feeling towards the respondent. The respondent, therefore, falied to sustain the burden, thrown upon him by the law, of proving actual malice."

The answer to this last question (whether the 2nd defendant acted with malice) is in the present case quite clear from the facts proved. The defendant did nothing beyond handing the copy of the original of Exhibit B, which he had received, to another officer and he did so as a part of his official duties. The decision last cited no doubt contains the law that would be applicable in British India and not the Cochin law. It is not, however, necessary to consider whether, on the materials before us, we can assume that the Cochin law is the same as the law applicable in British India. For, as I have already pointed out, where the cause of action alleged is a personsl tort committed outside the local limits of the jurisdiction of the Courts of British India, unless the act is wrongful according to the law both of British India and of the place where the act is committed, the suit will not lie.

The lower Courts were, therefore, in my opinion, right in dismissing the suit against the 2nd defendant and the appeal should be dismissed with costs.

AYLING, J.—I agree.

Appeal dismissed.

(16) 3 Q. B. 396; 9 B. & S. 279; 37 L. J. Q. B. 125; 18 L. T. 561; 16 W. R. 857.

(17) 10 Ex. 63; 102 R. R. 478.

ZOHRA JAN *v.* RAJAN BIBI.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 890 OF 1911.
March 18, 1915.
Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shah Din.
Musammat ZOHRA JAN *alias* AKHTAR—DEFENDANT—APPELLANT
versus
Musammat RAJAN BIBI—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 118—Promissory note—Presumption as to consideration—Onus.

Under section 118 of the Negotiable Instruments Act the initial presumption is that a promissory note was executed for consideration and the onus lies on the executant to prove that no consideration passed. [p. 404, col. 2.]

Where the consideration of a promissory note was stated to be the sum of Rs. 30,000 *borrowed in cash* by the defendant executant and in the course of the pleadings the plaintiff was constrained to admit that the consideration *as stated in the promissory note* did not pass, the initial presumption is rebutted and the onus is shifted on the plaintiff to prove affirmatively that the pro-note was executed by the defendant for full consideration. [p. 404, col. 2.]

First appeal from the decree of the District Judge, Rawalpindi, dated the 30th June 1911, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Messrs. *Beechey*, *Ralli* and *Sewa Ram Singh*, for the Respondents.

JUDGMENT.—The following pedigree shows the relationships of the parties:—

Nabi Bakhsh — *Musammat* Rajan Bibi, *alias* (defendant No. 2), Malan (plaintiff).
|
Abdul Karim — *Musammat* Zohra Jan, *alias* Akhtar (defendant No. 1).

The suit out of which this appeal has arisen was brought by the plaintiff-respondent, *Musammat* Rajan Bibi *alias* Malan, against *Musammat* Zohra Jan *alias* Akhtar, wife of Abdul Karim, who is the defendant-appellant, to recover Rs. 30,000 on the strength of a promissory note, dated the 7th March 1910. This promissory note which is marked as Exhibit P A and is printed at page 3 of the paper-book, is in the following terms:—

"I promise to pay on demand or order to Mian Nabi Bakhsh, my father-in-law, the sum of Rs. 30,000 (rupees thirty thousand) double of Rs. 15,000 (rupees fifteen thousand) borrowed in cash by me from him without interest. Hence the pro-note.
Lahore, the 7th March 1910. (Sd.) Zohra Jan, wife of Mian Abdul Karim."

This promissory note was executed by *Musammat* Zohra Jan in favour of her father-in-law, Mian Nabi Bakhsh, at Lahore on the 7th March 1910; and on the same date a deed of release, Exhibit D-1, was executed by Mian Nabi Bakhsh in favour of *Musammat* Zohra Jan at Lahore in respect of certain property situate in Rawalpindi. This deed was registered at Rawalpindi on the 8th April 1910, and is printed at pages 14 and 15 of the paper-book. On the 28th April 1910 the promissory note was assigned by Mian Nabi Bakhsh to his wife, *Musammat* Rajan Bibi, the endorsement being attested by Abdul Karim, son of Mian Nabi Bakhsh, and it is on the strength of this assignment that the present suit has been brought by *Musammat* Rajan Bibi against her daughter-in-law, *Musammat* Zohra Jan. Nabi Bakhsh was alive when the suit was brought and he was impleaded as a *pro forma* defendant. He was also alive when the present appeal was instituted by *Musammat* Zohra Jan, but he died during the pendency of the suit and his son, Abdul Karim, has been brought on the record as his legal representative. Nabi Bakhsh was a resident of Rawalpindi, and he and his son were reputed to be the proprietors of a firm called Nabi Bakhsh-Abdul Karim. Abdul Karim is said to have married four wives while he was still very young, and *Musammat* Zohra Jan, defendant-appellant, is his fifth wife and was married to him in or about 1908.

On the 22nd April 1909 Abdul Karim executed a deed of release, Exhibit D-3, (page 4 of the paper-book) in favour of his father under which he relinquished all his rights in certain properties specified in paragraph 2 of the schedule contained in the deed, save and except the right to realize the rents and profits of those properties during the life-time of his father, it being stated in the deed that this right had been conferred on him by his father and that he (Abdul

Karim) shall have no right to mortgage or sell the property during his father's lifetime. Certain other properties specified in paragraph 1 of the Schedule and valued at Rs. 49,500 were given by Nabi Bakhsh to Abdul Karim without any reservation, and the latter was authorized to transfer the said properties to whomsoever he pleased. By a registered deed of settlement, dated the 12th May 1909, Abdul Karim gave part of the property covered by the deed of release, dated the 22nd April 1909, to his wife, *Musammat* Zohra Jan. By a deed of gift, dated the 1st July 1909, Nabi Bakhsh gave some more of his property to Abdul Karim. These two deeds, dated the 12th May 1909 and the 1st July 1909, are not on the record, but they are referred to in another registered deed of gift, dated the 16th July 1909, which Abdul Karim executed in favour of *Musammat* Zohra Jan and by which he transferred to her in lieu of dower certain properties which he had received from his father and which were valued at Rs. 20,000. This deed of gift covered the reversionary rights of Abdul Karim in the property of which the rents and profits he was entitled to realize under the deed of release, dated the 22nd April 1909. Lastly, Nabi Bakhsh executed, as we have seen above, a deed of release in favour of *Musammat* Zohra Jan on the 7th March 1910 under which Nabi Bakhsh relinquished all the proprietary rights which had been reserved to him in the properties specified in paragraph 2 of the schedule contained in the deed of release, dated the 22nd April 1909. The combined effect of the deeds specified above was that *Musammat* Zohra Jan became full proprietor of the properties detailed in the deed of release, dated the 22nd April 1909, and certain other properties, and by the deed, dated the 7th March 1910, Nabi Bukhsh expressly conferred on her power to transfer the properties mentioned in the deed of the 22nd April 1909 by mortgage, sale or gift. The last-mentioned deed of release, dated the 7th March 1910, was executed at Lahore by Nabi Bakhsh in favour of *Musammat* Zohra Jan after the latter had executed the promissory note sued upon in favour of the former. After the execution of the promissory note and the said deed both Nabi Bakhsh and *Musammat* Zohra Jan left for Rawalpindi and there on the following day *i. e.*, the 8th March 1910, the deed of release was registered.

In answer to the plaintiff's claim to recover Rs. 30,000 on the strength of the promissory note in question, the defendant, *Musammat* Zohra Jan, pleaded, *inter alia*, that she had not received a farthing out of the consideration money mentioned in the promissory note; that she had executed the pro-note under undue influence exercised upon her by Nabi Bakhsh; that the real object for which the promissory note and the deed of release were executed by her and by Nabi Bakhsh, respectively, on the 7th March 1910 was to defeat the creditors of Nabi Bakhsh and Abdul Karim, and that, therefore, she was not liable on the promissory note at all. The statements of the Counsel for the parties were taken down by the District Judge before framing the issues, and each side gave its own version of the circumstances under which the promissory note and the deed of release just mentioned were executed by *Musammat* Zohra Jan and Nabi Bakhsh, respectively, in favour of each other. On the pleading of the parties the District Judge framed the following issues:—

(1) Is the pro-note for consideration?

(2) Did not plaintiff give consideration for the transfer?

(3) If not, can plaintiff still sue?

Although no explicit issue was drawn with regard to the plea of undue influence set up by *Musammat* Zohra Jan, that plea was sought to be established by evidence and was pressed in argument before the District Judge and the District Judge has recorded his finding upon it.

Upon the issues set out above the District Judge has held (1) that the promissory note in suit was executed for consideration, the consideration being, not Rs. 30,000 cash as mentioned in the promissory note, but the proprietary rights which were gifted by Nabi Bakhsh in favour of *Musammat* Zohra Jan by deed dated the 7th March 1910; (2) that the assignment of the promissory note in favour of the plaintiff was valid having been made for adequate consideration and that, therefore, the plaintiff could sue on the promissory note and (3) that the promissory note was executed by *Musammat* Zohra Jan as a free agent and not under any undue influence. Upon these findings

the District Judge has decreed the plaintiff's claim.

We have heard lengthy arguments by learned Counsel on both sides, who have discussed in minute detail the various points arising in the case which have been dealt with by the learned District Judge in his elaborate and carefully written judgment. The District Judge has set forth at some length the respective versions of the parties as to the circumstances under which the promissory note in suit and the deed of release dated the 7th March 1910 were executed at Lahore, but for the purposes of the present appeal it is not necessary for us to reproduce those versions in our judgment. In the view that we take of the case a great deal of the evidence relating to certain facts connected with the alleged extravagant and dissolute habits of Abdul Karim, the great influence which his wife, *Musammat* Zohra Jan, is said to have exercised over him, the financial embarrassments into which the family had been plunged, and the unpleasant position in which, according to the plaintiff, she and her husband, Nabi Bakhsh, found themselves placed in consequence of the alleged machinations of *Musammat* Zohra Jan must be treated as immaterial. The real issue in the case, which seems to us to have been rather obscured by the angry controversy which has arisen over certain details that have been noted by the learned District Judge in his judgment, is whether the promissory note sued upon was executed for consideration or not, and it appears to us that that issue can be decided without much difficulty. As expressly stated in the body of the promissory note, the consideration for it was the sum of Rs. 30,000, which was *borrowed in cash* by *Musammat* Zohra Jan from Nabi Bakhsh *without interest*. The words which have been *italicised* by us are rather important, as showing what the nature of the consideration was which was understood to have passed from Nabi Bakhsh to *Musammat* Zohra Jan, and on receipt of which the latter executed the pro-note. The wording of paragraph 1 of the plaint also clearly shows that, according to the plaint, Rs. 30,000 was the consideration for the promissory note, and it was not until after the defendant, *Musammat* Zohra Jan, had denied in her pleas that she had received any portion of the alleged consideration in cash that the plaintiff in her replication stated that the consideration for the promissory note was, not a sum of money, but certain proprietary rights in immoveable property which had been given to the defendant by Nabi Bakhsh under the deed of release dated the 7th March 1910. Before the District Judge it was argued on behalf of the defendant that having regard to the provisions of section 92 of the Evidence Act, it was not open to the plaintiff to give evidence to show that certain rights in immoveable property which were gifted by Nabi Bakhsh to the defendant formed the consideration for the promissory note, inasmuch as the promissory note was a contract in writing, the statement therein that the consideration was Rs. 30,000 cash was a term of the contract and no evidence could be given by the plaintiff for the purpose of contradicting, varying or adding to that term. In our opinion section 92 of the Evidence Act has no bearing whatever on this case. We start with the presumption laid down in section 118 of the Negotiable Instruments Act that the promissory note in suit was executed for consideration, and the onus lies on the defendant to prove that no consideration passed to her under the promissory note. To this extent the plaintiff has an advantage over the defendant. But when we find that in the body of the promissory note the consideration for it is stated to be the sum of Rs. 30,000 *borrowed in cash* by the defendant from Nabi Bakhsh *without interest*, and when in the course of the pleadings the plaintiff is forced to admit that the consideration *as stated* in the promissory note did not pass, in other words, when the plaintiff admits that the statement as to the passing of consideration in the shape of Rs. 30,000 from Nabi Bakhsh to the defendant was incorrect, when these are the facts, is not the Court justified in holding that the initial presumption raised in favour of the plaintiff by section 118 of the Negotiable Instruments Act has been rebutted and that the onus has been shifted on to the plaintiff to prove that the promissory note was executed by the defendant for consideration, the consideration being something else than Rs. 30,000 in cash? In our opinion the answer to this question must be in the

affirmative, *i. e*, that, in the circumstances of this case, it was incumbent, on the plaintiff to prove affirmatively that the defendant, *Musammat* Zohra Jan, had executed the pro-note in question for full consideration.

After giving every weight to the argument adressed to us by the plaintiff's learned Counsel, we are constrained to hold that the plaintiff has been unable to discharge herself of this onus. Her case is that the gift of proprietary rights in certain properties, which was made to *Musammat* Zohra Jan by Nabi Bakhsh under the deed of release, dated the 7th March 1910, and the value of which proprietary rights was mentioned in the deed to be Rs. 49,500, constituted the consideration for the promissory note and that the note is, therefore, valid and enforceable. In view, however, of the circumstances attending the execution of the deed of release in question and of the promissory note, we are unable to accept the contention of the plaintiff's Counsel on this point as sound. The persons who were present when the promissory note and the deed of release were executed at Lahore on the 7th March 1910 were, as admitted on all hands, Nabi Bakhsh, *Musammat* Zohra Jan and Sher Baz and Bhola Ram, who were servants of Nabi Bakhsh. Besides these persons, it is alleged by the plaintiff and denied by the defendant that Abdul Karim also was present on the occasion. Of these, Sher Baz, Nabi Bakhsh and *Musammat* Zohra Jan have given evidence in this case regarding the circumstances under which the promissory note and the deed of release were executed.

Sher Baz, the first witness for the plaintiff, says:—

"I am plaintiff's servant. The pro-note, Exhibit P-1, was written by *Musammat* Zohra Jan in her own hand at Lahore, at the Islamia Hotel in my presence, and the contents were recited to me. Her husband, Abdul Karim, was present, also Nabi Bakhsh. The consideration of the pro-note was the proprietary rights of two markets and five shops, situated in Rawalpindi, of which the estimated value was Rs. 49,500. She had the full power of alienating these rights, and the rights were those of absolute ownership. The pro-note was written on the 7th March, and on the same date Nabi Bakhsh gave Zohra Jan these proprietary rights by virtue of a document (Exhibit D-1). Both documents were written in Lahore, and the second was registered at Rawalpindi. * * * * * * * *."

"Zohra Jan had previously taken only the rents of the property: the rights of taking the rents had been given by Nabi Bakhsh to his son, Abdul Karim, who had alienated them to his wife. Nabi Bakhsh was annoyed with his son on account of his bad conduct, and wished to resume possession. He told me he was going to do so. Abdul Karim got to hear of this and wanted to conciliate his father. He and his wife went to Gujranwala, where he was and where I had accompanied him. There it was settled that Zohra Jan would pay Rs. 30,000 to Nabi Bakhsh in return for which she was to get absolute proprietorship of the property, and they then went to Lahore to consult lawyers and to write the necessary documents." (Page 33 of the paper-book.)

In cross-examination the witness states:—

"We got to Lahore in the evening of the day, and the *rukka* was written in the evening of the next. Lala Hakumat Rai's professional advice was taken about the documents. Abdul Karim and Zohra Jan drafted the promissory note. I read the *rukka* when it was written. The words 'I have taken Rs. 30,000 from my father-in-law, Nabi Bakhsh, by way of loan are correct, but he did not give her the money but the property. *Rukka* was written before the deed of release."

* * * * * * * *

"The lawyers at Lahore did not advise us to omit the consideration for the Rs. 30,000 in Exhibit D-I, nor to mention the fact of cash having been received in the pro-note. Nabi Bakhsh and Abdul Karim had settled amongst themselves not to mention the fact of the consideration in Exhibit D-1." (Page 34).

Mian Nabi Bakhsh who was also examined as plaintiff's witness says:—

"I gave Abdul Karim property worth Rs. 50,000 on one occasion and again more property worth Rs. 25,000. With the property worth Rs. 50,000 were the rights of recovering the rents of certain shops and markets, but not the proprietary rights in them. But I resumed these rights on the misconduct of my son and his wife. They came to me at Gujranwala and persuaded me

to sell them the full proprietary rights of the property worth Rs. 50,000 for a *hundi* for Rs. 30,000. The *hundi* is the promissory note in suit. Zohra Jan executed the promissory note. She did so because her husband had transferred to her the rights I had given him of recovering the rents. The promissory note was executed in a Muhammadan Hotel at Lahore. We went to Lahore, because it was closer to Gujranwala than Rawalpindi. I executed the document, Exhibit D-1, at Lahore and had it registered at Rawalpindi." (Page 35 of the paper-book).

Musammat Zohra Jan gives the following version of the facts relating to the execution of the promissory note and the deed of release :—

" I did execute a pro-note for thirty thousand rupees (*i.e.*, in suit) in favour of Mian Nabi Bakhsh at Lahore."

* * * * *

"Kalu, an old servant of my father-in-law, came to me from Gujranwala in order to take me there (to Gujranwala). So I went with him to Gujranwala."

* * * * *

"My further-in-law and mother-in-law then told me that they and Mian Abdul Karim were under heavy debts and so they wanted to make arrangements for it."

* * * * *

"Then I, my father-in-law, and one of his servants, Bhola Ram by name, also another *munshi* of his (named Sher Baz) proceeded to Lahore. We stopped in a hotel at Lahore in the city."

* * * * *

"When we reached Lahore Mian Nabi Bakhsh left me in the hotel and himself went to consult some Pleader. Mian Nabi Bakhsh returned after four or five hours and said that the Pleader had sent a *munshi* with him. Mian Nabi Bakhsh said that if we followed the advice given by the Pleader all will be well. Mian Nabi Bakhsh asked me to act up to his advice, and to write out what is told to her."

* * * * *

"She asked me to write the *rukka* at the dictation of the Pleader's *munshi* which I did. Next day we came to Rawalpindi. At Rawalpindi a document (which was perhaps executed at Lahore) was registered in my favour."

* * * * *

"The said document is shown to me. It is a transfer-deed, dated 7th March 1910." (Page 48 of the paper-book).

In cross-examination witness states :—

"I was not told what the object was to get the pro-note in suit executed from me. I was only told that it was in order to defeat the creditors. I was not told how the creditors will be defeated thereby. Pro-note was executed at 11 A.M., and the document D-1 was executed at 4 the same evening. It was executed as my father-in-law wanted to transfer his remaining rights in the property to defeat the creditors. Although the transactions at Lahore were intended to defeat the creditors, I paid 15 thousand rupees to the creditors as I was told my husband will be imprisoned and my father-in-law will be disgraced and my jewellery will be seized. I do not know if any warrant of arrest was issued against my husband at the time. I was told there was a suit pending against my husband and his father at Gujranwala."

* * * * *

"I got the right to sell the property through D-1. I was neutral in the matter of the execution of D-1. When the pro-note in suit was executed, I was not told that any property was to be transferred to me. I was told to execute a fictitious pro-note to defeat creditors."

From the evidence of these three witnesses Sher Baz, Mian Nabi Bakhsh and *Musammat* Zohra Jan, it is clear that no portion of the consideration money Rs. 30,000, passed to *Musammat* Zohra Jan under the promissory note in suit; that the promissory note was executed by her in favour of her father-in-law, Nabi Bakhsh, before the latter executed the deed of release in her favour; and that Nabi Bakhsh and *Mussammat* Zohra Jan are not agreed as to the object with which the two documents were executed at Lahore. It is further clear that the professional advice of a Pleader was taken before the documents in question were executed; and we have it on the authority of Sher Baz, who is plaintiff's

servant and who was a lawyer's *munshi* for about 10 or 12 years, that the real facts connected with the passing of the consideration were not correctly stated in the promissory note and in the deed of release, although the Lahore Pleader who had been consulted did not advise Nabi Bakhsh to mention in the pro-note the fact of Rs. 30,000 in cash having been received by the executant or to omit in Exhibit D-1 all mention of the consideration for it being Rs. 30,000. On the face of it, then, the transaction evidenced by the pro-note and the deed of release is highly suspicious, and it becomes necessary to scrutinize with some care the reasons which have been alleged on each side as having prompted the execution of the pro-note and of the deed of release, respectively. According to Nabi Bakhsh, the understanding arrived at between him and his wife, on the one hand, and his son Abdul Karim and *Musammat* Zohra Jan, on the other, was that he (Nabi Bakhsh) would sell to the latter full proprietary rights of the properties included in paragraph 2 of the schedule contained in the deed of the 22nd April 1909 for a *hundi* for Rs. 30,000; and he says that the promissory note in suit was excuted accordingly at Lahore. If really the understanding between the two parties was as stated by Nabi Bakhsh, it is exceedingly difficult to see why Nabi Bakhsh and his son and *Musammat* Zohra Jan and Sher Baz should have come to Lahore at all, for it was easy for Nabi Bakhsh to get the promissory note executed by both Abdul Karim and his wife for Rs. 30,000 in his own favour at Gujranwala, and in consideration for this he could have executed a deed of sale of his proprietary rights in the aforesaid properties in their favour and to get the deed registered at Rawalpindi. Instead of adopting that simple course, they all came to Lahore and, after consulting a Pleader here, got the promissory note executed by *Musammat* Zohra Jan, in which the recital as to consideration having passed in cash was absolutely incorrect; while at the same time Nabi Bakhsh executed, not a deed of sale of his proprietary rights in the properties referred to in the deed of the 22nd April 1909 in favour of both his son and *Musammat* Zohra Jan, as originally arranged, for Rs. 30,000, but a deed of release in favour of *Musammat* Zohra Jan alone without mentioning in the deed that the consideration for the release was the promissory note for Rs. 30,000 executed by *Musammat* Zohra Jan in favour of Nabi Bakhsh. This does not look like a transaction which was the result of undue influence or of deception exercised or practised upon Nabi Bakhsh by *Musammat* Zohra Jan; on the other hand, the more reasonable inference seems to be that both parties were anxious, after taking legal advice, to get certain documents executed with the object of helping each other against the creditors of Nabi Bakhsh and Abdul Karim because, as a matter of fact, the latter were then placed in an embarrassing financial position.

That this is the true explanation of the situation is clear from the evidence of Sher Baz and Nabi Bakhsh. Sher Baz says in his statement:—"At the time of writing the *rukka* there was a decree for Rs. 2,800 against Nabi Bakhsh and there was a suit for Rs. 14,000 also pending against him." (Page 34).

* * * * *

"Badri Das brought a suit for Rs. 14,000 against both of them (*i.e.*, Nabi Bakhsh and Abdul Karim). There are now two suits pending against both of them." (Page 35).

Nabi Bakhsh is less frank on this point. He says:--

"Badri Das of Gujranwala did file a civil suit against me. I had borrowed nothing from him. I do not know if the amount for which Badri Das sued appeared in my account books or not."

* * * * * * * *

"I do not know if any suit was pending against me at the time of the execution of the pro-note in suit. So far as I remember, no suit was pending against me at the time. I paid nothing to decree-holders." (Page 39).

In an earlier part of his statement at page 36 he says :—

"I owed about Rs. 35,000 to Rs. 42,000 in the *bazar*, to get which money in order to pay off my creditors I pledged my wife's jewels."

In cross-examination he says at page 37: "When Mian Abdul Karim executed the deed of release in my favour (that is in April 1909) I owed thirty or thirty-two thousand rupees."

In re-examination he says at page 40:—"When I said above that I owed thirty or thirty-two thousand rupees, I meant that I owed this sum to my wife. I borrowed from my wife and paid to my creditors."

It is clear from the above statement of Nabi Bakhsh that he is not telling the whole truth about his financial condition at the time when the promissory note and the deed of release were executed at Lahore; and reading his statement with that of Sher Baz in the light of attendant circumstances the only reasonable inference that can be drawn is that the parties' family was then suffering from some kind of financial distress and that in order to extricate themselves from a somewhat difficult position they agreed upon a scheme under which the family property could be saved from the present and prospective claims of the creditors. Under this scheme Nabi Bakhsh was to make a gift of proprietary rights in certain property included in the deed of 22nd April 1909 to *Musammat* Zohra Jan, and the latter was to execute a promissory note for Rs. 30,000 in favour of the former. Whether this device has or has not borne fruit is altogether beside the point. The question for determination is whether the transaction relating to the execution of the promissory note and of the deed of release of the 7th March 1910 was a genuine one or not; and upon careful consideration of the whole material upon the record we have no hesitation in coming to the conclusion that it was not a genuine transaction at all. We are quite clear that the plaintiff on whom, in the circumstances of this case, the onus lay of proving that the promissory note in suit was executed by *Musammat* Zohra Jan for consideration has failed to discharge that onus; and we, therefore, hold that the defendant, Zohra Jan, is not liable on that promissory note.

For the foregoing reasons we accept this appeal, and setting aside the decree of the District Judge we dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 494 OF 1913.

November 6, 1914.

Present:—Mr. Justice Beaman.

KHIMJI VASANJI AND ANOTHER—PLAINTIFFS

versus

NARSI DHANJI AND OTHERS—DEFENDANTS.

Cause of action—Breach of contract of marriage—Suit for damages—Action founded on conspiracy—Malice—Father's right to breach of daughter's engagement according to Hindu Law.

In every case founded on conspiracy, malice is essential to the giving of a good cause of action. [p. 409, col. 2.]

Where a man merely knowing of the existence of an unperformed agreement, without malice or the use of unlawful means, obtains the benefit of the agreement for himself, no action can lie against him for the breach of the agreement or procuring such breach, at the instance of the first promisee. [p. 414, col. 2.]

Lumley v. Gye, (1853) 22 L. J. Q. B. 463, 2 El. & Bl. 216; 17 Jur. 827; 1 W. R. 432; 118 E. R. 749; 95 R. R. 501, doubted.

Allen v. Flood, (1898) A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595; 14 T. L. R. 125, *Quinn v. Leathem*, (1901) A. C. 495; 85 L. T. 289; 70 L. J. P. C. 76; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749, discussed.

The plaintiff No. 1 betrothed his son, plaintiff No. 2, to one *J*. *J*'s father sometime after the betrothal married *J* to defendant No. 1. Upon this a suit for damages was brought on the allegation that defendant No. 1 had conspired with his sisters, defendants Nos. 2 and 3, and others wrongfully to procure the breach of contract of marriage:

Held, (1) that inasmuch as defendant No. 1 was not shown to have known of the betrothal before his marriage, no violation of any legal right either by individual procuration or conspiracy was proved and the plaintiffs had no cause of action; [p. 421, col. 2.]

(2) that as under Hindu Law a father may break off his daughter's engagement, should a more suitable bridegroom be available, the plaintiffs under that law never had more than a conditional right to the fulfilment of the contract and that, therefore, the suit was not maintainable. [p. 421, cols. 1 & 2.]

Messrs. *Wadia*, with him Mr. *Jardine* (acting Advocate-General), for the Plaintiffs.

Mr. *Davar*, with him Mr. *Setalvad*, for the Defendants.

JUDGMENT.—The plaintiffs, father and son, sue the defendants for damages alleging that the three defendants conspired with each other and others, not made parties to this suit, to procure the breach of a contract of marriage entered into by one Mulji, not a party, with the plaintiff No. 1 on behalf, respectively, of Jamnabai, the daughter of the said Mulji, and Kanji, the plaintiff No. 2. The material undisputed facts are that the girl Jamnabai was formally betrothed by her father Mulji in 1910 to the second plaintiff, the contract

being made according to the usages of the caste between Mulji and the plaintiff No. 1. The terms of the contract were that the plaintiffs were to provide Rs. 5,500 worth of ornaments for the bride.

Early in March 1913 Mulji appears to have contemplated making another marriage for his daughter, as he alleges, because he had already broken off the engagement with the second plaintiff on account of the plaintiff's failure to comply with the conditions of the original betrothal. Towards the close of March, Mulji went to Calcutta and appears to have sounded the defendant No. 1, who was then recently a widower. The defendant No. 1 is a much wealthier man than the plaintiff No. 1 or plaintiff No. 2.

The defendant No. 1 agreed to marry the girl, Jamnabai, who was now rather overmature in the opinions of these people to be left unmarried any longer.

Accordingly, on the 17th April, Mulji took the girl and a bridal party to Calcutta, where they all put up in the house of the defendant No. 1. Overtures appear to have been made to the local *jamat* that evening, but the customary dues were refused. The following morning, the betrothal ceremony was first performed and thereafter the marriage. The result is that Mulji, the father of the bride, as well as the defendant No. 1, have been ex-communicated for breaking off the girl's engagement to the plaintiff No. 2 and marrying her to the defendant No. 1.

An enormous amount of irrelevant evidence, about the past history of the first defendant and many other matters, has been accumulated. It is unnecessary to refer to any part of it. There is also much evidence about the manner in which the marriage of Jamnabai to Nursey, defendant No. 1, was hurried through, as well as the customs of this caste, and the attitude adopted by the *jamat*, the complaint made to the *jamat* by the plaintiffs and the like, the only bearing of which upon the points to be decided is, that it might heighten the probability of the defendant No. 1 having been fully aware of the previous engagement of the girl to plaintiff No. 2. There is also a good deal of evidence as to the subsequent conduct of the defendant intended to prove that he knew very well that he had deliberately wronged the plaintiffs and desired to hush the matter up. Except, again, as bearing upon defendants' knowledge of the pre-existing contract, this is immaterial.

Mulji's story is that he had a perfect right to break off the first engagement when the plaintiffs would not make the last three thousand rupees worth of ornaments, and that he had, in fact, done so after giving them a stipulated time in which to fulfil their part of the contract. It was only after this, according to Mulji, that he offered his daughter to the defendant No. 1. The plaintiffs deny that they ever refused to perform any part of their contract and alleged that the father of the girl threatened to withhold his daughter for three years after the last ornament had been made. The defendant No. 1 says that he knew nothing at all of the previous engagement till after his marriage with Jamnabai on the 18th April 1913.

Clearly, if the defendant No. 1 did not know of the contract between Mulji and the plaintiffs the plaintiffs would have no cause of action against him, either as an individual for procuring the breach of a subsisting contract or as a conspirator with others for the same object. And it has caused me much doubt since the case was opened whether in the facts and circumstances alleged in the plaint it discloses any cause of action against any of the defendants. It is to be noted that the case is laid in conspiracy. And surveying the history of the law of conspiracy since its origin in the first writ which ever issued on such a count in the Civil Courts, at the end of the thirteenth century, up to such cases as those of *Allen* v. *Flood* (1) and *Quinn* v. *Leathem* (2), it might be doubted whether any such action could have been maintained consistently with its historical development and theoretical origin without an ingredient of malice. No malice is alleged on the part of the defendants in this case. But ever since *Lumley* v. *Gye* (3), which was not a case of conspiracy, mere knowledge of the existence of a contract, which it was the

(1) (1898) A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595; 14 T. L. R. 125.

(2) (1901) A. C. 495; 85 L. T. 289; 70 L. J. P. C. 76; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

(3) (1853) 22 L. J. Q. B. 463; 2 El. & Bl. 216; 17 Jur. 827; 1 W. R. 432; 118 E. R. 749; 95 R. R. 501.

object of the individual or of a body of conspirators to get broken, has been held in law to be tantamount to malice. So it was summarily stated by Crompton, J, in delivering the judgment of the Court in *Lumley* v. *Gye* (3). Nevertheless it is worth noting that even in that case, the pleadings alleged malice on the part of the defendant. Erle, J.'s dictum appears to have been made the foundation of the later law, which may now be taken to govern in England all cases of the kind, whether put on the ground of conspiracy in the old sense or merely upon the ground of procuring the breach of a contract, as in *Lumley* v. *Gye* (3). In the latter class of cases, analogies from the old conspiracy action are introduced, probably on the supposition that there has still been a conspiracy between the defendant and the person induced to break the contract. The English Law on this subject is extremely interesting and the judgments of the numerous great Judges who took part in the decisions of such cases as *Lumley* v. *Gye* (3), *Mogul Steamship Company* v. *McGregor, Gow & Co.* (4), *Allen* v. *Jackson* (5), *Allen* v. *Flood* (1) and *Quinn* v. *Leathem* (2) seem to invite the closest analytical scrutiny. For it can hardly be denied that they are full of dicta, which are in conflict, and in no case can any of the broader generalizations to which some of our greatest Judges have committed themselves be considered as having really settled any one definite and consistent principle. Erle, J., said that procuring the violation of any subsisting right was a cause of action, and the violation of the right an actionable wrong. This appears to have been adopted either expressly or by implication by Lords Watson and Macnaghten in *Allen* v. *Flood* (1) and *Quinn* v. *Leathem* (2). But when the judgments of all the learned Law Lords in these cases come under critical examination it will be found, I think, that they contain many pieces of questionable or at least imperfect reasoning and attempts at definition which have not really succeeded in defining permanently or universally the notions in controversy. On the strength of these and many other earlier and some later judgments, text-sbook writers have settled down comfortably on one or two general propositions, as for example, "it is now settled law that procuring the breach of a contract is a good cause of action," and that "in civil actions for conspiracy malice is not but damage is the gist of the actoin." Lord Esher said in *Allen* v. *Jackson* (5), that merely persuading a man to break his contract with another gave no right of action in the civil law, unless it were done maliciously. That would make malice the gist of that kind of action, and *a fortiori*, in all conspiracy actions, the gist of the action, in one sense. The word "gist" is a bad word having but a very loose and ill-defined meaning. If the word "essential" be substituted for it, then we shall see at once that, notwithstanding the emphatic dicta of Lord Watson and Lord Macnaghten that the intentions of the conspirators mattered nothing at all, malice, either express or constructive, still remains an essential of all these actions. It is not the "gist" of the action in another sense of course. That is to say, unless damage is caused, a mere malicious attitude of mind or a malicious intention will not give a cause of action. It is only in that sense that it is true, I submit, that malice is not, and damage is, the gist of the action. Nor is it even now strictly true to say, in the widest sense, that a man's mental state has nothing to do with an action of this kind. This is too plain to allow of argument when we find it universally conceded (and indeed this is implied in every pleading) that unless the defendant knew of the contract which he is alleged to have conspired to break or the breaking of which he has procured, no action would lie against him. It might be said that knowledge can be proved as a fact, whereas intention cannot. But in the eye of the law intention has to be found as a fact in ninety-nine out of every hundred criminal convictions and if mere knowledge is held in law to involve malicious intention for all purposes of an action for damage for procuring the breach of a subsisting contract, nothing much is gained, in the direction of theoretical perfection at any rate, by peremptorily ruling out all considerations of intention. There is, in fact, whatever the law may choose to presume in its rough and ready fashion, a great difference between

(4) (1892) A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 7 Asp. M. C. 120; 56 J. P. 101.

(5) (1875) 45 L. J. Ch. 310; 1 Ch. D. 399; 33 L. T. 713; 24 W. R. 306.

mere knowledge and a malicious use of that knowledge. But the term "malice" in law has long been the despair of all clear thinkers, and it is probably too late now to attempt to clarify the fog which has gathered about this legal concept.

It may be doubted whether any practical difficulty was experienced in administering the law governing either (1) conspiracy actions, (2) actions for unlawfully and maliciously procuring the breach of a contract, until *Lumley* v. *Gye* (3) gave an enormous extension to a doctrine, which up to that time had been kept within narrow and intelligible limits. It is matter of judicial history that the decision in that case gave rise to much conflict of opinion and grave doubts. But Lord Macnaghten took occasion to say in *Quinn* v. *Leathem* (2) that, in his opinion, it was rightly decided. So again almost all the Irish Judges first concerned with *Quinn* v. *Leathem* (2) openly lamented the decision of the House of Lords in *Allen* v. *Flood* (1) as constituting a wide and questionable departure from the law as it formerly stood. To get anything like a clear perception of the entanglements of reasoning and the subtle difficulties underlying the judgments in the long series of cases usually cited in the later judgments, a broad line of cleavage ought, it is submitted, to be drawn and strictly observed between actions on the ground of conspiracy and heterogeneous actions which have really nothing to do with conspiracy at all, but have been gradually drawn into the current of legal thought and decision on this subject by way of analogical illustration. For example, the old case of the decoy ducks had nothing whatever to do with either conspiracy, or procuring the breach of a contract. The ground of that decision, involving a distinction too subtle, I think, to be maintained consistently, was, as far as I can make anything out of it, that the defendant was liable because his act was not only malicious but wrongful in itself, being in the nature of a nuisance. If he had alarmed the plaintiff's decoy duck area, by firing on his own land in pursuit of his own game, it would seem that he would not have been liable, but he was held liable because he fired for no other purpose than to injure and annoy the plaintiff. Similarly the *Schoolmaster's* case [*Gloucester Grammar School* case (6)] was not a case of conspiracy at all, but a case of procuring the breach of a contract. At least I suppose that would now be thought to be its true ground, though it might also have been presented as an instance of maliciously injuring a man in the peaceful pursuit of his own trade or profession. It is an interesting case, because it appears to me to conflict in principle with *Lumley* v. *Gye* (3), and to be referable so far as the reasons governing the decision go, to the principle of actions for conspiracy. Briefly, the formula of all conspiracy actions is the same, that *A*, *B*, *C* maliciously conspired together to do a rightful act by rongful means, or to do a wrongful act by wrightful means, or to do a wrongful act by wrongful means. Such ingredients exhaust, I think, the content of the legal notion of conspiracy in the civil law. But unless damage was caused there could be no action. For then it would be merely *injuria sine damno*. Yet it is important, nay, essential to remember, that the mere conspiracy *per se*, the agreement of the defendants, was in itself a wrongful act in view of the end aimed at or the means by which the end was to be attained. And this marks a distinction, and a very necessary distinction, to be observed between cases of conspiracy and cases of procuring the breach of a subsisting contract. Here is a very simple case. If *A*, *B*, *C* all sell their cargoes of wheat, then on the high seas, to *X*, a speculator, on condition that they shall be delivered to him at the price agreed on the ships reaching port, unless they, *A*, *B*, *C*, had before that event chosen to re-sell to others. Now, suppose *A* with the deliberate intention of injuring *X* re-sells his cargo to *M* at a lower price, and so deprives *X* of the bargain. It is pretty clear, I think, that no action would lie by *X* against *A*. So if *B* and *C*, each for himself and without pre concert, did the same, *X* would have no remedy. But if *A*, *B*, *C* maliciously conspired together to injure *X* by selling their respective cargos to others, then there would have been a case of conspiracy, and the facts being so found *X* would have had his remedy against them. It is obvious that the damage caused to *X* would have been exactly the same in the

(6) (1411) 11 Hen. IV, 47.

two cases last supposed, yet in the one case, for want of the conspiracy and the malicious intent, there would have been no remedy, while in the other, because of those factors, there would. In such a case how could it be said that malice was not an essential of the action? It might be objected that here is no conspiracy to do either an unlawful act, or a lawful act by unlawful means. But I apprehend that, according to the understanding of the older law, it would be an unlawful act to injure a man maliciously in the pursuit of his trade, and that merely conspiring to do so would be an unlawful means. Whether that understanding could be made to conform with the law laid down in *Allen* v. *Flood* (1) and in *Quinn* v. *Leathem* (2) is doubtful. It is not of course an actionable wrong merely to injure a trader by legitimate competition, as in the *Mogul's* case (4). There was a conspiracy up to that point, but as it was held that neither the end nor the means of the conspiracy were unlawful, the action failed. It would have been otherwise had the end been to injure the defendant maliciously. Had the conspiracy been formed not with the sole object of benefiting the conspirators by excluding hostile competition but out of spite to a particular person to ruin him, although the means employed had been exactly the same, I gather from the reasoning of all the learned Judges that the plaintiff would have succeeded. In a word, the conspiracy which *plus* damage gives an action at civil law must be a conspiracy which without damage would have been indictable. A conspiracy to coerce indentured servants to break their labour contracts would certainly have been indictable, and the whole current of conspiracy actions in the Civil Courts shows how directly they are derivable from the puculiar sentiments with which the Legislature long regarded the relations created by contract between master and servant. It may, however, be doubted whether an action could have been brought in the Civil Courts for conspiracy to procure the breach of a great number of other contracts or whether, in fact, any such case ever has arisen. Yet it is extremely hard to find any distinction in principle. There would, at least, be this refuge, which is denied to those who would seek a complete and satisfactory delimitation of the principle to which effect was given in *Lumley* v. *Gye* (3), that in the former cases the act of conspiring might be declared to be a wrong in itself, while in the latter there is no such discoverable element. It is obvious too that the use of the term "procuring" suggests a distinction between cases in which the defendant's motive must, on the facts, have been malicious in the widest sense, and others in which, using language in its ordinary sense, it could not have been. Here is another case. *A* sells a piece of land to *P*. *B* desires the land. Knowing that *A* is a strong temperance man, and that *P* means to put up a gin palace on the land, *B* informs *A* of *P*'s intention, with the result that *A* refuses to sell the land to *P*; and afterwards sells it to *B*. It is clear that, according to Lord Macnaghten's understanding and application of Erle, J.'s dictum, *B* would be answerable to *P* in an action for procuring a breach of contract. And so he would, presumably if he had merely offered *A* a higher price. Then the case would seemingly have been on all fours with *Lumley* v. *Gye* (3) in all material particulars. But would an action lie? Perhaps it would now, but it may be doubted whether it would before *Lumley* v. *Gye* (3). In the case supposed, if instead of the representation having been made to *A* by *B* alone in his own interest and without any particular malice against *P*, *B*, *C*, *D* had conspired to deprive *P* of his bargain in this way, and had, in furtherance of the conspiracy, made the same representation to *A*, then if an action would have lain against *B*, *C*, *D* at the suit of *P*, it would have been based on the conspiracy, and implied malice. Again, if no representation had been made to *A* but *B*, *C*, *D* had, as a syndicate, desired to get the land and had offered a higher price than that agreed upon between *A* and *P*, would this have been an actionable conspiracy? I doubt it, and I do not believe that any case of the kind can be found. Yet if *B*, *C*, *D* knew of the contract between *A* and *P* and deliberately induced *A* by offering a higher price to break it, the case falls within the terms and principle of the law laid down by Lord Macnaghten. There is a large and quite perceptible difference between all such cases of one or more individuals trying to get something already contracted for by some one else for them

selves, and all true cases of actionable conspiracy. But as the terminology of the most authoritative judgments stands at present, it is difficult, if not impossible, to express that difference in the terms of any constant principle. Because the one real and substantial criterion, namely, the motive, the malicious motive, has been peremptorily ruled out. But even were that still left for use, it would not suffice. Take such a case as this. *A* has a valet *B* who has agreed to serve him for a year. *X* particularly desires the services of *B*. He does not know *A* and has no malice, except in the most extended legal sense of that term, toward *A*. He offers *B* higher wages, and *B* deserts *A* after three months of the term agreed upon have expired. The ground of *A*'s action against *X* would now be, in the words of the old writ, *per quod servitium amisit*. And presumably this was the ground of the decision in *Lumley* v. *Gye* (3). The same writ would serve in an action for seduction of daughter or female servant, but it takes us far from the ground of the action in conspiracy. Still it may help to bridge the chasm between true conspiracy cases and cases for procuring the breach of a subsisting contract. As a limitation as well as an explanation it may here be of some service. It might be contended that in the two first hypothetical cases put, the plaintiff analogically had lost the use of the corn or the land and so the actions were referrable to the same principle. In all cases of the *Lumley* v. *Gye* (3) class, there must be taken to be an existing contractual relation already entered upon and in part performed, before it is broken at the solicitation or by the conspiracy of the defendant or defendants. It is true that we are here met at once by a fresh difficulty. For it has often been said in conspiracy cases that it makes no difference whether the object of the conspiracy be to break off exsisting contracts, or to prevent the making of fresh contracts. And this is intelligible when we bear in mind the nature of the conspiracy itself, and its malicious direction against the plaintiff. But it certainly would not be true if extended for the purposes of theoretical construction to such a case as *Lumley* v. *Gye* (3). Had there been no contract between Wagner and Lumley, it is clear that Lumley would have had no cause of action again Gye merely for outbidding him and so securing the services of Miss Wagner for himself And I think that is universally true of every case properly restricted to the procuring by a single person of the breach of an existing contract for his own benefit. If I am so far right, we come in sight of something like a real distinction which might be embodied in a general rule. Leaving aside for a moment cases of conspiracy, and confining ourselves to cases of procuring a breach of contract, it would then appear that such procuring is only actionable at civil law when the contract is of a peculiar kind already partly executed and partly to be executed. Even if it is so, it is extremely doubtful whether any logical ground could be discovered apart from conspiracy, and analogies drawn from that action, upon which to justify actions of the limited kind mentioned. It would, for example, be a nice and over-refined distinction to say that if *A* desiring to obtain the services of *B*'s valet should tempt him away from *B* a day after he had actually entered upon his service to *B* there would be a good action at *B*'s suit against *A*, but not if *A* had so tempted *B*'s servant after making the contract of service to break it one day before entering upon it. But the latter case is in no way distinguishable from any other case of procuring the breach of a contract. Eliminating malice, conspiracy, wrongful means and all such special factors, it would come to this, either all procuring the breach of a contract known to the procurer to be subsisting is actionable or none is. Subject to the eliminations just suggested, it is submitted that the proper answer is that none is. An article is to be sold. *A*, the proprietor, agrees to sell it to *B* on the next day. *X* who greatly desires the article, comes to *A* and offers him £ 500 more than *B* had offered. *A* accepts and breaks off his agreement with *B*. Now if *X* knew of the agreement with *B* he would, according to Erle, J.'s rule applied by Lord Macnaghten, be liable to *B* in an action for procuring the breach of *A*'s contract with B, but if he did not, he would not be liable. Yet the damage to *B* would be exactly the same. The basis of such an action is clearly revealed to be malice (which is a consideration I wish to have excluded in any attempt at a reasoned theory of these actions). For if *X* knows that *B* has a *prima facie* right

to obtain an article which he wishes to obtain for himself, he is presumed to act maliciously towards *B* in inducing *A*, the owner of the article, to break off his bargain with *B*. But this is a mere abuse of ordinary language to cover inexact thought and get over a difficulty which has always been felt but rarely expressed. In this grouping a complex of notions loosely under the dictum that knowledge in all such cases is equivalent to malice, the Courts have thrown a very wide net indeed, so wide as to embrace every case in which a man knowing of the existence of a contract between two others, persuades or induces the promisor to resile from his contract. Feeling this inconvenience, to use no stronger term, Judges have enwrapped the bare doctrine in a cloud of qualificatory phrases explanatory, or intended to be explanatory, of justification. The action will, it appears, always lie, but it is a good defence in the absence of malice, etc., to show that the defendant was justified in procuring the breach of the contract. What does or does not amount to justification is now shrouded in such a mist of words and phrases that it may be neglected for all purposes of scientific examination. But there is more in the bare doctrine which needs to be scrutinized. In the first place, it seems to ignore altogether the freedom of the will of the first promisor. When the Courts speak of the invasion of an existing right, it is pertinent surely to inquire what are the limits of the right. The right of *A* to the performance of an agreement entered into between himself and *B* at the hands of *B* is a tolerably clear and definite notion. As between these two, *A* who seeks to enforce the right is the person of inherence and *B* the person of incidence. Outside persons have nothing to do with it, for them the right does not exist. If *A* chooses to deny *B* his right or *B* chooses to deny *A* his right, each is at perfect liberty to do so, subject to a claim for compensation in damages, or, if need be, specific performance. In the case supposed, *A* being the person of inherence, *B* may refuse to perform his part, and *A* has his ordinary remedy. It is only on the supposition that *B*'s will is coerced by another so that he is no longer a free agent, that there could be any legal logical ground for the doctrine that the refusal of *B* to perform his part of the contract, thus "invading" or "violating" *A*'s right, gives *A* any cause of action against anyone else than *B*. That is where the old conspiracy action takes its stand. It supposes that a combination of persons may so oppress the will of one or more other persons that they cease to be free agents, and their acts are, therefore, really the acts of the conspirators who are, therefore, rightly made answerable to the aggrieved person. In contract the law assumes that men are perfectly free. It is only he who makes that can break the contract. And again it is only on the assumption that a third person or persons has deprived him of free contractual will, and so substituted his or their will for that of the original contractor, that these outsiders could be regarded as answerable in his stead to the person aggrieved by the breach. But where there has been no combination or conspiracy, it is plain that ordinarily no such reason could apply. There might be a case, in which the person procuring the breach of the contract stood in such authoritative relation to the first person of incidence that the breach might fairly be attributed to the substitution of his for the will of the contracting party. No case of that kind has yet, as far as I know, come before the Courts. And the reasoning I have ventured to suggest is entirely ignored in the broad, loose generalizations which cover the decision in the *Lumley* v. *Gye* (3) class of cases. It is submitted that where a man merely knowing of the existence of an unperformed agreement, without malice or the use of unlawful means, obtains the benefit of the agreement for himself, no action can lie against him for the breach of the agreement of procuring such breach at the instance of the first promisee. It is clear that there is no principle of law, nor any logical reason why such an action should be maintainable. The wrong done to the aggrieved person has been done voluntarily by the first promisor, not by the person with whom he has entered into a new agreement. It is only by transferring the doctrine of abetment from the criminal to the civil law that any colourable reason could be adduced in support of actions. A man who induces another to commit a crime is himself a criminal in the eye of the law. But by no parity of reason could it be argued

seriously that a person who induces another to give him the benefit of a contract, which he had formerly promised to someone else, should be answerable civilly to that third person. For, the same harm would be done to the first promisee whether the second promisee knew or did not know of his right. In the former case, on this line of reasoning, he is to have, in the latter he is not to have, a good action. Transpose this again into the criminal law of abetment and absurdity is patent. The cases of interference with existing contractual rights in operation, such as tempting a servant away from his master during the currency of the term of service, do not fall within the definition, since the agreement is already in part executed. And for all I can see there is no reason to make an exception of cases in which after a contract for service has been made, but before it is entered upon, some one else tempts the servant to break his agreement.

Turning again to Erle, J.'s dictum, so much approved later by some of the very greatest English Judges, let us see how in that later application it stands analysis. Procuring the violation of an existing right is a cause of action, the violation of the right is an actionable wrong. Now when the party aggrieved is seeking his remedy for the violation of his right (in the class of cases I am considering the breach of a contract), his whole action must presumably be referred to its cause. In other words, he must sue the procurer of the violation but allow the actual violator, his promisor, to go scot-free. It can hardly be contended that he has a two-fold remedy against both, the procurer of the breach and the breaker of the contract. Nor, I believe, would it be argued that he can sue them together jointly und severally. If he first sue his promisor for damages on the breach, what becomes of his cause of action against the procurer? And if he elect to sue the procurer of the breach, is the actual breaker of the contract to be exonerated? It may be answered that this is exactly what happens when actions for conspiracy to injure by causing others not to make contracts with the plaintiff are successful. It is not the servants and would-be customers who are sued, but the conspirators who have induced them to break their contracts or withdraw their custom, etc. True, but the reason for this is simple and does not apply to such cases as I have in view. By the act of their conspiracy to injure the plaintiff, and attain that end by bringing about unlawful acts or the use of unlawful means, they have done the plaintiff a civil wrong entirely distinct and separable from the particular wrongs done him by the several persons upon whom the conspiracy has taken effect. Nothing in the least like this happens where a person, knowing of the existence of a former agreement, merely takes a fresh agreement from the promisor of the former, although he knows also that doing so must involve the breach of the first agreement. Two elements at least are essential in the former action, the combination and the direction of its collective activity by means unlawful or lawful to an unlawful end, the malicious injury of the plaintiff. In the class of cases I am dealing with, one of these elements is entirely wanting and the other can only be imported by a very large and loose expansion of the legal notion of malice. If the underlying idea is that an abettor of a civil wrong should be liable to the person suffering it, just as in the criminal law an abettor is as punishable as the principal criminal, we need only turn to Erle, J.'s dictum and the practice founded upon it to see how completely the analogy breaks down. For here the abettor and the principal are not equally liable, but one or the other is to be selected as the wrongdoer, while the other, usually the principal, is absolved. The criminal abettor could not possibly procure the crime unknowingly, but the civil abettor might bring about exactly the same injury and damage to the aggrieved party to the first contract without ever having heard of him or his contract. Apart from conspiracy, which is an indictable offence and, therefore, a wrong in itself, it may be doubted whether the act of a single individual not prompted by malice nor supported by unlawful means, resulting in the breaking of a contract which he knew of and the making of a subsequent contract with himself for his own advantage would, in strictness, give the first promisee

any cause of action against him. In this connection it has often been argued in the Courts that there can be no conspiracy to do that which, if done by one member of the conspiracy alone, would not be an actionable wrong. This entirely overlooks the fact that the conspiracy itself is a wrong. No man is to be made the object of a conspiracy, although every man is free to play for his own hand by lawful means. It must be acknowledged that some of the greatest English Judges who have refuted this argument appear to have missed the point and strayed into reasoning, which, with deference I submit, is unsound.

Briefly, the position arrived at by this reasoning, that acts done by *A*, *B*, *C*, *D* and *X* in concert and furtherance of an end, not necessarily unlawful in itself, may give the person against whom they are directed a cause of action, though, if the same acts were done by *X* alone, they would not; in other words, that merely collective action can give an act a new quality of wrongfulness, which it would not have had but for the fact that it was done by many instead of one. And the ground of reason upon which this is supported is that a man may well resist or ignore the attacks of a single man while he might be forced to succumb to the oppression of numbers. Both the reason and the conclusion, so stated, are false. Take a simple illustrative case, that of an actor complaining of a conspiracy maliciously to hiss him off the stage and so injure him in his profession. Let us suppose that there are two hundred persons in the conspiracy who have all agreed to hiss the actor as soon as he appears. Let us suppose that the entire audience consists of a thousand persons. The conspiracy being proved, and its object also being proved, namely, to injure maliciously the plaintiff, the means by which that end is attained may be wrongful in themselves or they may be not wrongful in contemplation of law. Every person attending a place of public entertainment, and honestly disapproving of any of the actors, has a right to express his disapproval by hissing. The hissing *per se* is not a wrongful act. If one of the two hundred conspirators alone hissed, this might pass unnoticed, it might do the actor no harm. According to the reasoning under consideration it would be a harmless act giving rise to no cause of action. But done in concert with hundred and ninety-nine others it is now held to be a wrongful act. This is a plain fallacy. The act does not change its character because repeated by many. If the whole two hundred, without any pre-concert, honestly hissed together, the total hissing would be as indifferent in the eye of the law as the hissing of each of them. Add the eight hundred non-conspirators making up the audience, and suppose that the whole thousand were so displeased with the actor's performance that they all hissed him, would he have any cause of action against them? Certainly not. The wrong which is the ground of his action does not lie in the means used but in the end attained. He would be far more injured by the spontaneous and honest hissing of a thousand, than by the concerted and malicious hissing of two hundred, yet he would have no cause of action. The truth is that if the hissing of the two hundred, in furtherance of a conspiracy, was a wrongful act, then the hissing of each one of them for the same purpose would be just as wrongful an act. If the proposition is meant to apply to the wrong actually done, then it comes to no more than this, that one man might not have been able to do a wrong which many in combination might. But if the wrong were actually done by a single person with the same intent and by the use of the same means, as it might have been done by two hundred, it is impossible to find any distinction between the cases; the result in either must be the same in the eye of the law, if we eliminate the important fact that conspiracy is *per se* an offence, and so of course a material ingredient of a civil wrong. If it is lawful for *X* alone to induce a man not to sell his land to another, not to make a contract with another, or to exclude him from a new field of competitive enterprise, it is equally lawful for twenty or a hundred men without pre-concert or malice to do the same. It is true that the combination of two hundred might achieve what one of their number alone could not. But this pre-supposes conspiracy. It is also true that the collective but not concerted or malicious action of two hundred might

similarly achieve a result which any one of them singly would have failed to achieve. But here no one can doubt but that no action would lie against any one of them singly or all together. In the hissing case, just given, every one of the two hundred would be as liable as any other or all together if it could be proved (*a*) that he was actuated by malice, (*b*) that his act caused damage to the plaintiff. For this, like so many other cognate cases, is really a case of privilege in the first instance, later displaced by proof of malice. It will be found on analysis that the reasoning of all the eminent Judges who have dealt with this argument resolves itself into this, that given a wrong aimed at, many may succeed in inflicting it where any single person would not. But this is quite a different conclusion from that I have stated, namely, that what done by a single person would not be a wrong at all would be a wrong if done by a number of persons in concert. The only possible ground for any such distinction is that the fact of combination or conspiracy is a wrong *per se*. And this is not very logical either when we turn to the ordinarily accepted definitions of "conspiracy." There could be no indictable conspiracy except to do a wrong act or use wrong means to do an act not otherwise wrong. Nor could there be any civil action for conspiracy unless (*a*) a wrong act had been done or (*b*) wrong means had been used. Now we see *ex vi terminorum*, that in the first case there could be no valid distinction between the case of one person acting alone and the case of twenty people acting together, for to give a cause of action a wrong must have been done. And a wrong must always be a wrong whether done by one or by twenty. No case, therefore, can possibly be put under this head in which a wrong done to an individual by conspiracy would not also have been a wrong if done to him by any given member of the conspiracy. If it is wrong for fifty men to prevent servants going into *A*'s service, it must equally be a wrong for one man to do so. But it is argued that apart from the conspiracy, it is a fair fight one man against another, and no wrong would be done to *A* by *X* merely seeking to engage servants whom *A* desired. Neither for that matter would it be a wrong if done by the fifty, did not the conspiracy and the implied malice introduce new elements. If without malice and solely in his own interests *X* tried to corner the labour market, he would have given *A* no cause of action; but then neither would *X* plus forty-nine others. This was in effect the ground of the decision, as I understand it, in the *Mogul's* case (4). But if the object of the fifty was malicious, merely to ruin *A*, and this could be shown from the facts of the combination and its subsequent action, *A* might have his action. But in like circumstances I do not see why he should not have his action against *X* alone. The difficulty would then be to prove the malice, since there would be no starting point of a conspiracy to injure *A* in his trade. It would be hard indeed in such a case, as Lord Macnaghten and Lord Watson have said, to expect the Courts to pry into a defendant's soul and get at the hidden motives of conduct not unlawful in itself. And this brings us to the *B* category. Given an end not unlawful in iteslf, the means used to attain it by a single man could only be less wrongful than those employed by fifty men because they would be less effective, in other words, would fail of attaining the desired end. It thus becomes clear that the proposition goes no further than this, that the pressure exerted by numbers might amount to coercion, which is wrongful, while the pressure exerted by one of them alone might not, and, therefore, would not be unlawful. That is not a distinction between the quality of the same act repeated by fifty persons and the act done by one alone, but views the collective action of fifty from the standpoint of results alone as in law a different act from the act of one. In the former case it is called coercion, in the latter, it is not. Yet of course there might be genuine coercion by a single person if he were influential enough, and then the attempted distinction disappears altogether.

I return now to my central point, where, if anywhere, can a limit be set to the application of the principle established in *Lumley* v. *Gye* (3)? Logically I should say nowhere, practically I should say that it was desirable to confine that case within

the narrowest possible bounds. In a later case Rigby, L. J., puts such a set of facts as I am dealing with, though of course with reference to English customs and sentiments, as a *reductio ad absurdum* of any extension of *Lumley* v. *Gye* (3) beyond its own facts. If a lady were engaged to be married to A and before the wedding X fell in love with her and induced her to break off her engagement with A and become engaged to him, would A, he asks, have any cause of action against X? Carry it a step further, and suppose that before the lady married X, A brought his action and applied for an injunction against X restraining him from pursuing his courtship, would any Court listen to him? Similarly, in *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (7) Joyce, J., without going very deeply into the question, expresses a very strong opinion against the too liberal extension of the principle upon which *Lumley* v. *Gye* (3) appears to have been decided. He would draw a distinction between cases in which contractual relations already existing may be distinguished from unfulfilled contracts, confining the former cases to the relations existing under contracts of service between master and servant, or employer and employed. I am unable to see how any such distinction can validly be based upon the dicta of the many eminent Judges who have had to deal with this question in the English Courts. The real distiction, if one is to be drawn and maintained at all, ought to rest upon plainer and solider ground. I have already tried to indicate that ground.

In all matters of private contracts the parties are supposed to be free agents accountable to each other and no one else. The promisor may break his promise with or without external inducement and the damage to the promisee is precisely the same in either case. What conceivable right then can he have against a third person on the ground that he has induced the promisor to break his promise, unless it can be shown that he has done so maliciously or by the use of unlawful means? None at all that I have been able to discover. The aggrieved party to the first contract always has his remedy against his promisor, and it is no concern of his how his promisor was brought to break his promise. It is enough that he has done so.

Perhaps some assistance might be got out of an analysis of the terms of Erle, J.'s dictum, 'Procuring the violation of an existing right etc." Now in the case of a contract, what is the existing right of the promisee? Ordinarily, it goes no further merely as a legal right than damages, should the contract be broken. In some cases it goes the length of specific performance. But marriage is evidently not one of those cases. Where the contract is not of a kind of which specific performance could be granted, then the legal existing right, up to actual performance, is no more than the right to have damages for the breach. And that right cannot, of course, be violated by anyone who merely induces the breach. In the very nature and essence of the thing the legal right of one party to a contract against the other is restricted to that other, and is limited to compelling him, in some cases, to carry out the contract, in others, to getting damages out of him should he fail to perform it. Where then all other elements are absent and the wrong complained of is confined to the loss occasioned to the promisee by the non-performance of his promise by the promisor, the inducement by another out to perform, whether that other was or was not aware of the existence of the contract, does not, in strictness, appear to make up any part of the real cause of action. No violation of any right actually existing in the plaintiff, in such an action against the inducer, has been procured by the defendant. But this is possibly too nice, since it might fairly be replied that if there were no existing right in the promisee against the promisor to have the promise carried out, there would be no ground for the action for damages against him, and the reasoning just suggested might be thought to confound right with remedy.

On the other hand, the peremptory ruling out of all regard to the intention of the defendant insisted upon by Lords Watson and Macnaghten is open to as plain an objection. For, in fact, it never is neglected as being of the essence of the plaintiff's cause of action against such a procurer, though it is partly concealed under a looser

(7) (1907) 76 L. J. Ch. 194; 96 L. T. 218; 23 T. L. R. 189.

idea. This idea too is implied in the use of such a word as "procure." In one sense a man, who tempts the owner of an article with a higher price than that for which he has already agreed to sell it, may be said to procure the breaking off of the former agreement even though he did not know of its existence. And this also exhibits the rather coarse substitution of the bare idea of knowledge for that of malicious intent. For if two persons do precisely the same act, having the same damaging and injurious consequences to a third, and one of those persons is liable to the third in law for damages on account of knowledge, while the other is not, plainly the essence of the action against the former lies in the knowledge, or in other words, in the malice which is pre-supposed in the bare knowledge. Mere knowledge by itself could never, in an exact analysis, be such an ingredient as, added to an act, would convert it from a non-actionable into an actionable wrong. It is only when, to avoid difficulties of proof, such mere knowledge is presumed in law to impute malicious intent that we arrive at a true understanding of why an act not actionable alone may be, with that ingredient added, actionable. We are thus brought back to what is undoubtedly the truth, that in every case conforming to the required conditions, malice is essential to the giving of a good cause of action.

In the case put by Rigby, L. J., there was the existing right, there was a procuring of its violation, and there was the requisite knowledge, which, according to Crompton, L. J., is tantamount to malice, and yet no one can doubt that the party injured by the breaking of the first contract would have no cause of action against him who induced its breach. The rule then deducible from *Lumley* v. *Gye* (3) and the comments made on it in *Allen* v. *Flood* (1) is not a rule of universal applicability. Any exception invalidates an universal. Probably it is untrue to impute malice to mere knowledge; the fact of knowledge may suggest the existence of malice, but it seems rather a rude generalization to say that the two are equivalent. But if they are not, and the line requires to be drawn where I have submitted that it ought to be drawn, one thing is clear and that is that *Lumley* v. *Gye* (3) was wrongly decided. This cannot be argued now, since it was explicitly approved by the House of Lords in the later cases of *Allen* v. *Flood* (1) and *Quinn* v. *Leathem* (2). This much at least may be hazarded without disrespect, that the universality of the rule which appears to have been established by *Lumley* v. *Gye* (3) is questionable, and that it ought not to be applied to any new set of facts without a Court being satisfied that it exactly fits them. I should like to say that limiting the case before me to the plaintiffs and the defendant No. 1 (I will deal shortly with the element of conspiracy presently), it does not apply, and that, on the facts pleaded, the plaint discloses no cause of action. But in view of the state of the law at present I do not think it would be safe to do so, since it would appear from a perusal of the leading text-books that it is accepted as axiomatic that procuring the breach of a contract gives a good cause of action. I shall never be able to bring myself to believe that, without the addition of other elements, it does. I assume that the word "procuring" in this compendious phrase connotes knowledge of the existence of the contract which the defendant procures to be broken. Even so, in the absence of express malice, I do not think that looking at the development of the doctrine historically and theoretically that as an universal proposition is good law and true.

The plaintiffs have entirely failed to prove any conspiracy between the defendants *inter se* or with others not made parties to the suit. Some attempt was made to prove that the defendant No. 1 wrote to his sister, Radhabai, defendant No. 2, on the subject of procuring a bride for him. Some attempt was made to prove that the betrothal of Jamnabai to the defendant No. 1 took place in Bombay under the auspices of the 2nd defendant, who was well aware of the existence of the betrothal of Jamnabai to the second plaintiff. But that attempt appears to me to have failed. Nor, even had it been successful, would it have been sufficient to prove a conspiracy between the defendants Nos. 1 and 2 to procure the breaking off of the marriage arranged between Jamnabai and plaintiff No. 2. There is absolutely nothing to show that at that time the defendant No. 1 had any particular girl in view, or was aware of the betrothal

of Jamnabai to Kanji. Defendant No. 1 has, for many years, resided permanently in Calcutta and must not be presumed to have known all that was going on in the caste in Bombay. As to the third defendant, I cannot remember that any serious attempt was ever made to connect her with this alleged conspiracy. Both defendants Nos. 2 and 3 are sisters of the defendant No. 1. Such evidence as there is of conspiracy points to a woman, called Adhibai, having taken the leading part. It was she who appears to have recommended Mulji, the father of the girl Jamnabai, to go to Calcutta and choose a husband for her, naming one Bhabar and the defendant No. 1 as suitable bridegrooms. But what conceivable reason had this woman Adhibai to conspire with defendant No. 1 to procure the breaking off of Jamnabai's betrothal to the plaintiff No. 2? I do not believe that there was any conspiracy or anything in the least like a conspiracy. It is possible that when the marriage between Jamnabai and Kanji hung fire so long, members of the caste may have found out or guessed that the girl's father was dissatisfied with the proposed marriage, and so suggested to him that he had better look out for a more suitable husband for his daughter. It is quite possible that up to a point what Mulji has deposed to may be true. He may have insisted upon the punctual fulfilment of the terms of the betrothal, and the plaintiffs may have procrastinated, and so an impression got abroad that the match was broken off, as indeed Mulji swears that it was, before he opened negotiations with defendant No. 1.

That may account for Adhibai's intervention and suggestions. But nothing in the evidence, either direct or inferential, would warrant me in holding that a conspiracy between the defendants had been proved. As the plaint founds the claim on conspiracy this might be a sufficient ground for dismissng the suit.

But the separate case of the defendant No. 1 might still have to be considered, after eliminating the element of conspiracy. Did he know when he proposed to marry Jamnabai, that she was still engaged to Kanji? Was she in fact so engaged? I think that the latter question would have to be answered in the affirmative. I do not doubt that Mulji was very much dissatisfied with his prospective son-in-law, and was anxious to break off the engagement upon any pretext. But I do not believe that he had in fact broken it off when he went to Calcutta in March. Had that been the case, I think he would have returned the deposit of Rs. 3,000 and the Rs. 2,500 worth of ornaments already made. This he did not do, and later the plaintiffs had to sue him for the deposit and the ornaments. But I think that he was eagerly desirous of finding a substitute for Kanji, and went to Calcutta with the express object of suggesting a marriage with defendant No. 1. Defendant No. 1 is a much wealthier man than either of the plaintiffs and doubtless in the opinion of Mulji a much better match for his daughter. Up to this point (apart from the evidence that Jamnabai was actually betrothed to defendant No. 1 in Bombay with the full knowledge of Radhabai, and presumbly, therefore with the knowledge of the defendant No. 1 himself that she was at the time betrothed to Kanji) there is nothing to suggest that Nursey knew anything of the engagement of 1910 to Kanji. The Court is asked to infer that he did from what followed. It is true that the marriage and betrothal, both on the same day, in Calcutta (if as regards the betrothal this part of the evidence for the defendant be true) with other circumstances suggest that all concerned were in the utmost haste to get the girl married to the defendant No. 1. The many unseemly informalities, attending upon the indecent haste with which the marriage was put through on the 18th April, are strongly insisted upon on behalf of the plaintiffs as proof enough of the defendant No. 1's knowedge. But they are at least as consistent with Mulji's desire to keep defendant No. 1 in the dark about the previous engagement until the marriage was an accomplished fact as with the defendant No. 1 knowing of that previous engagement. It is not as though this haste enabled the marriage to be performed under the auspices and with the sanction of the Calcutta *jamat*. The *jamat* did not countenance the marriage. This did not deter the bridegroom, who claims to be a reformer and to care little for caste ordinances and authority. He went through with it, and as a result was out-casted.

If the object of all this hurry had been to get the approva lof the Calcutta *jamat* before they were made aware of the fact that the bride had already been promised to another, it entirely failed of its object. The elders refused the customary fees and would have nothing to do with the affair. The suggestion is that Nursey, knowing that his bride was already promised to another, wanted to get married before the *jamat* had time to put its veto on the ceremony. But since the facts show that Nursey was quite indifferent, did not care whether the *jamat* sanctioned the marriage or not, the suggestion loses much of its force. On the other hand it is, in my opinion, much more probable that Mulji was extremely anxious to obtain so good a match for his daughter and feared that should Nursey hear before the marriage that she had already been betrothed he might refuse to go on with the marriage. This would account for the haste with which everything was precipitated, and many customary decencies ignored. At the same time it would be consistent with Nursey's sworn statement that he did not know before he married Jamnabai that she was at the time engaged to Kanji. As to what occurred afterwards, that has little bearing on this point. The plaintiffs appealed to the Bombay *jamat*, and Nursey might very well have wished to placate them, not only in order to avert the unpleasantness of being out-casted, but the much more serious prospects of heavy litigation. I do not think there is anything in the evidence as to what occurred after the marriage which would suffice, along with the inferences I have already indicated to prove affirmatively that the defendant No. 1 knew of the existence of the engagement of 1910 to Kanji, when he married Jamnabai on the 18th April 1913.

But there is another answer to the plaintiffs' claim, which appears to me to be conclusive. It has the advantage, too, of lying outside the English Law, and being unaffected by any of the English decisions. The Hindu Law, by which these parties are governed, enacts that a father may break off his daughter's engagement, should a more suitable bridgroom be available. Under that law, then, the plaintiffs never had more than a conditional right to the fulfilment of the contract upon which this suit is founded. So that since it was optional with the father of the promised bride to give her any other more eligible suitor, and such a suitor having leen found before the betrothal to Kanji had been followed by his marriage to the betrothed girl, it is clear that no legal right inhering in him or his father has been violated. There can then be no cause of action for the violation of any such right, either by individual procuration or by conspiracy.

All that the plaintiffs at best had a right to, was the marriage of Jamnabai to Kanji at some future time, should a certain event not happen. It has happened, and there is an end of it.

I think that on every ground the plainiffs' suit fails and must be dismissed with all costs.

Suit dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1527 OF 1913.

November 16, 1914.

Present:—Mr. Justice Scott-Smith.

KHAIR DIN—PLAINTIFF—APPELLANT

versus

HAKIM BIBI—DEFENDANT—RESPONDENT.

Muhammadan Law—Marriage—Consent or ratification of grandfather—Repudiation—Puberty.

According to Muhammadan Law the marriage of a minor girl with the consent or ratification of her grandfather is valid and she has no option to repudiate it on attaining majority, whether the marriage has been consummated or not. [p. 422, col. 1.]

Kullan v. *Piari*, 157 P. R. 879, referred to.

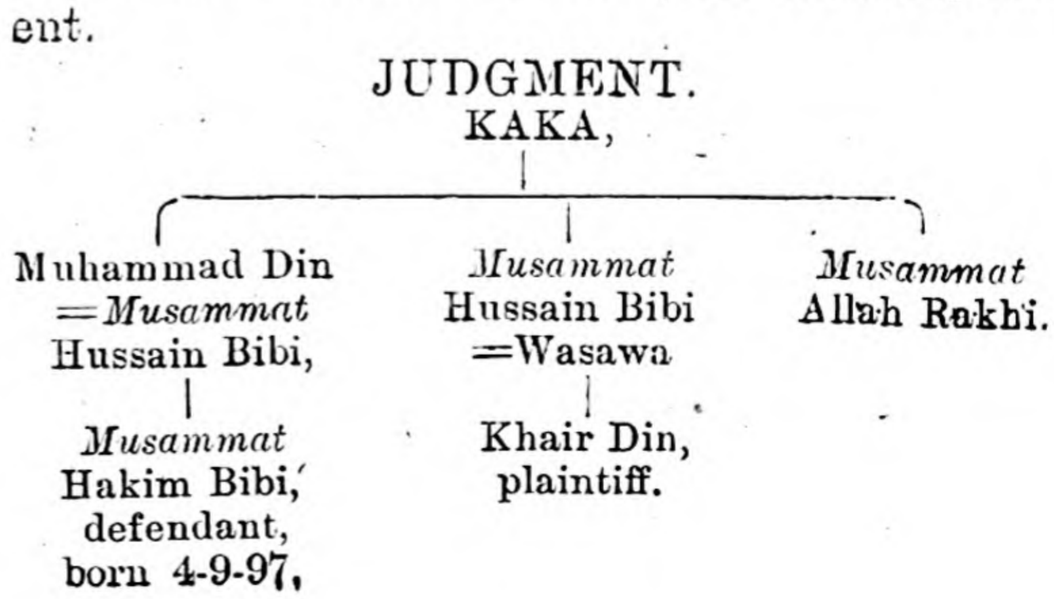
A Muhammadan girl over 15 years of age is to be presumed adult in default of any other evidence to the contrary. [p. 422, col. 1.]

Second appeal from the order of the Divisional Judge, Sialkot Division, dated 8th July 1913, reversing that of the first Court, dated 16th May 1913, decreeing plaintiff's claim.

Mr. *Fazl-i-Hussain*, for the Appellant.

Mr. *Badr-ud-Din Kureshi*, for the Respondent.

JUDGMENT.



The above pedigree-table explains the relationship of the parties. Khair Din, plaintiff, sued for restitution of conjugal rights in regard to *Musammat* Hakim Bibi.

The first Court found that the marriage was proved and that it was effected with the consent and approval of defendant's grandfather, Kaka, and that, therefore, she had no option of repudiation on reaching puberty. It accordingly gave plaintiff a decree.

The lower Appellate Court was not clear as to whether Kaka consented to the marriage, but held that he at all events ratified it subsequently. It did not come to any finding as to whether under these circumstances defendant had an option of repudiation, but thought that as neither plaintiff nor defendant was proved to have reached the age of puberty the plaintiff could still exercise her option of repudiating the marriage which has not yet been consummated, that the first Court was not bound to grant a decree and that plaintiff was not entitled to one. It, therefore, accepted the appeal and dismissed plaintiff's suit. In appeal it is urged that as Kaka ratified the marriage, the effect is the same as if he had been the contracting guardian. Mr. Fazal-i-Hussain relies upon *Kullan* v. *Piari*(1), Wilson's Anglo-Muhammadan Law, 4th Edition, Chapter II, Sections 18 and 28, and Tyabji's Principles of Muhammadan Law, Article 57, at page 88.

The last-named authority and the ruling of this Court of 1879 appear to me to support the argument of Counsel and I hold that Kaka having ratified the marriage, the defendant has no option of repudiation.

I am also inclined to agree with the first Court that Kaka must have consented to the marriage, which was between two of his grand-children.

As to the question of puberty defendant was over 15 years of age when the present suit was brought and in default of other evidence should be presumed to be adult,—see Section 91 of Wilson's Digest.

I, therefore, accept the appeal and setting aside the decree of the lower Appellate Court, restore that of the first Court with costs throughout.

Appeal accepted.

(1) 157 P. R. 1879.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

November 25, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

JAMBU PARSHAD—PLAINTIFF—APPELLANT

versus

MUHAMMAD NAWAB AFTAB ALI KHAN AND ANOTHER—DEFENDANTS — RESPONDENTS.

Registration Act (III of 1877), ss. 17, 32, 33, 34, 35, 49, 87—Transfer of Property Act (IV of 1882), s. 59—Presentation of document—Defect—Procedure—Presence of executant—Mortgage-deed—Power-of-attorney.

Where mortgage-deeds were presented by agents who held powers-of-attorney which did not authorize them to present the deeds for registration on behalf of the mortgagee, the mortgagor duly appearing at the registration office and admitting execution:

Held, that there was no proper presentation of the deeds for registration as required by the Registration Act, III of 1877, sections 32 and 33, and that want of proper presentation was not a mere defect in procedure under section 87, but rendered the deeds invalid, and that the object of sections 32, 33, 34 and 35 of Act III of 1877 was to prevent fraud by means of registration under the Act and, therefore, the provisions were imperative. [p. 425, col. 2, p. 426, col. 1.]

The jurisdiction of a Sub-Registrar only comes into force if and when a document is presented to him in accordance with law by a person who has executed or claimed under it or by the representative or assign of such person or by an agent of such person, representative or assign, duly authorised by a power-of-attorney executed and authenticated in manner prescribed by section 33 of the Act and the mere admission of execution by executants is not proper presentation by them. [p. 425, col. 2.]

Mujib-un-nissa v. *Abdul Rahim*, 28 I. A. 15; 23 A. 233; 11 M. L. J. 58; 5 C. W. N. 177; 3 Bom. L. R. 154 (P. C.), *Ishri Prasad* v. *Baijnath*, 28 A. 707; 3 A. L. J. 743; A. W. N. (1906), 195, approved.

Consolidated appeals from two judgments and decrees of the High Court, Allahabad, reported in 15 Ind. Cas. 881, dated 13th February 1912 one of which confirmed and the other modified the judgments and decrees of the Subordinate Judge of Saharanpur, dated 26th September 1910.

FACTS of the case appear sufficiently from their Lordships' judgment.

Mr. *DeGruyther, K. C.* (with him Mr. *O'Gorman*), for the Appellant, contended that the High Court had erred in holding that there was no proper presentation of the deeds and that they were, therefore, inadmissible in evidence. Persons presenting the deeds must have authority, otherwise registration was null and void.

JAMBU PARSHAD v. MUHAMMAD NAWAB AFTAB ALI.

[MR. AMEER ALI:—That was not done in this case.]

Mr. *Lowndes* (interposing):—The whole thing depends on *Mujib-un-nissa* v. *Abdur Rahim* (1).

That ruling was already distinguished by the High Court of Calcutta and regarded as very harsh in principle.

[LORD DUNEDIN: You say that presentation by a person not duly authorised by the executant under section 33 of the Registration Act is mere defect of procedure.]

[MR. AMEER ALI:—What is the object of putting in section 32? It is the most effective protection in so far as mortgagee's protection is concerned.]

[MR. AMEER ALI referred to *Kirta Kishen* v. *Harnam Chand* (2)].

The point was the validity of the deed.

[LORD DUNEDIN: -There is real conflict of opinion. I would have been slow to interfere with a formality required by the Indian people. What Lord Robinson says is that you cannot set proper machinery going unless formality is observed.]

[LORD SHAW:—One has to be careful with a particular provision of an Act.]

[LORD DUNEDIN:—If they find that the person against whom a deed is executed and the procedure is going on before him and, therefore, there is inference of implication, then section 35 would apply.]

[LORD SHAW:—If you say that provision of registration was not complied with, it would be monstrous to plead it.]

Presentation was a passing ministerial act. It was, therefore, a defect in procedure. The whole object of registration was fulfilled. There was registered confirmation of the deeds in dispute.

[SIR JOHN EDGE:—You cannot have decree on that when the requirement of the Act is not satisfied.]

They could not redeem this mortgage unless they redeemed other mortgages. The object of registration was to put on register something for the benefit of the third party. If it was a condition precedent that presentation must be in a certain form, the question was for the Registrar and if it was a defect it was cured by section 86.

(1) 28 I. A. 15; 23 A. 233; 11 M. L. J. 58; 5 C. W. N. 177; 3 Bom. L. R. 154 (P. C.).
(2) 17 Ind. Cas. 465; 35 A. 72; 10 A. L. J. 510.

Reference was made to *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (3), *Muhammad Ewaz* v. *Brij Lall* (4), *Sheo Shunkur Sahoy* v. *Hirdey Narain Sahu* (5), *Isak Mahamad* v. *Bai Khatija* (6), *Ishri Prasad* v. *Baijnath* (7), *Gauri* v. *Gayadin* (8) and the Registration Manual of N.-W. P. and Oudh.

Mr. *Lowndes*, for the Respondents, contended that both mortgages were governed by the Transfer of Property Act. There was no mortgage. The matter was under the Act of 1877 and Lord Robinson's judgment was in 1900. The Registration Act of 1908 repealed section 32 and *infra*. The Legislature was re-considering the provision.

Section 32 laid down specific rules to be observed.

[LORD SHAW:—Sections 32 and 33 must be read together.]

The deed had to be presented in a certain way before registratien could take place.

[LORD DUNEDIN:—There are a set of things and the Government of India have provided for them.]

[LORD SHAW:—Is there anything to show that they were parties to the presentation?]

None whatever.

[LORD DUNEDIN:—The real argument is based upon estoppel, which has no place where there are a set of Statutes?]

Mujib-un-nissa v. *Abdul Rahim* (1) applied to the present case. The provisions of the Registration Act were imperative and must be observed in a registration.

Mr. *De Gruyther*, in reply.

JUDGMENT.

SIR JOHN EDGE.—These are consolidated appeals from two decrees, dated the 13th February 1912,* of the High Court of Judicature at Allahabad, one of which affirmed a decree of the Subordinate Judge of Saharanpur of the 26th September 1910, and the other of which partly affirmed and partly reversed a decree of the same Subordinate Judge of the 26th September 1910. The

(3) 2 I. A. 210; 15 B. L. R. 228; 24 W. R. 75.
(4) 4 I. A. 166; 1 A. 465; 3 Suth. P. C. J. 438; 3 Saraswati's P. C. J. 738.
(5) 6 C. 25; 5 C. L. R. 194.
(6) 6 B. 96.
(7) 28 A. 707; 3 A. L. J. 743; A. W. N. (1906) 195.
(8) 4 A. 355; A. W. N. (1882) 66.

*See 15 Ind. Cas. 881.—*Ed.*

suits in which the decrees were made were brought in the Court of the Subordinate Judge of Saharanpur, one on the 20th May 1909 and the other on the 16th March 1910. They were suits for sale of immoveable property. The suit of 1909 was based on a mortgage-deed of the 10th August 1886, the consideration for the mortgage having been Rs. 7,000. The suit of 1910 was based on a mortgage-deed of the 2nd July 1882, the consideration for that mortgage-deed having been Rs. 59,000, and upon a mortgage-deed of the 25th October 1892. There was in each suit a claim for a money decree. The Subordinate Judge dismissed the suits on the grounds that the mortgage-deeds had not been validly registered, and consequently could not affect the immoveable property which was comprised in the mortgages, and that claims for money decrees were time-barred. On appeal to the High Court at Allahabad, the High Court dismissed the appeal in the suit of 1909, which was based on the mortgage of 1886, dismissed the appeal in the suit of 1910 so far as it related to the mortgage of 1882, and allowed the appeal in that suit so far as it related to the mortgage of 1892. These consolidated appeals are from the decrees of dismissal. The plaintiff in the suits is the appellant here. The respondents have been defendants in these suits, and one of them is the representative of a deceased defendant.

The only questions which have to be considered in these consolidated appeals are, whether the mortgage-deed dated the 2nd July 1882 and the mortgage-deed dated the 10th August 1886 were validly registered under Act III of 1877. They were documents which were required by section 17 of Act III of 1877 to be registered. If they were not validly registered they could not, by reason of section 49 of that Act, affect any immoveable property comprised in them, or be received as evidence of any transaction affecting such property. Further, if the documents of 1882 and 1886 were not validly registered instruments, no mortgage could, by reason of the first paragraph of section 59 of Act IV of 1882, be effected by them. They were in fact registered, but the question is—was the registration a valid registration? The Subordinate Judge and the High Court found that there was no valid registration in either case.

In section 32 of Act III of 1877 it is enacted that:—

"Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order,

or by the representative or assign of such person,

or by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

So far as is material to the decision of these appeals, it is in section 33 of Act III of 1877 enacted:—

"For the purpose of section 32, the powers-of-attorney next hereinafter mentioned shall alone be recognised (that is to say):—

(*a*) If the principal at the time of executing the power-of-attorney resides in any part of British India in which this Act is for the time being in force, a power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides."

The mortgage-deed of the 2nd July 1882 was presented for registration on the 11th of July 1882 at Saharanpur at the proper registration office on behalf of Lala Mitter Sen, the mortgagee, by one Nathu Mall, who held a power-of-attorney, of the 19th June 1882, from Lala Mitter Sen, which, however, did not empower Nathu Mall to present documents for registration. Lala Mitter Sen lived at Saharanpur, and the power-of-attorney had been duly authenticated by the then Sub-Registrar of Saharanpur on the 19th June 1882, but apparently it had not been executed before the Registrar or the Sub-Registrar. The Sub-Registrar's note to the copy of the power-of-attorney in the register merely states that Lala Mitter Sen was known to him, and admitted the execution and completion of the document. It has not been proved that Nathu Mall held any other power-of-attorney from Lala Mitter Sen. The mortgagors admitted before the Sub-Registrar of Saharanpur, on

the 11th July 1882, the execution and completion of the mortgage deed, and received in his presence the mortgage money, Rs. 59,000, and thereupon the Sub-Registrar registered the mortgage-deed

The mortgage-deed of the 10th August 1886 was presented for registration on the 9th September 1886 at Saharanpur, at the proper registration office, on behalf of Lala Mitter Sen, the mortgagee, by one Ilahi Bakhsh, who held a power-of-attorney of the 17th February 1885 from Lala Mitter Sen, which, however, did not empower Ilahi Bakhsh to present documents for registration. This power-of-attorney had not been authenticated by the Registrar or the Sub Registrar of Saharanpur, and it does not appear that it had been executed by Lala Mitter Sen before either of those officials. It has not been proved that Ilahi Bakhsh held any other power-of-attorney from Lala Mitter Sen. The mortgagors admitted before the Sub-Registrar of Saharanpur, on the 9th September 1886, the execution and completion of the mortgage-deed of the 10th August 1886, and acknowledged the receipt by them of the mortgage money, Rs. 7,000, and thereupon the Sub-Registrar registered the mortgage-deed.

It was contended on behalf of the appellant here that it might be presumed the mortgage-deeds had been presented for registration by the mortgagors who had executed the deeds, and who attended before the Sub-Registrar. It is, however, obvious that the mortgagors had attended at the office of the Sub-Registrar to admit that they had executed the deeds and not to present them for registration, and that they did not present them for registration. The mortgagors attended to enable the Sub-Registrar to comply with sections 34 and 35 of Act III of 1877 by satisfying himself that they had executed the deeds. In the one case the deed was presented for registration by Nathu Mall, an agent of the mortgagee, and in the other case the deed was presented for registration by Ilahi Bakhsh, another agent of the mortgagee, and in neither case did the agent hold such a power-of-attorney as was necessary to enable a valid registration to be made.

It was decided, and as their Lordships considered correctly, by Sir John Stanley, C. J., and Sir George Knox, J., in 1906 in *Ishri Prasad* v. *Baijnath* (7) that the terms of sections 32 and 33 of Act III of 1877 are imperative, and that a presentation of a document for registration by an agent, in that case the agent of a vendee of immoveable property, who has not been duly authorised in accordance with those sections, does not give to the Registering Officer the indispensable foundation of his authority to register the document. As those learned Judges said:—

"His (the Sub-Registrar's) jurisdiction only comes into force if and when a document is presented to him in accordance with law."

These learned Judges also rightly decided in the same case that the fact that the Sub-Registrar had summoned before him the executant of the deed, who was the vendor, and had obtained his consent to the registration of the deed, did not give the Sub-Registrar jurisdiction to register it, and that the omission of the Registering Officer to notice that the power-of-attorney under which the agent had presented the sale deed for registration had not been executed or authenticated in accordance with section 33 of Act III of 1877, could not be regarded as a defect in procedure within the meaning of section 87 of that Act.

Although the facts in these consolidated appeals are not the same as were the facts in *Mujib-un-nissa* v. *Abdul Rahim* (1), their Lordships consider that the principle which this Board applied in that case is applicable here. That principle, in their Lordships opinion, is that a Registrar or Sub-Registrar under Act III of 1877 has no jurisdiction to register a document unless he is moved to do so by a person who has executed or claims under it, or by the representative or assign of such person, or by an agent of such person, representative or assign, duly authorised by a power-of-attorney executed and authenticated in manner prescribed in section 33 of that Act. It is obvious that executants of a deed who attend a Registrar or Sub-Registrar merely to admit that they have executed it cannot be treated, for

the purposes of section 32 of Act III of 1877 as presenting the deed for registration. They no doubt would be assenting to the registration, but that would not be sufficient to give the Registrar jurisdiction.

One object of sections 32, 33, 34 and 35 of Act III of 1877 was to make it difficult for persons to commit frauds by means of registration under the Act.

It is the duty of Courts in India not to allow the imperative provisions of the Act to be defeated when, as in this case, it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to present it.

These appeals fail, and their Lordships will humbly advise His Majesty that the appeals should be dismissed. The appellant must pay the costs of these appeals.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Ranken Ford, Ford & Chester.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 205 OF 1912.

December 8, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Richardson.

Chowdhury MAHADEO PRASAD—PLAINTIFF—APPELLANT

versus

Musammat SHEONANDAN KOER—DEFENDANT—RESPONDENT.

Possession, presumption of Submersion—Re-appearance.

The plaintiff came into possession of the land in dispute, before its submersion, on a partition with the defendant. A survey was made during the period of submersion and the land was recorded in the name of the plaintiff. After the re-appearance of the land the defendant took possession of it:

Held, that under the circumstances possession during the period of submersion should be atributed to the plaintiff.

The mere fact that the defendant leased out the fishery rights during the period of submersion, is not sufficient to show actual possession by the defendant of the land in dispute which belonged to the plaintiff.

Appeal against the decree of the District Judge of Darbhanga, dated the 21st of September 1911, affirming that of the Munsif, second Court, at Madhubani, dated the 31st of January 1911.

Babu *Bankim Chandra Mukerjee*, for the Appellant.

Babu *Baldeo Narayan Singh*, for the Respondent.

JUDGMENT.

RICHARDSON, J.—Out of the 4 *bighas* claimed by the plaintiff, only a small portion, 2 *cottas* 10 *dhurs*, is now in controversy. A partition was effected between the predecessors of the parties in 1851 and this portion of the land was then allotted to the plaintiff's predecessors. Subsequently the whole area claimed was submerged and remained under water till within twelve years of the date of the institution of the suit. Since its re-appearance the defendant has been in possession. A survey was made in or about the year 1900 (during the period of submersion) when the land was recorded in the name of the plaintiff. In regard, therefore, to the area of 2 *cottas* 10 *dhurs* the plaintiff has in his favour both the partition title and the survey record. On these facts possession of this area during the period of submersion should have been attributed to him. The learned District Judge in the Court below referred to the fact that the defendant leased out the fishery rights during the period of submersion. This is not sufficient to show actual possession by the defendant during that period of the small portion of the bed of the river which belonged to the plaintiff.

The appeal is allowed in regard to the 2 *cottas* 10 *dhurs* and dismissed as regards the remainder of the land. Proportionate costs throughout.

COXE, J.—I agree.

Appeal partly allowed.

SAHIB RAI *v.* CHAIT RAM.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 124 OF 1914.

January 4, 1915.

Present:—Mr. Justice Shah Din.

SAHIB RAI—DEFENDANT—PETITIONER

versus

CHAIT RAM AND OTHERS—PLAINTIFFS AND DESI MAL—DEFENDANT—RESPONDENTS.

Award—Limitation Act (IX of 1908), Sch. I, Art. 158—Objections raised more than ten days after award is submitted—Notice of submission necessary—Civil Procedure Code (Act V of 1908), Sch. II, para. 10—Court not properly disposing of objections to award—Revision.

Under Article 158 of the first Schedule to Act IX of 1908 the period of ten days is to be computed from the day on which the parties receive notice that the award has been submitted to, and not from the date on which it is actually received by, the Court.

Therefore, where award was submitted to the Court on 30th September but the parties came to know of its submission on 11th October, the petition of objections to the award presented on 20th October is within time.

Mehta Kashi Ram v. *Dadabhoy*, 124 P. R. 1880, dissented from.

An order rejecting objections to an award without adequate inquiry into them, apparently under the impression that these were not raised within time, is liable to be set aside on revision.

Petition, under section 70 of Act XVIII of 1884, as amended by Act IV of 1912, for revision of the decree of the District Judge, Multan, dated the 28th November 1913, decreeing the claim.

ORDER.—(*March* 14th, 1914.)—Although the award was filed in Court by the arbitrator on the 30th September 1913, no intimation of this was given to the parties before the 11th October, on which date the case was called on for hearing. On the 11th October ten days were allowed to the parties to file objections, and the defendants accordingly filed their objections on the 20th October. The objections were thus filed within time, and the Court was not right in rejecting them summarily as barred by limitation. There has been no proper adjudication on those objections. Notice.

Mr. *Nand Lal*, for the Petitioner.

Mr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—My order, dated the 14th March 1914, admitting this case to a hearing will be read as part of this judgment. It is to be observed that on the 30th September 1913, when the arbitrator filed his award in Court, no notice of the filing of the award was given by the Court to the parties, as required by paragraph 10 of the second Schedule to the Civil Procedure Code the case was fixed for hearing on the 11th October 1913, and on that date the usual ten days were allowed to the parties to file objections to the award. The Counsel for the respondents contends that under Article 158 of the first Schedule to the Limitation Act the petitioner was bound to file his objections to the award within ten days from the date when the award was submitted to the Court, *i.e.*, within ten days from the 30th September 1913, even though no notice of the filing of the award had been given to him by the Court. Counsel cites *Mehta Kashi Ram* v. *Dadabhoy* (1) in support of his contention. I cannot accept this view. Reading paragraph 10 of the second Schedule to the Civil Procedure Code with Article 158 of the first Schedule to the Limitation Act, I am of opinion that the District Judge was right in allowing to the parties 10 days' time from the 11th October for filing objections to the award, because no notice had been given to them of the filing of the award before the 11th October. This being the case, the petition of objections was not barred by limitation.

No doubt the District Judge, after stating at length the principal objections raised by the petitioner to the award, says that his own witnesses disprove the pleas raised in the objections, most of which were legally inadmissible, but this is not a proper decision of the questions raised in the petition of objections. It seems to me that but for the fact that the District Judge held that the objections were barred by limitation, he would have taken greater pains in the disposal of those objections, and as I have held that the plea of bar by limitation cannot hold good, it follows that the District Judge must now adjudicate upon the objections in question in a proper manner.

I accordingly accept this revision and setting aside the judgment and decree of the District Judge, I send the case back for disposal according to law. The petitioner will get his costs against respondent No. 1. Counsel's fee Rs. 16.

Revision accepted.

(1) 124 P. R. 1880.

MORDHAJ SINGH v. JAHANGIRI MAL.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 265 OF 1914.

February 17, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

Thakur MORDHAJ SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

JAHANGIRI MAL AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court, power of, to set right decree although respondent not appealing.

An Appellate Court has power to set the decree of the Court below right even in respect of that portion of it which is against the respondent and in respect of which the respondent has not appealed. [p. 429, col. 1.]

Execution first appeal from the First Additional Sub-Judge of Aligarh, dated May 16th, 1914.

Mr. *Ryves*, for the Appellant.

Mr. *Bajpal*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings taken to execute a decree for sale passed in a suit upon two mortgages dated June 18th 1888 and August 10th 1894. The earlier mortgage comprised 5 *biswas* of a village called Partaul and 5 *biswansis* of a village called Nausana. The later mortgage was of a 2 *biswas*-share in Partauli and a 5 *biswansis*-share in Nausana. In the suit on the mortgages it was held that the same 5 *biswansis*-share in Nausana was covered by both mortgages, but that of the 2 *biswas*-share in Partauli covered by the second mortgage, only 1 *biswa* 12 *biswansis* 16 *kachwansis* were included in the 5 *biswas*-share mortgaged by the first deed, and the remaining 7 *biswanis* 4 *kachwansis* were outside the 5 *biswas*-share. The Court passed a peculiar decree, which provided that the shares included in the first mortgage should be sold separately for the recovery of Rs. 1,876-4-0 declared to be due on that mortgage and that if there was a balance after discharging that amount then the whole of so much of the balance as was attributable to Nausana and part of the balance attributable to Partauli (*i.e.* a part bearing the same proportion to the whole as 1 *biswa* 12 *biswansis* 16 *kachwansis* bear to 5 *biswas*) should be devoted towards the discharge of the second mortgage. In passing we may observe that the decree does not indicate how the balance, if any, was to be divided between the two villages, but we assume that the intention was that the balance should be divided between the two shares in proportion to the sums realised by the sale thereof. The decree went on to provide that the 7 *biswansis* 4 *kachwansis*-share in Partauli should be sold and the proceeds along with the balance aforesaid should be devoted to the discharge of the second mortgage. In July 1913 the judgment-debtors paid Rs. 2,085 into Court, that being the amount then due on the first mortgage, and claimed that it should be received by the decree-holders on account of that mortgage alone, and that that mortgage should be declared to have been discharged. The decree-holders objected and the Court held with them that the payment must be taken to have been made on account of the whole decree. The judgment-debtors appealed to this Court but their appeal was dismissed. In February 1914 the decree-holders made the application for execution out of which this appeal has arisen, praying that the property might be sold in accordance with the directions contained in the decree. The judgment-debtors objected that the first mortgage had been discharged by the payment of 1913 and that the decree-holders were entitled only to bring to sale the 7 *biswansis* 4 *kachwansis*-share in Partauli. The Court below has held that the decree-holders are entitled to bring to sale a 2 *biswas*-share in Partauli and a 5 *biswansis*-share in Nausana for recovery of the balance due under the decree, that is to say, the amount due under the second mortgage. We cannot follow the Subordinate Judge in his construction of the decree. In our opinion the judgment-debtors cannot go behind the previous decision that the payment made by them was made on account of the decree as a whole. We hold that the decree-holders are entitled to execute the decree in accordance with its terms, *i.e.*, they are entitled to bring to sale the 5 *biswas*-share in Partauli and the 5 *biswansis*-share in Nausana. Out of the proceeds the first mortgage should be discharged and the balance, if any, should be dealt with as directed by

the decree, *i. e.*, 41/125ths of the balance attributable to the share in Partauli and the whole balance attributable to the share in Nausana should be devoted to the discharge of the second mortgage, and then if necessary the 7 *biswansis* 4 *kachwansis* share in Partauli should be sold. The amount paid in by the judgment-debtors should be treated as part satisfaction of the decree as a whole and dealt with in the usual way. The only question is whether we can make an order to this effect now, seeing that the Court below has made an order giving the decree-holders less than they are entitled to and the decree-holders have not appealed against it. Order XLI, rule 33, empowers us to pass such an order if we think fit to do so. On a full consideration of all the circumstances, we have come to the conclusion that we ought to take advantage of this rule. The order of the Court below is clearly wrong, but it would be most inequitable to merely set it aside as suggested by the judgment-debtors with the probable result of putting an end to further execution of the decree. In 1913 the judgment-debtors sought to take advantage of the peculiar nature of the decree and prevent the decree holders from enforcing their security. That attempt was frustrated by the Court. Their present objection is another dishonest attempt to deprive the decree-holders of the fruits of their decree. We, therefore, allow this appeal and set aside the order of the Court below, but we direct that the decree be executed in the manner laid down in the decree, that is to say, that the 5 *biswas*-share in Partauli and the 5 *biswansis*-share in Nausana be sold and the proceeds be devoted to discharging the first mortgage, that the balance be dealt with as provided by the decree, and that the 7 *biswansis* 4 *kachwansis* share in Partauli be sold and the proceeds together with the balance aforesaid be devoted to discharging the second mortgage, and that the sum paid into Court by the judgment-debtors be credited towards the decree as a whole. The parties will pay their own costs in this Court. The judgment-debtors will pay the decree-holders costs in the Court below.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 127 AND 128 OF 1912.

December 8, 1914.

Present:—Sir John Edward Power Wallis, Chief Justice, and Mr. Justice Seshagiri Aiyar.

RAJAGOPALA CHETTY—PLAINTIFF—APPELLANT

versus

P. KANDAPPA CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 34—Discretion of Court to award interest—Plaintiff not entitled to contract rate as of right.

A plaintiff is not entitled as of right to interest from the date of suit to the date of decree. The question is one for the discretion of the Court, which should not, however, refuse to allow any interest without assigning any reasons for doing so.

Sophia Orde v. *Alexander Skinner*, 3 A. 91 at pp. 106, 107; 7 I. A. 196; 7 C. L. R. 295; 3 Suth. P. C. J. 788; 4 Ind. Jur. 476; 4 Saraswatis' P. C. J. 178, followed.

Ramachandra v. *Deru*, 12 M. 485, dissented from.

Appeals against the decrees of the District Court of North Arcot in Original Suits Nos. 30 of 1910 and 5 of 1911, respectively.

Mr. *A. Ramachandra Aiyar*, (for Mr. *D. V. Neelamegachariar*), for the Appellant.

Mr. *L. Venkataraghava Aiyar*, (for Mr. *L. A. Govindaraghava Aiyar*), for the Respondents.

JUDGMENT.

IN APPEAL SUIT NO. 127 OF 1912.

Having regard to the language of section 34 of the Code of Civil Procedure and the observations of their Lordships in *Sophia Orde* v. *Alexander Skinner* (1), we are unable to follow the decision in *Ramachandra* v. *Deru* (2) that the plaintiff is entitled as of right to recover the contract rate of interest from the date of suit to the date of decree. The question is one for the discretion of the Court, but in this case, the District Judge has not allowed any interest at all for this period and has given no reason for taking this course. We must modify the decree by awarding interest for the period at the rate of 9 per cent. per annum. The appeal is not pressed as to the other two items, which the 1st respondent's Vakil says have been recovered from the 2nd defendant. The appeal is

(1) 3 A. 91 at pp. 106, 107; 7 I. A. 196; 7 C. L. R. 295; 3 Suth. P. C. J. 788; 4 Ind. Jur. 476; 4 Saraswati's P. C. J. 178.

(2) 12 M. 485.

allowed as to the interest with proportionate costs and the decree will be modified accordingly. As regards the disallowed items there will be no order as to costs on either side.

The memorandum of objections is dismissed with costs.

IN APPEAL SUIT No. 123 OF 1912.

This case follows our decision in Appeal No. 127 of 1912 on the file of the High Court and for the reasons as are contained in our judgment therein, this appeal also is allowed as regards interest with costs in this Court, and the decree will be modified accordingly.

Appeals partly allowed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1496 OF 1911.
December 7, 1914.
Present:—Mr. Justice Holmwood and Justice Sir Herbert Carnduff, KT.
Fakir MOHAN DAS AND ANOTHER—DEFENDANTS - APPELLANTS
versus
JAGABANDHU RAUT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Non-occupancy right, extinction of—Relinquishment.

Where the worship of the *thakur* is a necessary condition of a tenancy, the entire neglect to take possession and carry on the worship amounts to evidence of relinquishment and repudiation. p. 431, col. 1.

Dayamoyi v. Ananda Mohan Roy Choudhury, 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52; 42 C. 172, followed.

Appeal against the decree of the District Judge of Cuttack, dated the 1st of April 1911, reversing that of the Munsif, Additional Court at Balasore, dated the 30th of July 1910.

Babus *Mohini Mohan Chatterjee* and *Pyari Mohan Chatterjee*, for the Appellants.

Babu *Satish Chandra Bose*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiffs for confirmation of possession after declaration of the plaintiffs' *ryoti* right to the land in suit.

The history of the land is sufficiently set out in the preamble to the judgment of the lower Appellate Court. It appears that in the revisional Settlement after a dispute under section 103 of the Bengal Tenancy Act the Assistant Settlement Officer found that the plaintiffs-appellants were in possession, but that the respondent No. 1 was a *raiyat*, so the appellants were recorded as *shikmi raiyats* under the respondent No. 1, though the parties both deny the relationship of tenant and under-tenant as between themselves.

The learned Munsif in the first Court dismissed the plaintiffs' suit, on the ground that they had not succeeded in getting rid of the presumption raised by the Record of Rights. The learned Judge in the Court below has set aside the judgment and decree of the Munsif and has given the plaintiffs a decree declaring their *ryoti* right to the land in suit and confirming their possession. Incidentally the learned District Judge in the Court of Appeal below has found as a fact that Jagannath, the ancestor of the defendants, was a non-occupancy, *raiyat*, though he has held erroneously as has now been decided by authority, that such a right is not heritable. He has, however, further found as a fact that there was relinquishment of the tenancy by the act of defendant No. 4 and by the acquiescence of the other defendants who, he found, were never in possession. He has, therefore, reversed the Munsif's decision and found for the plaintiffs.

In appeal it is urged that the heritable non-occupancy right of the defendants Nos. 1 and 2, who are the appellants before us, cannot be defeated by the act of relinquishment of defendant No. 4 or by the mere non-payment of rent by the other defendants. There is one rather important fact which the learned Judge thinks has not much to do with the question, that is, that the origin of the tenancy was an undertaking of Jagannath to conduct the worship of the *thakur* as *shebait* in lieu of rent. This point he says is made much of by the respondents and in the appeal before us their learned Vakil also pressed it as most important. But in the face of the Judge's finding that there was virtual relinquishment by the defendants of the holding by reason of their never taking the tenancy and allowing their co-tenant who was in possession to abandon, it seems to us that this fact goes strongly against

the defendants' case. If the worship of the *thakur* was a necessary condition of their tenancy, the entire neglect to take possession and carry on the worship would, in our opinion, amount to such evidence of relinquishment and repudiation as would cover the rule laid down in the recent Full Bench ruling in *Dayamoyi* v. *Ananda Mohan Roy Chowdhury* (1). The substantial effect of the defendants Nos. 1 and 2's conduct would be a relinquishment or repudiation of the tenancy.

The case is not altogether free from difficulty, but on full consideration we are of opinion that it is concluded by the findings of fact in the lower Appellate Court. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52; 42 C. 172.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL NO. 1639 OF 1914.

January 16, 1915.

Present:—Mr. Justice Shadi Lal.

GOKAL CHAND—PLAINTIFF—APPELLANT

versus

THE LAHORE BANK, LTD., THROUGH THE HON'BLE R. B. BAKHSHI SOHAN LAL, LIQUIDATOR—RESPONDENT.

Companies Act (VI of 1882), s. 169—Settling a share-holder's name on list of contributories—Forfeiture of shares—General notice to forfeit shares by Company—Absence of resolution to forfeit share of certain share-holder, effect of—Share-holder, whether can insist on forfeiture—Clause in Company's Articles that shares will ipso facto *be forfeited on default, effect of—Default in payment of calls—Option of Company to forfeit.*

To constitute a valid forfeiture of shares there must be power to forfeit, and intention to forfeit, and a notice of that intention, and further, the intention must be actually carried into effect. A default in payment of calls does not *ipso facto* bring about a forfeiture, nor does the intention to forfeit not carried into effect amount to a forfeiture. [p. 431, col. 2.]

A Company has got the option to forfeit or not and unless the option is exercised the defaulter continues to be a member of the Company. Even where the Articles provide that a forfeiture shall take place *ipso facto* on default in payment of calls, defaulting share-holder cannot insist on the cla acted upon. [p. 431, col. 2.]

In re East Kongsberg Company; Brigg's case, 1 Eq. 309; 35 L. J. Ch. 216; 12 Jur. (N. S.) 89; 13 L. T. 627; 14 W. R. 244, followed.

Miscellaneous first appeal from the order of the District Judge, Lahore, dated the 27th April 1914, settling the appellant on the list of contributories.

Bakhshi *Gokal Chand*, for the Appellant.

Mr. *Nihal Chand Mehra*, for the Respondent.

JUDGMENT.—This is an appeal under section 169 of the Indian Companies Act, VI of 1882, from an order of the District Judge settling the appellant on the list of the contributories of the Lahore Bank, Limited now in liquidation. The learned Counsel for the appellant has not challenged the finding that his client applied for, and was duly allotted ten shares, and the sole question for determination is whether the shares were forfeited by the Company.

Now it appears that the appellant made default in the payment of the calls on the shares and accordingly the Company issued to him on the 18th May 1911 a notice that if he did not pay the arrears of his calls by a certain date, his shares would be liable to be forfeited. The appellant did not make the payment and it is clear that the Company did not carry out its threat and did not, in accordance with Article 34 of the Articles of Association, pass a resolution forefeiting the shares. The appellant's name remained on the books of the Company as it had been before the notice. I cannot, in these circumstances, hold that he ceased to be a member of the Company.

To constitute a valid forfeiture there must be the power to forfeit, and intention to forfeit, and a notice of that intention and further, the intention must be actually carried into effect. It seems to me abundantly clearly that a default in payment of calls does not *ipso facto* bring about a forfeiture, nor does the intention to forfeit not carried into effect amount to a forfeiture. The Company has got the option to forfeit or not and unless the option is exercised, the defaulter continues to be a member of the Company. Even where the Articles provide that a forfeiture shall take place *ipso facto* on default in payment of calls, the defaulting share-holder cannot insist on the clause being acted upon. This principle of law is fully borne out by the decision of the Vice-

Chancellor in *In re East Kongsberg Company; Brigg's* case (1). In that case, a shareholder received notice that if he did not pay his calls in arrears by a certain date, his shares will be forfeited without further notice; he paid his calls on some of his shares but not on others, stating that he should submit to their forfeiture, but the Directors after all did not forfeit them, and kept his name on the books. On the subsequent winding-up of the Company he was held to be a contributory in respect of all his shares.

Following the law laid down in the above judgment, I hold that there has been no forfeiture in this case and that the appellant was rightly placed on the list of contributories. I accordingly affirm the order of the District Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 1 Eq. 309; 35 L. J. Ch. 216; 12 Jur. (N. S.) 89; 13 L. T. 627; 14 W. R. 244.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 318 OF 1913.

February 18, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Musammat SUNDAR KUNWAR—PLAINTIFF—APPELLANT

versus

DINA NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Ejectment suit in Revenue Court—Question of proprietary title decided—Appeal not filed in Civil Court—Finality of decision—Subsequent suit in Civil Court, maintainability of.*

Where in an ejectment suit in a Revenue Court the defendants raise a plea of proprietary title and the Revenue Court decides the question itself and the plaintiff fails to appeal to the District Judge, the decision of the Revenue Court becomes final and bars any subsequent suit in the Civil Court. [p. 433, col. 1.]

Shazade Singh v. *Mohammad Mehdi Ali Khan*, 3 Ind. Cas. 954; 32 A. 8; 6 A. L. J. 917; *Bed Saran Kuar* v. *Bhagat Deo*, 10 Ind. Cas. 924; 8 A. L. J. 341 (F. B.); 33 A. 453; *Beni Pande* v. *Raja Kausal Kishore Prasad Mal Bahadur*, 29 A. 160; 4 A. L. J. 53; A. W. N. (1907) 6, referred to.

First appeal from the decision of the Subordinate Judge of Moradabad, dated the 2nd May 1913.

FACTS.—The plaintiff, Sundar Kunwar instituted a suit in the Revenue Court. The defendants pleaded that they were not her tenants and that the plaintiff had given them the property. The Assistant Collector decided in favour of the defendants. The plaintiff appealed to the Commissioner who affirmed the decree of the Collector. The plaintiff again brought a suit in the Revenue Court, which dismissed the suit. The plaintiff then brought the present suit in the Civil Court. The Subordinate Judge dismissed the suit, the plaintiff appealed to the High Court.

Mr. *B. E. O'Conor* (with him *Dr. Surendra Nath Sen*), for the Appellant:—The defendants were trespassers. They were in possession without any right and the suit for their ejectment could only lie in the Civil Court. The learned Judge is wrong in holding that the suit was not cognisable by the Civil Court.

In the first case, the finding that the defendants were rent-free grantees and had got the same as gift was wholly unnecessary. The point that arose in that case was whether the defendants were tenants. Rent-free grantees cannot be called proprietors, and the defence of being rent-free grantees did not raise a question of proprietary title and so no appeal lay to the District Judge. The present suit was, therefore, not barred.

Mr. *Mohan Lal Sandal*, for the Respondents:—The defendants clearly raised a question of proprietary title. They denied that they could be ejected as tenants. If the plaintiff felt aggrieved by the adverse decision of the Revenue Court against him, his remedy lay in an appeal to the District Judge. He did not avail himself of his opportunity and the decision has become final between the parties, and the present suit cannot be entertained.

I rely on *Shazade Singh* v. *Mohammad Mehdi Ali Khan* (1) and *Bed Saran Kuar* v. *Bhagat Deo* (2).

The Revenue Court had the right to decide the question of proprietary title raised. It having decided it and the judgment having become final, the present suit is barred.

JUDGMENT.—This appeal arises out of a suit for ejectment. A suit was instituted

(1) 3 Ind. Cas. 954; 6 A. L. J. 917; 32 A. 8.

(2) 10 Ind. Cas. 924; 33 A. 453; 8 A. L. J. 341 (F. B.).

by the plaintiff in the Revenue Court in the year 1909 or 1910, in which the plaintiff alleged that the defendants were her tenants and she sought to eject them for non-payment of rent. In that case the defendants pleaded that the plaintiff had given them the property. The Assistant Collector held that the story told by the defendants was correct, namely, that the plaintiff having no issue of her own brought them from their village and established them on the property, promising that they should have the property now in suit. Having found that these were the true facts he concludes by saying, "under these circumstances I find the defendants are rent-free holders of the land in suit, which was given to them in gift by the plaintiff". The plaintiff appealed to the Commissioner (not to the District Judge). The Commissioner held in effect exactly the same as the Assistant Collector had held. Meanwhile a second suit had been brought by the plaintiff for rent, also in the Revenue Court. This suit has been dismissed as being a matter which was already decided in the suit to which we have already referred. The plaintiff then instituted the present suit in the Civil Court. The Court below has dismissed her suit on the ground that the previous proceedings bar the suit.

It seems to us that the decision of the Court below was correct. The plea of the defendants in the first mentioned suit was clearly a plea that they were the proprietors. Two courses were open to the Revenue Court. It could decide the question itself, in which case the appeal lay to the District Judge, or it might refer the parties to the Civil Court. From the nature of the issue framed and the finding of the Court it seems to us that we must presume that the Revenue Court adopted the first course. It was, therefore, the plaintiff's duty to have appealed to the District Judge if she was dissatisfied with the decision. She did not do so and, therefore, the decision of the Revenue Court is final and has the same effect as the decision of the Civil Court. [See *Shazade Singh* v. *Mohammad Mehdi Ali Khan* (1), *Bed Saran Kuar* v. *Bhagat Deo* (2), *Beni Pande* v. *Raja Kausal Kishore Prasad Mal Bahadur* (3)].

(3) 29 A. 160; 4 A. L. J. 53; A. W. N. (1907) 6.

If we were to hold that the decision by the Assistant Collector and the Commissioner was that the defendants were rent-free grantees, then the plaintiff's remedy would be under the Tenancy Act to have the rent-free grant resumed.

We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 1309 OF 1914.

February 5, 1915.

Present:—Mr. Justice Macleod.

NISSIM ISAAC BEKHOR—PLAINTIFF

versus

Haji SULTANALLI SHUSTARY—DEFENDANTS.

Contract—'C i. f.,' meaning of—Bill of lading—Insurance against war risks—Purchaser, whether bound to pay the premium—Shipment at enemy port—Royal Proclamation forbidding trading with enemy, effect of.

A *c i. f.* contract is one under which the purchaser is bound to pay the stated price for the goods on tender of the documents showing that the goods have been shipped for transit, to the port of destination, duly insured according to the terms of the contract, and that freight has been paid. [p. 435, col. 1.]

A bill of lading, as known to merchants, is a receipt for goods actually delivered over and shipped on board the ship named therein signed by the captain of the steamer or his representative, and no document which does not conform to these conditions can strictly be called a bill of lading. [p. 436, col. 2.]

A *c. i f.* purchaser is entitled to ask for a bill of lading, for he is not bound to pay upon proof merely that the goods have arrived at the port of departure. [p. 436, col. 2.]

On the 9th of June 1914 the defendants contracted with the plaintiff for the purchase of five tons of round copper bottoms "*c. i. f.* Mahomerah, net cost in Bombay against bill of lading". The copper was shipped on board the steamer Tangistan on or about the 28th July 1914. On the 5th of August in consequence of war having broken out between Great Britain and Germany, the plaintiff's agent in England insured the copper against war risks. The documents arrived in Bombay on the 7th of September, whereupon the plaintiff demanded payment of the price and the war insurance premium which latter the defendants refused to pay. By another contract in writing, dated the 17th July 1914, the defendants purchased from the plaintiff 900 bags of sugar *c. i. f.* Mahomerah, July shipment, the defendants undertaking to pay for the sugar in Bombay against the bills of lading. The sugar was shipped at Hamburg on board the steamer Nicomedia on the 28th of July and was insured against war risks on the 29th.

NISSIM ISAAC BEKHOR *v.* SULTANALLI SHUSTARY.

The documents arrived in Bombay on the 15th August when the plaintiff demanded payment, which the defendants refused on the ground that there were no bills of lading and that owing to the war and the Royal Proclamation of 5th August, the contract had become impossible of performance:

Held, (1) that as the plaintiff was not bound to insure the copper against war risks, the defendants were not liable to pay the war insurance premium; (p. 435, col. 2.

(2) that in view of the Royal Proclamation the second contract had become impossible of performance and the defendants were not liable to pay. (p. 437, col. 2.

It is certainly desirable that a Judge trying a commercial cause should have a power to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence or otherwise. (p. 437, col. 1.)

Messrs. *Weldon* and *Campbell*, for the Plaintiff.

Messrs. *Inverarity* and *Setalvad*, for the Defendants.

JUDGMENT.—On the 9th of June 1914, the defendant firm, carrying on business in Bombay, purchased from the plaintiff, a merchant, also carrying on business in Bombay, five tons—round copper bottoms, c. i. f. Mahomerah, July shipment, by a contract in writing at the price and on the terms mentioned in the said contract. The defendants agreed to pay for the copper in Bombay against bills of lading. The copper was shipped on board the steamer Tangistan on or about the 28th day of July 1914, and the plaintiff says he obtained the relative bills of lading and also insured the copper against the ordinary marine risks. On the 5th day of August, in consequence of war having broken out between Great Britain and Germany, the plaintiff's agent in England insured the copper against war risks and paid 10 per cent. premium for such insurance. The documents arrived in Bombay on the 7th of September, whereupon the plaintiff delivered three invoices for the copper to the defendants and called upon them to pay the invoice price and also the aforesaid premium for insurance against war risks. The defendants refused to pay the amount demanded, on the ground that they were not liable to pay the aforesaid premium. By another contract in writing, dated the 17th July 1914, the defendants purchased from the plaintiff 900 bags of sugar, c.i.f. Mahomerah, July shipment, at the price and on the terms mentioned in the said contract. The defendants also agreed to pay for the sugar in Bombay against the bills of lading. The plaintiff alleges that, in performance of the contract, he got the sugar shipped at Hamburg on board the steamer Nicomedia on the 28th of July 1914, and obtained the relative bills of lading, and also insured the sugar against the ordinary marine risks. On the 29th of July, his agent in England insured the sugar against war risks and paid half per cent. premium for such insurance. He further alleges that the bills of lading relating to the sugar arrived in Bombay on the 15th day of August. Thereupon, he delivered to the defendants an invoice of the sugar and called upon them to pay the sum of Rs. 19,251-15-3, being the price of the sugar inclusive of the aforesaid premium for insurance against war risks. He further alleges that he has tendered the bills of lading for the sugar and the policy of insurance against war risks to the defendants, but they have failed to pay the amount claimed. Accordingly, he asks for a decree in this suit for the sum of Rs. 8,878-4-11, being the price of the copper with interest at 9 per cent. from the 7th of September 1914, and the sum of Rs. 19,251-15-3, being the price of the sugar with interest at 9 per cent. from the 22nd of August 1914.

The defendants in their written statement deny that they were liable to pay the 10 per cent. premium for insurance of the copper against war risks. As a matter of fact, since the suit was filed, the defendants have paid the whole of the plaintiff's claim in respect of the copper without prejudice to their contentions in this suit, in order to get delivery of the copper; and if their contentions are correct they will be entitled to a refund of the amount paid for the insurance against war risks. With regard to the sugar the defendants do not admit that the plaintiff got the sugar shipped at Hamburg on the 28th of July or that the plaintiff obtained the relative Bills of lading in respect of such shipment. Finally, they contend that, in view of the war and the proclamations that have been issued from time to time by the British Government, the contract between the parties has become impossible of performance.

Exhibits A and B are the contracts for the purchase of copper and sugar respectively.

They are what are called c. i. f. contracts under which the purchaser is bound to pay the stated price for the goods on tender of the documents showing that the goods have been shipped for transit to the port of destination, duly insured according to the terms of the contract, and that freight has been paid. I think it is clear that under these contracts the seller was not bound to insure against war risks. This was admitted by defendants' Counsel, and by the plaintiff in his circular of the 28th July 1914 addressed to his constituents (Exhibit D), whereby he drew their attention to the necessity of insuring sugar indented through him against war risks in view of the political situation in Europe. He also asked them to note that if he did not receive any instructions by 6 P. M., he would effect the necessary insurance against war risks on their sugar, and debit them with the extra premiums. Without receiving any instructions from the defendants the plaintiff cabled on the 28th to his agent in England to effect insurance against war risks, and I find that he was not justified in debiting the defendants with extra premiums in the absence of express instructions from them which, as a matter of fact, were not given. The sugar indented for under Exhibit B was insured against war risks at $\frac{1}{2}$ per cent. premium but it appears now that the condition for such insurance was that the sugar was to be shipped before the 1st August. The copper indented for under Exhibit A was not insured until the 5th August when, owing to war having been declared between Great Britain and Germany, 10 per cent. premium was charged by the under-writers.

The invoices for the copper per SS. Tangistan were sent to the defendants on the 7th September, and on the 9th September they write: "Again on the 7th instant you sent your invoices Nos. 522, 543 and 544 for shipment of copper by SS. Tangistan charging 10 per cent. extra insurance, and we are surprised to see why you have put such extra amount. Please note that you have never informed us that you were going to insure copper against war risks before shipment up to the time of the invoices. We are quite prepared to pay you accordingly as soon as we are satisfied that the consignments have been really shipped as per invoice and are in course of transit." This might be construed as a consent on the part of the defendants to pay the 10 per cent. on being satisfied that the goods had been shipped, but the plaintiff's letter of the 10th shows that the plaintiff did not consider that the defendants had agreed to pay the 10 per cent. and in their letter of the 11th September the defendants definitely disclaim all liability for extra insurance. It was contended that the case fell within section 70 of the Indian Contract Act, but I do not think it does. The cases cited were cases in which a mortgagee was held entitled to charge his mortgagor for sums paid by him for land revenue to avoid the mortgaged land being sold for non-payment. The analogy would only hold good if the Tangistan had been captured and the defendants had claimed the benefit of the insurance against war risks. On the 21st October the defendants wrote that it had been mutually agreed that plaintiff was to charge 10 per cent. for war risks on goods shipped per SS. Tangistan, but plaintiff denied this in his Solicitors' letter of the 28th October. It is evident that the defendants were perfectly willing, on a concession, to pay 10 per cent. but this was not accepted by the plaintiff, and it is impossible to find any substantial ground for the contentions in their letter of the 28th October that the defendants were bound to pay whatever premium the plaintiff might have paid on their behalf for the copper.

I find, therefore, that the defendants are entitled to a refund of what they have paid to the plaintiff for the insurance effected by him against war risks, in order that they might get delivery of the copper.

The next question is whether the defendants were entitled to refuse payment of the invoice amount of the sugar.

It is admitted that the invoice (Exhibit K) was delivered at the defendants' office by the plaintiff's clerk, Saul, on the 15th August, on which day the English Mail arrived.

The invoice value was Rs. 19,146-3-3 to which was added Rs. 423 approximate insurance against war risks pending the arrival of policy from London. It is admitted that Rs. 423 was far in excess of what had been paid by the plaintiff's agent in London, and, therefore, in any event, the defendants were asked to pay more than

what was due, but further there is a conflict of evidence as to whether the shipping documents were tendered on the 15th August, and I am satisfied that no such tender was made. The plaint carefully refrains from alleging they were, nor is any such suggestion made in the correspondence until the 16th November.

I do not believe the witness Saul, who said that he tendered shipping documents to the defendants' *moonim* together with the invoice on the 15th August. The documents were sent to the National Bank and it would be most unlikely that the plaintiff received them from the Bank on the same day that they arrived from England, and this is supported by the plaintiff entering in his bill-book the bill drawn against the sugar on the 18th August. It seems clear that the usual practice of the plaintiff was to send the invoices to his constituents, to inform them what was the amount payable, the documents thereafter either being sent with a covering letter, see Exhibit 8, or being delivered over on payment of the invoice value.

But assuming that the shipping documents now produced in Court were actually tendered to the defendants on the 15th August, was there amongst them a bill of lading against which only the defendants were bound to make payment? Exhibit H collectively are the documents relating to the 900 bags of sugar issued by the Hamburg American Line, which the plaintiff contends are bills of lading. The writing on the face of the document is in German. On the back general rules are printed in German and English.

Each document which was issued in triplicate purports to be a receipt for the goods named therein from Messrs. Cohre and Amme for transport by the German steamer, Nicomedia, Captain, or subsequent steamer through the Suez Canal for Mohammerah to order or to be delivered to the order of—. I see no reason to doubt that the plaintiff has frequently received documents in a similar form purporting to be bills of lading which he has handed over to his indentors and that, on presentation of such documents, the indentors have obtained delivery from the shipowners of the relative goods and that, therefore, such documents have performed the ordinary functions of bills of lading. But it is indisputable that a bill of lading, as known to merchants, is a receipt for goods actually delivered over and shipped on board the ship named therein signed by the captain of the steamer or his representative, and no document which does not conform to these conditions can strictly be called a bill of lading. It may be that, as a matter of convenience, shipowners may issue to shippers receipts in triplicate for goods delivered at the warehouse for shipment, such receipts being accepted by the shippers in place of bills of lading, forwarded to the consignee and accepted by the shipowners' agents at the port of delivery as entitling the consignee to delivery, and under ordinary circumstances no dispute would arise. But the fact remains that these receipts are not evidence of shipment and if such a receipt is tendered to a c. i. f. purchaser, he is entitled to ask for a bill of lading, for he is not bound to pay upon proof merely that the goods have arrived at the port of departure. It has been contended that, under the contract in this case, the purchaser has agreed to accept the date of the carriers' or wharfingers' receipt as the date of shipment, and that, therefore, he is not entitled to say that the goods were not shipped on the 28th July, the date on which the documents (Exhibit H) were issued. But that agreement is contained in the clause which absolves the seller from responsibility for late or non-arrival of the goods under certain circumstances and declares that the period during which such stoppage as is therein described continues, shall not be considered to form part of the time mentioned in the contract for the completion thereof. Therefore, the sugar having been received by the carriers at Hamburg on the 28th July, the purchaser could not contend that it was not July shipment, but the seller was not absolved from his obligation to tender a bill of lading. If a bill of lading had been tendered the purchaser would have been bound to pay the invoice value, though he would be still entitled to claim a refund if he could prove that, as a matter of fact, although the bill of lading had been issued the goods had not been shipped.

The defendants, before the hearing, took out a summons for the issue of a commission to examine witnesses in London, Dunkirk and Hamburg in order to prove that the Nicomedia left Dunkirk on the 30th July and arrived at Hamburg on or about the 31st July, but I do not think that they were entitled in this suit to ask for such a commission, as the question whether the goods had been shipped could only be relevant in a suit to be filed by the defendants.

Mr. Inverarity produced certain copies of Lloyd's Weekly Index which showed that, according to the information received at Lloyd's from their agents, the Nicomedia left Dunkirk on the 30th July, arrived at Hamburg on or about the 31st July and was still there in November. He admitted that the information contained in the Weekly Index was not evidence, but it seems unfortunate that in a Court dealing with commercial cases it should not be permissible to rely on such a publication which is treated by business men as affording reliable information regarding the movements of ships on Lloyd's register and that it should be necessary in order to prove where a ship was on a particular date to produce evidence of witnesses who had actually seen the ship. A special list for commercial causes was instituted so as to induce the confidence of the commercial world that their disputes would be adjudicated upon expeditiously and in accordance with the Law Merchant. The law of evidence has always been the despair of the business man and apart from the fact that a commercial cause is set down for hearing as soon as possible after the issue of the summons and takes precedence of other causes, there is little to be gained if a party is exposed to the ordinary delays of the law.

It is certainly desirable that a Judge trying a commercial cause should have a power to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence or otherwise.

The last question is whether if the bills of lading had been tendered, that would have amounted to a valid tender having regard to the Proclamation issued by the British Government on the 5th August and published in the *Bombay Government Gazette*, on the 10th August (Exhibit 9).

All persons resident, carrying on business or being in British dominions are warned not to supply to or obtain from the German Empire any goods, wares, or merchandise or supply to or obtain the same from any person resident, carrying on business or being therein, nor to supply to or obtain from any person any goods, wares, or merchandise for, or by any way of transmission to or from the German Empire or to or from any person resident, carrying on business or being therein, nor to trade in or carry any goods, wares, or merchandise destined for or coming from the German Empire or for or from any person resident, carrying on business or being therein.

It is difficult to see how the acceptance of the shipping documents relating to the sugar by the defendants would be considered as not being a violation of this Proclamation.

In *Duncan Fox & Co.* v. *Schrempft & Bonke* (1) the plaintiff had sold Chilian honey per steamer c.i.f. to Hamburg. The honey was shipped on a German steamer and on the 5th August what was admitted as a tender of the shipping documents was made. The defendants refused to accept the tender. On a special case stated by arbitrators it was held that such refusal was justified, because by accepting the tender and obtaining the goods the defendants would be carrying out a contract in violation of the Proclamation against trading with the enemy. It seems that this decision must cover a case of goods coming from Germany.

The suit must be dismissed with costs, each party to pay his own costs of the summons for commission.

Defendants to be entitled to a refund of the amount paid for the 10 per cent. premium and interest, if any, with interest at six per cent. from date of payment.

Suit dismissed.

(1) (1915) 1 K. B. 365; 31 T. L. R. 66; 59 S. J. 92.

KALLU v. PARBHU LAL.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1575 OF 1914.

February 11, 1915.

Present:—Justice Sir George Knox, Kt.

KALLU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PARBHU LAL—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 16—Document—Undue influence—Burden of proof—Circumstances dominating the will—Inference.

Where a *kabuliat* registered three days after its execution contained nothing in the document itself to show that it was a hard bargain or otherwise of an exacting nature, it is for the executant to prove that it was executed under undue influence. The fact that a compoundable criminal case was pending between the parties and the prosecution was ready to compound the offence and to withdraw the charge if the *kabuliat* was executed and that the executant was ready to execute it on condition of the withdrawal of the charge, would not lead to the necessary inference that the other side was in a position to dominate the will of the executant and that he used that position to obtain an unfair advantage upon him. [p. 439, col. 2.]

Gobardhan Das v. *Jai Kishen Das*, 22 A. 224; A. W. N. (1900) 52, referred to.

Second appeal from the decision of the Second Additional Judge of Aligarh.

Mr. *Haribans Sahai*, for the Appellants.

JUDGMENT.—This is an appeal brought by Kallu and Karamat-ul-lah who were defendants in the Court of first instance. The plaintiff was one Parbhu Lal. The lower Appellate Court has found upon evidence certain matters to which I shall presently refer, and the learned Vakil who appeared for the appellants has more than once stated in his argument that he accepts the findings of fact as found by the lower Appellate Court. His contention is that the lower Appellate Court has drawn wrong inferences of law, and not that it has arrived at wrong findings of fact. It is admitted in the case that the appellants executed a *kabuliat* on the 4th of November 1909 in favour of the respondent and that that *kabuliat* was afterwards registered.

The findings of fact are that one Abdullah was co-sharer in the village, that the land in suit was Abdullah's *sir* land, that Abdullah's proprietary rights passed by sale to Ahmad Bux and that Ahmad Bux in turn transferred the rights, whatever they were, to the respondent. The result of all these transactions was that Abdullah became an ex-proprietary tenant of this land. After becoming ex-proprietary tenant Abdullah sub-let those tenant rights to the appellants. Later on the respondent ejected Abdullah on the 3rd of August 1909. With that ejectment of Abdullah went the tenant rights of the persons to whom Abdullah had sub-let them, *i. e.*, the appellants. Three months after this had come and gone the appellants executed the *kabuliat* in favour of, the respondent. It is not easy at first sight to see how this position can be got out of but his arguments addressed to me have been very ingenious.

They are (1) that when Abdullah was ejected the tenant rights of Abdullah enured in favour of all the co-sharers. The appellants were two of such co-sharers, I believe there were eight in all, and the tenants' rights enured partly in favour of other co-sharers in the *mahal*. It is not easy to see what follows from this argument. The position laid down is unassailable; it amounts to this and no more, that the appellants by reason of being co-sharers of the whole *mahal* become co-sharers of the rights vested in Abdullah, nothing more.

In the course of the delivery of this judgment I was informed that what the argument meant was that upon the ejectment of Abdullah the ex-proprietary rights of Abdullah became extinguished and the land which Abdullah held became ordinary land. Press this as far as it can be pressed, it will not extend to the necessary inference that the appellants became tenants or joint tenants in the land in dispute. In the course of the argument allusion was made to the evidence of the *patwari*, who is said to have stated that this land became the *kasht* of all the proprietors. This may or may not be a correct interpretation of what the *patwari* did say. The mere fact that land was written down in the *patwari* papers as *khudkasht* land will not make that land *khudkasht*, more than an entry in the *patwari* papers will be required to establish this, when disputed, as in this case.

Then the second contention is that the appellants never got possession. The lower Appellate Court has considered this question and finds that the land covered by the *kabuliat* is cultivated by the appellants or their relatives. This is tantamount to a finding that the *kabuliat* was acted

upon. But there is a still further contention and that is that the *kabuliat* is void, inasmuch as it was executed under undue influence and my attention was directed to section 16 of Act IX of 1872. This point also did not escape the consideration of the lower Appellate Court. That Court found itself unable to deal with this issue and referred to the Court of first instance the following issues:—"Whether the defendants executed the said *kabuliat*, dated the 4th November 1909, through undue influence, and was that influence exercised by the plaintiff or by anybody else acting on his behalf? In the order of remand the Court was directed to take such additional evidence as may be necessary for a proper decision. The finding returned was that the defendants were unduly influenced to execute the *kabuliat*; because there was a criminal case pending between the parties under sections 352 and 447 of the Indian Penal Code and the plaintiff said he would not withdraw it unless the defendants executed the *kabuliat*. The lower Appellate Court considered this finding and disagreed with it. It held that if the defendants agreed to execute the *kabuliat* on the 1st November 1909 because the plaintiff withdrew his charges against them under those sections, it was not undue influence but consideration and that the defendants were the gainers by the *kabuliat*, because they had otherwise no right to hold the land in question. Section 16 lays down that "a contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other." The criminal case was a charge of offences punishable under sections 447 and 352. Neither offence is a grave charge and both the offences are offences which the law permits parties to compound. Seeing that this particular *kabuliat* was both executed and registered some three days after it was executed, the burden of proving undue influence would lie on the appellants. The words of section 16 of Act IX of 1872 are important; they go on to say that "where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other." The words themselves show that this clause 3 applies only to a transaction which on the face of it or on the evidence adduced appears to be unconscionable. It would be a very long step indeed to take to say that, under the circumstances which have been found by the lower Appellate Court that, the execution of this *kabuliat* would be an unconscionable transaction. The probability is that the respondent was for some reason very anxious to get this *kabuliat* executed, but there is nothing in the *kabuliat* itself to show that it was a hard bargain or otherwise of an exacting nature, even if we go so far and hold that a criminal case of a nature here represented had sprung up between the parties. The fact that the prosecutor was ready to compound the offences and to withdraw the charges if the *kabuliat* was executed and that the appellants were ready to execute the *kabuliat* on condition of the withdrawal of the charges, would not lead to the necessary inference that the respondent was in a position to dominate the will of the appellants and that he used that position to obtain an unfair advantage upon them. The appellants are Muhammadans, the respondent is a Hindu and a *mahajan*. There is nothing to show that there had been any previous money transactions between the parties and that they, therefore, started in this race unfairly. This Court has had occasion to consider this very question in *Gobardhan Das* v. *Jai Kishen Das* (1). That case, it is true, was decided before section 16 of the Indian Contract Act had been amended, but the amendment does not seem to make this case without value as a precedent. The observations of the Chief Justice, Sir Arthur Strachey, lay down what is meant by undue influence The learned Chief Justice says, referring to that particular case: "I have no doubt that at the time when he executed the submission he was to some extent, at all events, in fear of the criminal proceedings, but he does not say

(1) 22 A. 224; A. W. N. (1900) 52.

a word to suggest the conclusion that the plaintiff or any one else took advantage of his state of mind to apply any pressure or exercise any influence to procure his consent. It cannot be held that a state of fear by itself constitutes undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement." Nothing of this kind has been alleged or proved in the present case, and I hold that the lower Appellate Court was right in its finding that the execution of the *kabuliat* was not brought about by undue influence on the part of the respondent.

One more contention was pressed before me and that was that the respondent was not entitled to bring this case without joining as parties to the case the other co-sharers. Section 194 of Act II of 1901 was cited in support of this contention, also that if the respondent could sue alone he was not entitled to recover anything more than his share of the rent. But this contention entirely overlooks the finding that a special *kabuliat* has been executed and registered in favour of the respondent. The respondent is suing upon that registered *kabuliat* to which he and none of the other co-sharers was a party. The case appears to me to fall under clause 2 of section 194. There was a special contract between the parties, the respondent was entitled to recover separately his share of the rent payable by the appellants. It would be for the *lambardar* and the co-sharers to consider whether they are entitled to any part of this rent and to sue for it, if necessary.

None of the other pleas in the memorandum of appeal were pressed before me. In the course of the argument my attention was drawn to the case of *Lal Mahomed* v. *Kallanus* (2). I do not propose to say how far I agree with the learned Judges of the Calcutta High Court, but the case cited seems to me dead against the appellants. The learned Judges are careful to say that in section 116 of Act I of 1872 the words "at the beginning of the tenancy" only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession. So far as the tenancy in this case is concerned, the appellants had not been previously in possession of the tenancy. As I pointed out in another part of this judgment, they may have been co-sharers but they were not co-sharers of this particular piece of land. The act which put him in possession was the act of the respondent following upon the registered *kabuliat*.

I dismiss the appeal.

Appeal dismissed.

(2) 11 C. 519.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 5 OF 1912-13 OF HARDOI DISTRICT.

August 5, 1913.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

MADARI LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PAHALWAN SINGH—PLAINTIFF—RESPONDENT.

Resumption suits—Grantor and grantee, suit between—Mortgagee from grantee, whether necessary party—Mortgagee, if impleaded, right of.

In resumption suits a mortgagee from the grantee is not a necessary party and is bound by the decision arrived at in such suits if the proceedings are fairly conducted between the grantor and the grantee; but where the proceedings are not fairly conducted between the grantor and the grantee, and the mortgagor impleads the mortgagee, the latter has the right to have his pleas fully heard and determined. [p. 441, col. 1.]

Gaya Prasad v. *Nawab Tasadduk Husain*, 6 O. C. 130, referred to.

Appeal from the decree of the Commissioner, Lucknow, dated 1st April 1913.

JUDGMENT.

TWEEDY, J. M.—I do not think that the lower Courts were right in holding that the mortgagees of this *muafi* have no *locus standi* in the Revenue Court. It has been held that they are not necessary parties to the suit and that they are bound by the decision arrived at by the Courts in proceedings *fairly conducted* between the

grantor and grantee. [*Gaya Prasad* v. *Nawab Tasadduk Husain* (1), quoted in Mata Prasad and Maharaj Narain's Rent Act, page 177.]

In the present case the proceedings were *not* fairly conducted, for the grantees did not contest the suit but left their mortgagees to bear the brunt of the grantor's attack. The latter was not bound to make them parties, but as he did so, I think they have the right to have their pleas fully heard and determined. The *wajib-ul-arz* does not show that this grant is resumable but only that it is assessable, and, therefore, the grantees were entitled to hold at a fair rent for seven years. The finding that the *muafi* does not come under section 107H is certainly a finding of fact and the Commissioner was right in not interfering in second appeal; but the question whether the grant could only be assessed and not resumed has not been determined. The claim to have rent assessed is not clearly made in the grounds of appeal, but it was made in argument by Counsel and I think it is entitled to prevail. I would decree the appeal in part and under rule 13 return the case for assessment of rent under section 107G. Costs to be on parties.

BAILLIE, S. M.—I concur.

Appeal partly allowed.

(1) 6 O. C. 110.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1720 OF 1912.

October 28, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

Musammat MALAP KAUR—DEFENDANT—APPELLANT

versus

HAKIM SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Colonization of Government Lands (Punjab) Act (V of 1912), s. 21—Deed of tenant before commencement of Act—Payment of necessary sums for acquisition of proprietary rights.

Where on the death of a tenant the tenancy was mutated in the names of his son's widow and his son's son's widow, who paid the necessary sums to the Government for the acquisition of proprietary rights, and the original tenant's reversioners claimed the property:

Held, (1) that section 21 of the Act did not apply as the tenant died before the Act came into force; [p. 442, col. 1.]

(2) that the defendants, when they had paid in full the necessary sums to Government, became *ipso facto* owners in their own right of the land in suit. [p. 442, col. 1.]

Second appeal from the order of the Divisional Judge, Gujranwala Division, dated the 27th August 1912.

Mr. *Roshan Lal*, for the Appellant.

Rai Bahadur Pandit *Sheo Narain* and Sardar *Kharak Singh*, for the Respondents.

JUDGMENT.—In this case Mr. Sheo Narain on behalf of the respondents has raised the preliminary objection that no appeal lies. His point is that the issue, after deciding which the lower Appellate Court remanded for fresh decision, is either a question of fact or one of custom; that, if it is a question of fact, no second appeal lies, and if it is a question of custom, appellants should have obtained a certificate for appeal from the lower Appellate Court, which they have not done; and he refers us to *Sawan Singh* v. *Mothu* (1). We are unable to assent to this way of dealing with the matter. The first question for decision is, whether section 21, Punjab Act V of 1912, governs the case, and this is a pure question of law. We, therefore, overrule the objection.

On the merits also we have heard arguments and have examined the record and the law aforesaid, and we find it clear beyond all doubt that the decision of the lower Appellate Court is incorrect and that its order must be recalled and the suits dismissed. (Civil Appeal No. 1720 and Civil Appeal No. 1721 are intimately connected and can conveniently be disposed of together).

Jawala Singh first obtained the tenancy of this land from Government in 1890. He died, and eight or nine years before suit the two widows (defendants in these two cases), one of whom is Jawala Singh's son's widow and the other his son's son's widow, admittedly paid to Government the necessary sums for acquisition of proprietary rights. Plaintiffs are the descendants of Gulab Singh, father of Jawala Singh, through a son Mewa Singh; and the lower Appellate Court, applying section 21 aforesaid of the Colony Act,

(1) 23 Ind. Cas. 817; 85 P. R. 1914; 152 P. L. R. 1914; 120 P. W. R. 1914.

finds that the land must be treated as ancestral *qua* plaintiffs. But Jawala Singh died long before the Act came into force, and the lower Appellate Court has overlooked the words in section 21 "when *after the commencement of this Act* any tenant dies," and Mr. Sheo Narain very rightly admits that the section 21 cannot be rightly applied in this case, even if defendants could be said still to be tenants.

Further we incline to the opinion that defendants, when they had paid in full the necessary sums to Government, became *ipso facto* owners in their own right of the lands in suit; and thus, whichever view is taken of their present *status*, plaintiffs' suit must fail. We are unable to see any force in Mr. Sheo Narain's contention that even in these circumstances there remains a possible case for plaintiffs on the score of "custom." We cannot imagine any possible custom under which plaintiffs can oust defendants in either of the two alternatives stated above. In neither case have they any possible *locus standi*.

For these reasons we accept these appeals and dismiss the plaintiffs' suits with costs throughout, the remand orders being set aside.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 582 OF 1913.

December 22, 1914.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

JAVERBHAI JORABHAI—PLAINTIFF—APPELLANT

versus

GORDHAN NARSI—DEFENDANT—RESPONDENT.

Mortgage—Covenant to compensate—Bhagdari and Narwadari Act (Bom. Act V of 1862), s. 3—Unrecognized sub-division of bhag, *mortgage of—Illegal mortgage—Mortgagee, right of, to compensation—Contract Act (IX of 1872), s. 65—Limitation Act (IX of 1908), Sch. I, Art. 62.*

The house in suit and certain other properties were, by a registered deed of 1897, mortgaged to the plaintiff's father by defendants Nos. 1 and 2 and the deceased husband of defendant No. 3, these mortgagors having purchased the properties from the *bhagdar* owner in 1893. In 1901 on accounts being taken between the mortgagors and the mortgagee, part of the property was sold to pay a part of the mortgage-debt, while the balance of the debt was secured by a fresh mortgage of the house in suit. The mortgagors remained in possession of the house as plaintiff's tenants under yearly rent-notes. The last rent-note was passed in 1908. On the defendants' refusing to surrender possession the plaintiff sued for possession averring that in case he was held not entitled to recover possession, he was in any event entitled, under a covenant contained in the deed of mortgage, to compensation. The defendants admitted the mortgage-deed and rent-notes, but contended that they were void under the Bhagdari and Narwadari Act and also pleaded limitation:

Held, (1) that under section 3 of the Bhagdari and Narwadari Act both the mortgage and the rent-notes were void. [p. 443, col. 1]:

(2) that so far as the contract of mortgage was concerned, the consideration unquestionably failed *ab initio*, and the money advanced by the plaintiff's predecessor-in-title was money received by the defendants for the plaintiff's use, within the meaning of Article 62 of the Limitation Act, and the suit having been brought beyond the period of limitation was barred by time [p. 443, col. 2]:

(3) that the covenant to compensate contained in the mortgage-deed was collateral and not merely dependent upon the mortgage contract and that under the circumstances of the case though the main contract was wholly null and void by the Statute, the plaintiff was entitled to claim under the covenant. [p. 446, col. 1.

Second appeal from the decision of the First Class Subordinate Judge at Broach, in Appeal Suit No. 69 of 1911, confirming the decree passed by the Second Class Subordinate Judge at Jambusar, in Civil Suit No. 251 of 1910.

Mr. *D. A. Khare*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.—The plaintiff, who is the appellant before us, brought this suit as mortgagee to recover possession of a house and Rs. 14 as rent or, in the alternative, to recover Rs. 749 from the mortgaged house and other properties of defendants in case the Court should hold that plaintiff's mortgage was void. The plaint set out that the house in suit and certain other properties were, by a registered deed of 1897, mortgaged to the plaintiff's father by defendants Nos. 1 and 2 and Shankar Narsi, the deceased husband of defendant No. 3, these mortgagors having purchased the properties from the *bhagdar* owner in 1893; that in 1901, on accounts being taken, part of the property was sold to pay part of the mortgage-debt, while the balance of the debt was secured by a fresh mortgage of the house in suit; that the defendants

JAVERBHAI JORABHAI *v.* GORDHAN NARSI.

Nos. 1 and 2 and Shankar Narsi or, after his death, his widow, the third defendant, remained in possession of the house as plaintiff's tenants under yearly rent-notes; that the last such rent-note was passed in 1908; and that the defendants refused to surrender possession. It was further pleaded that, in case the plaintiff should not be held entitled to recover possession, he was in any event entitled, under a covenant contained in the deed of mortgage, to a sum of Rs. 749 as compensation, that being the sum due under the mortgage.

The defendants admitted the mortgage-deed and rent-notes, but contended that they were void under the Bhagdari Act, that the plaintiff took no interest in the property either under the mortgage or under the rent-notes, and that the suit was barred by limitation. On the material issues both the trial Court and the lower Court of appeal have found that the mortgage and the leases were void *ab initio*, that the defendants were not estopped from raising this contention and that the plaintiff's claim to compensation was barred by limitation. On these findings, so far as concerns the house now in litigation, the suit was dismissed. From this dismissal the plaintiff brings the present appeal.

The property in suit being admittedly an unrecognised sub-division of a *bhag*, its alienation is prohibited by section 3 of the Bhagdari Act, 1862. The argument advanced in the lower Courts that this mortgage could be saved from the prohibition was not pressed before us, and *Jijibhai Laldas* v. *Nagji Gulab* (1) is authority for the view that the mortgage is void under the Act nonetheless because the original mortgagors were not *bhagdars*. The rent-notes were, we think, part and parcel of the one indivisible transaction ; they are, therefore, tainted with the illegality which affects the mortgage, and they must suffer the same fate. We hold that both the mortgage and the rent-notes are void.

The only remaining question is that to which the arguments before us were almost exclusively confined, namely, whether the plaintiff is entitled to any and what compensation. The lower Courts, following *Jijibhai's case* (1), have decided that the plaintiff has a good claim to compensation under section 65 of the Indian Contract Act, but both Courts have felt compelled to hold that the claim is out of time, though the learned Subordinate Judges recognise the hardship of a decision which deprives the plaintiff both of his mortgage security and of the money which he advanced. It may be observed in passing that the hardship happens in this case to be all the greater, because it is found that the plaintiff had no knowledge of the *bhag* charactor of the property until the decision of a former suit filed so late as 1908. But both the Courts have felt constrained to hold that, inasmuch as the contract of mortgage was void *ab initio*, the consideration must be taken to have failed from the date of the contract, that is, 1897, whether the plaintiff was aware of the illegality or not; for this view they have relied on *Ardeshir* v. *Vajesing* (2), which followed the decision of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (3). It cannot be denied that if this view be sound and take account of the whole of plaintiff's case, the claim for compensation is out of time. So far as the contract of mortgage is concerned, the consideration unquestionably failed *ab initio* and the money advanced by the plaintiff's predecessor-in-title was money received by the defendants for the plaintiff's use, within the meaning of Article 62 of the Indian Limitation Act. Under that Article, therefore, the plaintiff is now too late to obtain compensation in respect of the consideration attaching to the mortgage.

But there still remains the question whether the plaintiff is not entitled to recover for breach of a separate covenant contained in the deed of mortgage. That covenant was passed by the defendants-mortgagors in the following terms: "If there should be any hindrance or obstruction concerning the house, or if the house should be taken out of your possession, then we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced." Assuming, for the moment, that this covenant can properly

(1) 3 Ind. Cas. 761; 11 Bom. L. R. 693.

(2) 3 Bom. L. R. 190; 25 B. 593.

(3) 19 C. 123; 18 I. A. 158.

be made the basis of a claim for compensation independently of the original mortgage, it is plain that that claim will be within time, for the plaintiff's case is that the breach of the covenant did not occur till 1909 when, the term of the last lease having expired, the defendants refused, on demand made, to surrender possession and the suit was filed in 1910. We may notice also that this covenant is of a different character from that which in *Ardeshir's* case (2) was held incapable of saving the plaintiff's suit from the bar of limitation. For there neither the plaintiff nor his vendor had possession of the *wanta* land in suit, and the covenant, it was held, did not amount to an agreement to compensate the purchaser for non-possession, but proceeded on the assumption that he had obtained possession. Here the covenant covers as well the cases where hindrance or obstruction should occur in taking possession as the case where possession, after having once been obtained, is afterwards taken away from the purchaser.

It remains to determine whether, although the mortgage is void under the Bhagdari Act, it is open to the plaintiff to claim under this covenant. It has not been suggested that in the Indian Contract Act or any other Indian enactment there is anything to prohibit such a claim; and the only provision which has any bearing upon the question of its validity, namely, section 65 of the Indian Contract Act, favours the view that the defendants are bound to make restitution. Having regard, however, to the precise wording of section 65, there may perhaps be difficulty in holding that this section is directly applicable to our present facts, but the section at least indicates that the plaintiff's claim is consonant with the general principle adopted by the Statute. Assuming that the plaintiff's claim under the covenant cannot be wholly justified by reference to section 65, it follows that the point under discussion is not covered by any Indian enactment. That being so, it is competent to us to turn for guidance to the decisions of the English Courts on a similar state of facts. In *Kerrison* v. *Cole* (4), the plaintiff sued upon a bill of sale transferring to him the property in certain ships by way of mortgage security for a sum of £2,500 advanced by the plaintiff. But the bill of sale itself was void under a particular Statute inasmuch as it did not recite the certificates of registry. Yet it was held that the plaintiff was entitled to sue the mortgagor upon his personal covenant contained in the same instrument of mortgage for the re-payment of the money. For the defendants it was contended that the whole instrument was void, and Counsel relied upon the comprehensive words of the Statute which were that "the bill or other instrument of sale shall be utterly null and void to all intents and purposes," arguing that the suit was an attempt to make the instrument good to one intent and purpose. The Court, however, held that the Statute was not to be construed thus harshly, and Lord Ellenborough, C. J., after observing that in terms the Statute purported to vacate only the bill of sale, said: "It does not vacate the whole instrument which may happen also to contain any other independent contract between the parties; but that part of it only which operates as a bill of sale....But to go farther, and vacate the covenant for payment of the money lent, would be going beyond the reason and object of the Legislature in order to work injustice." And Le Blanc, J., said: "The object of the Act, which was to enforce a mere political regulation, is effectually attained by avoiding the transfer of the ships for want of the requisites in the bill of sale: and there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further." The words which we have quoted seem to us to be apposite to the present case. The Bhagdari Act, like the English Statute, has for its object to enforce a political regulation, the preamble setting forth that the permanence of this superior tenure is endangered by the practice of attachment and sale, by civil process, of the homesteads and buildings appertaining to the *bhags*, and that it is desirable to prevent the alienation of any unrecognised portion of a *bhag*. But, as in the English case, there is nothing immoral in such alienations *per se*; for political reasons they are prohibited by law. And as the English Statute, in the words of Lord Ellen-

(4) (1807) 8 East 231: 103 E. R. 330

borough, vacated only the bill of sale itself, and not any other independent contract which might be contained in the instrument, so section 3 of the Bhagdari Act provides only that it shall not be lawful (*inter alia*) to alienate or mortgage any unrecognised sub-division of a *bhag*, that any such alienation or mortgage shall be null and void, and that the Collector may remove from possession any such alienee or mortgagee who is in possession in violation of the section. It is, in the present case, the mortgage only that is to be avoided, and, following the language of Le Blanc, J., we may say that the object of the Act is effectually attained by avoiding the mortgage and, there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further so as to enable the mortgagor both to recover possession of the security and to retain the moneys advanced. *Kerrison* v. *Cole* (4) was followed in *Payne* v. *Mayor of Brecon* (5), where *Mouys* v. *Leake* (6) was also relied on. This latter case was concerned with the grant of a rent-charge created by a rector out of his benefice, such charge being absolutely void under the Statute 13 Eliz., c. 20. But as the deed of grant contained a covenant by the rector personally to pay the charge, the Court refused to order the deed to be delivered up for cancellation, and held the covenant to be valid. The grounds upon which Lord Kenyon, C. J., put the judgment of the Court were stated in the following words, which appear to us applicable to the present appeal: "In this case," said his Lordship, "one of the defendants executed a deed, by which he granted an annuity or rent-charge out of certain benefices. This is not *malum in se*. There is nothing wrong in such a transaction, except as far as it is prohibited by the Statute. If indeed there had been any moral turpitude mixed in it, I would have followed it in all its consequences: but a deed that was intended to operate one way, may operate another way, *ut res magis valeat, quam pereat*, if honesty requires it." It seems, therefore, to be clear that where, as here, the covenant is collateral and not merely dependent upon the principal contract, it may, in such circumstances as these, form the proper basis of a claim, even though the main contract be, as here, wholly null and void by Statute. It appears necessary to explain that this is so in conformity with the authorities cited, because in *Payne* v. *Mayor of Brecon* (5) Baron Bramwell, as he then was, used language which might seem to cast doubt on the proposition that the covenant might be good even though the alienation might be wholly void by Statute. We do not think, however, that the language used was really intended so to decide a question which was not then strictly before the Court, because the learned Judge himself quoted with approval the decision in *Ke rison's* case (4), where the mortgage of the ships was void by Statute, and Watson B., relied upon Lord Kenyon's judgment in *Mouys* v. *Leake* (6), where the grant of the rent-charge was void by Statute. The most, therefore, that defendant's Counsel can now make of *Payne* v. *Mayor of Brecon* (5) is to say that it was not so strong a case as either of the other two, and that the Court decided the case they had before them; but in so doing, they expressly approved the decisions in *Mouys* v. *Leake* (6) and *Kerrison* v. *Cole* (4). For the rest it is only necessary to add that in *Payne's* case (5) the Municipal Corporation of Brecon had borrowed money for a purpose to which the borough fund was not applicable by section 92 of 5 & 6 Will. IV, c. 76, and had, as security, executed a deed of mortgage without the approbation of the Lords of the Treasury as required by section 94 of the Act. The mortgage was consequently invalid, but the deed contained a covenant to re-pay the borrowed money, and it was held that this covenant was valid. The judgment of the Court was, as we have said, based upon the cases of *Mouys* v. *Leake* (6) and *Kerrison* v. *Cole* (4), as to which Watson, B., said: "Those cases are founded on good sense and are sound law, and it would be mischievous to disturb them." That being so, it cannot, we think, be fairly said that in *Payne's* case (5) the Court decided for the validity of the covenant merely because the mortgage executed by the Corporation was only invalid and not wholly void by the Statute. Apart from the general reliance on the authority of the cases *Mouys* v. *Leake* (6) and *Kerrison* v. *Cole* (4), the *ratio* of the decision in *Payne's* case (5) was, in the words of Martin, B., that there was nothing

(5) (1858) 3 H. & N. 572; 27 L. J. Ex. 395; 6 W. R. R. 801; 117 R. R. 863.

(6) (1799) 8 T. R. 411; 101 E. R. 1461.

in the Statute of Will. IV which prohibited a Corporation from entering into a covenant to pay its lawful debts. We find that there is nothing to that purpose in the Bhagdari Act, and that, though the transfer by way of mortgage must be set aside as void under the Statute, the English authorities show, consistently with the principles embodied in section 65 of the Indian Contract Act and section 38 of the Specific Relief Act, that the plaintiff is entitled to claim under the covenant.

Now the covenant promises compensation in the event of the disturbance of possession, and the plaintiff's case upon this point is put in this way. The first mortgage was executed on 3rd February 1897, and covered the house now in suit together with certain other properties. By another mortgage of 1901, the house alone was secured. The house was never redeemed from the mortgage of 1897, and the possession then transferred to the plaintiff was held by him continuously till July 1909 when it was first challenged by the defendants. Throughout this period, the defendants passed annual rent-notes to the plaintiff, and consequently held as the plaintiff's tenants. The last of such rent-notes was passed on 20th June 1908, and it was not till after the expiry of this rent-note, that is July 1909, that the defendants, upon demand made, refused to surrender possession. The period from February 1897 to July 1909 exceeds the 12 years prescribed by the Statute, and the plaintiff relies upon his possession throughout that period as giving him an absolute title to the limited interest and so justifying his claim under the covenant for compensation for disturbance. In our opinion, this contention must be allowed. The mortgage and the rent-notes are void, but the plaintiff for over 12 years was in possession of the limited interest as mortgagee in possession and in assertion of that right held adversely to the defendants, who continuously attorned to him. As against the defendants the plaintiff's title to the limited interest had become absolute by July 1909, and it is now too late for the defendants to deny either the plaintiff's possession or their own disturbance of that possession in July 1909. If authority be needed for these conclusions, we may refer to *Adam Umar Sale* v. *Bapu Bavaji* (7) as showing that possession held under an alienation void under the Bhagdari Act is adverse to the true owner, and to *Budesab* v. *Hanmanta* (8) as showing that possession of a limited interest, equally with possession of the absolute interest, creates, when held adversely for the statutory period, an unimpeachable title.

It follows that the plaintiff has a good claim for compensation under the covenant. But since the mortgage is void, the amount of the claim must, under the *damdupat* rule, be limited to double the principal. There will, therefore, be a decree for the plaintiff for Rs. 400 with costs throughout and interest on judgment at 6 per cent. till realisation.

Decree varied.

(7) 10 Bom. L. R. 1128.

(8) 21 B. 509.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 145 OF 1910.

July 2, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

AMBICA PROSAD SINGH—DEFENDANT No. 1—APPELLANT

versus

PARDIP SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 4, applicability of—Decree on a ground common to all parties—Partition—Costs severed—Appeal by one defendant, reversal of.

It is not necessary for the application of Order XLI, rule 4, Civil Procedure Code, that the decree should proceed on every ground common to all the parties. It is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs [p. 447, col. 2.]

Therefore, the fact that a decree for partition which proceeds upon a ground common to all the parties is severed so far as to make each party of defendants liable for the costs allocated against it, does not prevent the Court on an appeal by one defendant to make an order that will enure to the benefit of all the defendants. [p. 447, cols. 1 & 2.]

Ram Kamal Shaha v. *Ahmad Ali*, 30 C. 429, followed.

Where there is no bar to the application of Order XLI, rule 4, Civil Procedure Code, it is not necessary to invoke the aid of Order XLI, rule 33, which gives the Court of Appeal very wide powers for the purpose of doing justice between the parties. [p. 447, col. 2.]

Shama Soonduree Debia v. *Messrs. Jardine Skinner and Co.*, 12 W. R. 160; *Dildar Ali Khan* v. *Bhawani Sahai Singh*, 34 C. 878, 5 C. L. J. 642, referred to and followed.

AMBICA PROSAD SINGH *v.* PARDIP SINGH.

Appeal against the decree of the Sub-Judge of Darbhanga, dated the 22nd of December 1909.

Babu *Gonesh Datt Singh*, for the Appellant.

Babus *Joges Chandra Roy, Rajendra Chandra Guha, Kulwant Sahai & Anilendra Nath Roy Chowdhury*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the partition of a *mouza* called Patailia in which the parties have different shares. The defendant No. 1 appeals against the final decree on two grounds: *first*, that the allotment of shares is improper and, *secondly*, that the costs before the preliminary decree should not have been decreed in favour of the plaintiff.

As regards the first point, we think that the appellant has a good ground for complaint. The Commissioner allowed him one block to the north; but the learned Judge has split that block up into three and allotted him the one farthest from his house. We think that he should have his portion of the northern block as near as possible to his house, that is to say, he will have his northern block from the north-east, commencing from Nos. 1852, 1860, 1861, and 1862 and go westwards so as to make this block equal in value with the block which has been allowed him to the north-west. Defendant No. 5 will get the block to his west and defendants Nos. 2 to 4 will get the block to the west of defendant No. 2. The appellant will retain his eastern and south-western blocks and the allotment of blocks will be altered accordingly.

The next question is as to the costs. It is contended that the costs before the preliminary decree should not have been allotted to the plaintiff and the cases of *Shama Soondurce Debia* v. *Messrs. Jardine Skinner and Company* (1) and *Dildar Ali Khan* v. *Bhawani Sahai Singh* (2) are quoted in support of this contention. As the appeal is by one of the defendants only, it is contended that under Order XLI, rule 4, Code of Civil Procedure, we can make a decree in this respect that will enure to the benefit of all the defendants.

The decree in this case is a decree for partition and proceeds upon a ground common to all the parties, namely, the convenience and inconvenience of each. The appeal also is directed against the whole decree. It is true that the portion of the decree which deals with the question of the incidence of the costs is severed, so as to make each party of defendants liable for the costs allocated against it, but that does not prevent the application of Order XLI, rule 4, Code of Civil Procedure. It has been held in the case of *Ram Kamal Shaha* v. *Ahmad Ali* (3) that it is not necessary for the application of section 544 (now Order XLI, rule 4), Code of Civil Procedure, that the decree should proceed on every ground common to all the plaintiffs or defendants, and it is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs. We think, therefore, that there is no bar to the application of Order XLI, rule 4, Code of Civil Procedure, and that being so, it is not necessary to invoke the aid of Order XLI, rule 33, which is couched in very wide terms and gives the Courts of appeal very wide powers for the purpose of doing justice between the parties.

It has been further argued that the judgment does not order the apportionment of the costs of the suit, that the decree is not in accordance with the judgment so far as these costs are concerned and that the decree is, therefore, amenable to amendment.

The amendment might, of course, have been made by the first Court, but that would result in a joint decree for the costs of the suit against all the defendants. Such a decree would offend against the principles of the cases of *Shama Soondurce Debia* v. *Messrs. Jardine Skinner and Company* (1), *Dildar Ali Khan* v. *Bhawani Sahai Singh* (2). Under section 107, Code of Civil Procedure, we have the same power as the Court of first instance, and in making the final determination in the case, we must pass a decree that is in conformity with law.

In this view of the question raised, we think that the order of the Court below as to the costs incurred before the preliminary decree should be set aside and each party directed to bear its own costs up to that point. The costs of the partition will be

(1) 12 W. R. 160.
(2) 34 C. 878; 5 C. L. J. 642.
(3) 30 C. 429.

SAKINA BIBI v. CHARNJIT SINGH.

apportioned according to the shares of the parties. The success of the appellant being only partial, each party will bear its own costs in this appeal.

Appeal partly allowed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1145 OF 1913.

March 20, 1915.

Present:—Mr. Justice Scott-Smith.

Musammat SAKINA BIBI—PLAINTIFF—PETITIONER

versus

CHARNJIT SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 3 —Presentation of application for leave to sue in forma pauperis *- Authorized agent, meaning of—General power-of-attorney, whether sufficient.*

An authorized agent within the meaning of Order XXXIII, rule 3, of the Civil Procedure Code, does not include a recognized agent or Pleader as such. He must be specially authorized to present an application under Order XXXIII and must fulfil the other conditions detailed in rule 3. [p. 448, col. 2.]

Musammat Bhugobatty Kooer v. *Gunesh Dutt*, 21 W. R. 308, referred to.

Where, therefore, an application for permission to sue as a pauper was presented under the authority of a power-of-attorney granted by the plaintiff to two Pleaders and a duly certificated *Mukhtar*:

Held, that as the Legal Practitioners merely had an ordinary power-of-attorney and were not specially authorized for the presentation of such an application, this was not a due presentation within the meaning of the rule and the application was rightly rejected. [p. 448, col. 2.]

Petition for revision, under section 70 of Act XVIII of 1884, as amended by Act IV of 1912, Punjab Courts Act, of the order of the District Judge, Jullundur, dated the 23rd July 1913, rejecting the application for permission to sue as a pauper.

The Hon'ble Mr. *Muhammad Shafi*, K.B., for the Petitioner.

Messrs. *B. Bevan-Petman* and *C. Kirkpatrick*, for the Respondent.

JUDGMENT.—This is an application by the plaintiff for revision of an order of the District Judge at Jullundur rejecting her application for permission to sue as a pauper under Order XXXIII, rule 5, of the Code of Civil Procedure. The ground of rejection is that the application was not presented in the manner laid down in rule 3 of Order XXXIII of the Code.

The application for permission to sue as a pauper was presented under the authority of a power-of-attorney granted by the plaintiff petitioner to two Pleaders and a duly certificated *Mukhtar*. The power-of-attorney is drawn up in the ordinary form and gives no special authority to present an application *in forma pauperis*. No doubt a Pleader may be an authorised agent within the meaning of rule 3 of Order XXXIII, but it was held in *Musammat Bhugobatty Kooer* v. *Gunesh Dutt* (1) that in that case he must be specially authorised as the pauper's Attorney, an ordinary *vakalatnama* not being sufficient. Under Order III of the Civil Procedure Code any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a Pleader duly appointed to act on his behalf. Now, rule 3 of Order XXXIII lays down that notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent, and so on. Now 'authorized agent' in this rule clearly does not include a "recognized agent or a Pleader" as such. A Pleader no doubt may be an authorized agent, but in order to bring him within rule 3 he must, in my opinion, be specially authorized to present an application under Order XXXIII and he must fulfil the other conditions detailed in rule 3. In the present case the Legal Practitioners who presented the application have merely an ordinary power-of-attorney and are not specially authorized for the presentation of such an application. *Prima facie*, therefore, the presentation was not a due presentation within the meaning of the rule. It is now urged that the Pleaders or *mukhtars* were orally authorized. This, however, does not appear to have been urged in the Court below and

(1) 21 W. R. 308.

though a date was given them for the production of evidence, no attempt was made to show that they were authorized in any way other than by the power-of-attorney on the record. I have no doubt that the present allegation that they were authorized verbally is an after-thought.

I am doubtful whether a verbal authorization would be sufficient. Ordinarily a recognized agent shows his authority by a power-of-attorney, and I think the authority required by the rule should be apparent on the face of the record. I do not, however, consider it necessary to finally decide this point.

The application for revision is rejected, but I leave parties to bear their own costs in this Court.

Revision rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1151 OF 1913.

December 18, 1914.

Present:—Mr. Justice Spencer and Mr. Justice Tyabji.

RAMARAZA THEVAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

VELUSAMI THEVAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 3 (11), 74, 77—"Water supplied or taken for cultivation of the land," meaning of—Water coming on to one's own land without any application—Water rent, liability to pay.

Water flowing over a *ryot's* land on account of its favourable situation without benefiting the cultivation is not water "supplied or taken for the cultivation of the land" within the meaning of section 3 (11) of the Madras Estates Land Act and no water-rate is chargeable on lands cultivated with the aid of such water. [p. 450, col. 1.]

Second appeal against the decree of the District Court of Ramnad at Madura, in Appeal Suit No. 494 of 1912, preferred against that of the Court of the Sub-Collector, Ramnad, in Summary Suit No. 3256 of 1911.

Mr. *C. S. Venkatachariar*, for the Appellants.

Mr. *K. C. Desikachariar*, for the Respondents.

This second appeal coming on for hearing on 17th April 1914, the Court delivered the following

JUDGMENT.—This appeal arises out of a suit for rent under section 77 of the Madras Estates Land Act. The parties were at issue as to the amount of the rent due on the lands. The decision of this question depended upon whether anything is payable to the plaintiff "on account of the use and enjoyment of water supplied or taken for cultivation of land" under section 3 (11) of the Act. The 1st issue was framed in the following form.

"Were the *punja* lands, said to be irrigated with tank water, so irrigated ?"

The first Court held that "the tank water irrigated the defendants' *punjah*, but that it flowed over it against the defendants' will and without benefiting defendants' crop."

The learned District Judge in appeal stated that "the question for decision was whether the plaint crops had or had not been raised with the assistance of the water of the landlord's tank." He then held that it was admitted that the water came to the defendants' land and the question that remained, therefore, was whether the water was "supplied or taken for cultivation of the land." The District Judge held that even if the defendants did not themselves "procure suchs upply, there can be no doubt about their lands being favourably situated for the production of wet crops, standing as they do in the way of water flowing from one tank to the other." The basis for this finding by the District Judge is apparently Exhibit H, which was an application by the plaintiff under section 74 of the Act. The District Judge says the crops must have been standing on the date of this application and that this makes it certain that they were not ripe "at the date of the irrigation," that is, when the water flowed over the defendants' lands.

Exhibit H was not in itself evidence of the fact deduced from it by the District Judge. It may be that if the District Judge was inclined to rely on the oral evidence on behalf of the plaintiff, Exhibit H might have corroborated such oral evidence, on the ground that an application to the Revenue Officer to assess the value of the crops would not be made unless the crops were standing. But as it is the

inference that the crops must have been standing at the date of Exhibit H and that, therefore, they must have been benefited by a flow of water anterior to that date is unwarranted.

We are, therefore, of opinion that the finding of the District Judge is not arrived at on such evidence as was available to him, but on a document which in itself was not evidence for the finding. We will call for findings on the evidence on record on the following issues:

(1) "Whether water was supplied or taken for the cultivation of the lands in question from the tank of the plaintiff."

(2) "Whether the said water benefited the cultivation."

In deciding the 2nd issue the District Judge will consider whether the water came to the said lands when the crops were ripe or prior to their becoming ripe.

The findings should be submitted within six weeks after the vacation and ten days will be allowed, for filing objections.

In compliance with the order contained in the above judgment the District Judge of Ramnad at Madura submitted the following

FINDINGS. * * * *

"I find on the first issue that no water was 'taken' by defendants, or 'supplied' by plaintiffs, for the cultivation of the suit lands; but that D. W. Nos. 2 and 3 and other *ryots* holding lands under the small tank took water to that tank, from the big tank, for the cultivation of their *nunja* lands under the small tank, and that that water necessarily flowed over defendants' lands on its way to the small tank, but without the permission or knowledge of plaintiffs, and without any requisition or acquiescence on defendants' part;" and on the second issue "it is difficult to see how it can be held that the cultivation was benefited by the irrigation in question. I find this issue against plaintiffs and for defendants."

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—Accepting the findings we allow the second appeal and restore the decree of the first Court. The respondents will bear their own and appellants' costs in this Court and the lower Appellate Court.

Appeal allowed; Suit dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 210 OF 1913.

August 4, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

PROKASH CHANDRA GHOSE—APPELLANT

versus

HASAN BANU BIBI—OPPOSITE PARTY—RESPONDENT.

Mortgagor, when entitled to redeem—Contract, enforcement of—Notice for payment within the term—Interest for whole term, whether can be realised.

A mortgagor is not entitled to redeem before the debt becomes due, even though he may offer to pay interest for the whole period. [p. 451, col. 2]

Brown v. *Cole*, 14 Simons 427; 14 L. J. Ch. 167; 9 Jur. 290; 63 E. R. 424; 65 R. R. 618 and *Burrough* v. *Cranston*, 2 Ir. Eq. Rep. 203, followed.

If the mortgagee makes a demand for payment within the term and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term. [p. 451, col. 2.]

Letts v. *Hutchins*, (1871) 13 Eq. 176; *In re Moss, Levy* v. *Sewill*, 31 Ch. D. 90; 55 L. J. Ch. 87; 54 L. T. 49; 34 W. R. 59 and *Smith* v. *Smith*, (1891) 3 Ch. 550; 60 L. J. Ch. 694; 65 L.T. 334; 40 W. R. 32, referred to.

Where the mortgagee has given notice requiring payment within the term, he cannot withdraw it without the consent of the mortgagor. [p. 451, col. 2.]

Santley v. *Wilde*, (1899) 1 Ch. 747; 68 L. J. Ch. 681; 47 W. R. 297; 80 L. T. 154; 15 T. L. R. 190, followed.

Appeal against the decree of the Special Land Acquisition Judge of 24-Perganas, dated the 26th of April 1913.

Babus *Baidya Nath Dutt*, *Tarakeswar Pal Chowdhury*, *Mohini Nath Bose* and *Bhupendra Kumar Ghose*, for the Appellant.

Babu *Probodh Chandra Chatterjee*, for the Respondent.

JUDGMENT.—This appeal is directed against an award in an apportionment case under the Land Acquisition Act. The facts necessary for the decision of the question of law raised before us may be briefly stated.

On the 28th September 1912, the appellant advanced Rs. 5,000 to the respondent on mortgage of four properties in Calcutta. The mortgage money was re-payable on the 28th September 1913, and carried interest at 12 per cent. per annum. One of the properties given by way of security was the

subject-matter of a proceeding under the Land Acquisition Act. The statutory declaration for the acquisition of the land had been published on the 2nd February 1912 and the award of the Collector made on the 20th September 1912. The record does not show whether the mortgagee was, at the time when he accepted the security, aware of the proceedings under the Land Acquisition Act, it is probable that he had no knowledge thereof, and the case has been tried on that assumption. On the 11th October 1912, the mortgagee applied to the Land Acquisition Judge that the money due under his mortgage, namely, Rs. 5,000 as principal and Rs. 600 as interest thereon for one year might be paid to him out of the compensation money. The mortgagee in substance wanted a return of the mortgage money together with interest for the full period of one year. The mortgagor did not contest the claim for the principal amount, but urged that she was not liable to pay interest for one year. It is needless to consider whether this question could have been considered in the course of the land acquisition proceeding; for no objection was taken by either of the parties, and it is in the interest of both that the question in controversy between them should now be finally settled. The Land Acquisition Judge has held that the mortgagee was entitled to interest only for one month, and has accordingly ordered the payment of Rs. 5,050 to him. The mortgagee is not satisfied and has appealed to this Court with a view to obtain an additional sum of Rs. 550 as interest for eleven months on the loan.

On behalf of the appellant it has been argued that under the mortgage contract, he was entitled to interest for one year and that the mortgagor is bound to pay that sum even though the mortgage money is re-paid on an earlier date. In support of this contention reliance has been placed upon the decision of the Judicial Committee in the case of *Bakhtawar Begam* v. *Husaini Khanam* (1). That case, however, is an authority only for the proposition that, ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. This principle is of no assistance to the appellant. It need not be disputed that the mortgagor is not entitled to redeem before the debt becomes due; and it was held in *Brown* v. *Cole* (2) that he is not entitled to redeem before the debt becomes due, even though he may offer to pay interest for the whole period [See also *Burrough* v. *Cranston* (3)]. But in the case before us, the contract between the parties cannot be performed according to its letter, by reason of circumstances beyond the control of the parties. No doubt, the mortgagor agreed to keep the money for one year; but that was on condition that the land should remain security for the loan during the term. The land, however, has been acquired and the mortgagee has lost a part of his security. As soon as this happened, the mortgagee applied for return of the mortgage money. The question consequently arises whether he is entitled to interest thereon for the whole of the term. We are clearly of opinion that the claim is unjust.

It is well-settled that if the mortgagee makes a demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term. Reference may, in this connection, be made to the cases of *Letts* v. *Hutchins* (4); *In re Moss, Levy* v. *Sewill* (5) and *Smith* v. *Smith* (6). Indeed, where the mortgagee has given notice requiring payment within the term, he cannot withdraw it without the consent of the mortgagor. *Santley* v. *Wilde* (7).

In the present case, the mortgagee might have called upon the mortgagor, under section 68 of the Transfer of Property Act, to give additional security. He did not adopt that course, and claimed a refund of the money, to which the mortgagor consented. Under these circumstances, it is plain that the mortgagor was not bound to

(1) 23 Ind. Cas. 355; 36 A. 195; 18 C. W. N. 516; 26 M. L. J. 474; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 344; 1 L. W. 813; 12 A. L. J. 473.

(2) 14 Simons 427; 14 L. J. Ch. 167; 9 Jur. 290; 60 E R. 424; 65 R. R. 618.

(3) 2 Ir. Eq. R. 203.

(4) (1871) 13 Eq. 176.

(5) (1885) 31 Ch. D. 90; 55 L. J. Ch. 87; 54 L. T. 49; 34 W. R. 59.

(6) (1891) 3 Ch. 550; 60 L. J. Ch. 694; 65 L. T. 334; 40 W. R. 32.

(7) (1899) 1 Ch. 747; 168 L. J. Ch. 681; 47 W. R. 297; 80 L. T. 154; 15 T. L. R. 190.

pay interest beyond the period of one month. Reliance has finally been placed upon the provisions of sections 108 and 114 of the Land Clauses Act, 1845, relating to the acquisition of mortgaged properties. It is sufficient to observe that the Indian Legislature has not framed similar provisions applicable to this country.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs. We assess the hearing-fee at ten gold *mohurs*.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 125 OF 1914.
February 10, 1915.
Present:—Mr. Justice Chamier and Mr. Justice Piggott.
HAR NARAIN AND OTHERS—DEFENDANTS—APPELLANTS
versus
BALWANT SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 79, application of—Dispute between tenants—Suit, whether under s. 79.

One set of tenants sued another set that the defendants had unlawfully encroached upon their holding and appropriated land belonging thereto. The *zemindar* had nothing to do with the dispossession:

Held, that the suit was not governed by section 79 of the Agra Tenancy Act.

First appeal from an order of the first Additional District Judge of Aligarh, dated the 18th of July 1914.

Mr. *Shafi-uz-zaman*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants against an order of remand passed under Order XLI, rule 23, of the Code of Civil Procedure. The dispute out of which this suit arose was one between two sets of tenants with regard to the boundary between their respective holdings. The plaintiffs' case is that the defendants have unlawfully encroached upon their holding and appropriated land belonging thereto. The first Court seems somehow to have arrived at the conclusion that the defendants had dispossessed the plaintiffs from a portion of their land acting on behalf of the *zemindars*, so

that the dispossession must be held to have been effected by the *zemindars* and the plaintiffs' only remedy was one by a suit under section 79 of the Agra Tenancy Act (Local Act II of 1901). We agree with the learned District Judge that no suit under that section could have been brought on the facts stated in the plaint. We notice, moreover, the lower Appellate Court has found that there is nothing to show that the *zemindars* had anything to do with the dispossession of the plaintiffs from any portion of their holding. We dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1387 OF 1912.
January 14, 1915.
Present:—Mr. Justice Holmwood and Mr. Justice Mullick.
Lala SEOSARAN LAL—DEFENDANT—APPELLANT
versus
HARIHAR PRASAD SINGH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 89, 36—Money received and not accounted for—Misappropriation by servant—Limitation—Civil Procedure Code (Act V of 1908), O. XX, r. 16—Preliminary decree in suit for accounts, when to be passed.

Money received and misappropriated by a servant is covered by Article 89 and not by Article 36 of the Limitation Act. It is immaterial in a civil action whether the misappropriation charged is criminal or not. If there is no misappropriation but money is payable by the defendant to the plaintiff for money received by the defendant and not accounted for, Article 89 still applies. [p. 453, cols. 1 & 2.]

Under Order XX, rule 16, Civil Procedure Code, it is clear that it is not in every suit for accounts that a preliminary decree directing such accounts to be taken as the Court thinks fit, is necessary. It is only where it is necessary in order to ascertain the amount of money due to or from any parties that an account should be taken, and that the Court should before passing the final decree pass a preliminary decree directing such accounts to be taken as it thinks fit. [p. 453, col. 2.]

Appeal against the decree of the Subordinate Judge, Shahabad, dated the 29th March 1912, modifying that of the Munsif, Buxar, dated the 17th of February 1911.

SEOSARAN LAL *v.* HARIHAR PRASAD SINGH.

Babus *Provash Chandra Mitter* and *Satish Chandra Bose*, for the Appellant.

Babu *Jogendra Chandra Ghose*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff to recover Rs. 536-13-6 and interest from the defendant. The defendant was admittedly the servant of the plaintiff and the plaint said that he misappropriated the amount. The plaint also said that the defendant was dismissed in the end of March 1907, and on the 10th March 1907 the defendant appears to have filed a certain list of expenditure, called *farad kharcha*, which has been reproduced in his written statement and which he desired to be set off against the sum claimed by the plaintiff, which sum the defendant admitted in his written statement had been recieved by him.

The defence in the Court below urged that the suit was barred by limitation by reason of Article 62. The lower Courts, the Munsif at any rate, seem to have held that it came under Article 64, and that although the plaintiff did not ask for an account and although it was found that there had been no misappropriation, he seemed to think that the suit might be treated as a suit for accounts. The learned Subordinte Judge in the lower Appellant Court treated the case from the commonsense point of view, which we have just indicated, in stating what the case really is, and he found that the only questions for determination in appeal before him were, *first*, how much, if any, is due to the plaintiff from the defendant, and *second*, is the suit barred by limitation? As regards the first point we have nothing to do in second appeal and it is concluded by the finding of fact.

As regards the question of limitation we are clearly of opinion that the plaintiff's suit as originally framed fell under Article 89 of the Limitation Act, and that the suit as it has been treated in the lower Court, by dealing with the defendant's allegation of payment or expenditure and by going into each item and finding what the balance due to the plaintiff is, is quite within the scope of such suit. A great deal has been said as to the suit being wholly based on the allegation of criminal misappropriation of a specific sum. But it is immaterial in a civil action whether the misappropriation charged is criminal or not. Money received and misappropriated by a servant is undoubtedly covered by Article 89 and not by Article 36 as was sought to be argued before us. If there is no misappropriation but money is payable by the defendant to the plaintiff for money received by the defendant and not accounted for, Article 89 still applies, and although the defendant filed the *farad kharch* or bill of expenditure, it is found that the accounts were never adjusted and the plaintiff never admitted any of the items which the defendant pleaded. It cannot, therefore, be said that the money received by the defendant, which admittedly was money due on decrees and deposits in Court, was ever accounted for. The Courts below have, therefore, it appears to us, rightly gone into the allegation of the defendant that he had made certain payments and they have found in some instances in his favour, in some instances against him. Those are findings of fact with which we have no concern.

But it is argued that in a suit for accounts there must be a preliminary decree directing such accounts to be taken. We wish to point out that it is not in every suit for accounts that such a decree is necessary. Order XX, rule 16, is clear on the point. It is only where it is necessary in order to ascertain the amount of money due to or from any parties that an account should be taken that the Court shall, before passing the final decree, pass a preliminary decree directing such account to be taken as it thinks fit. Here the Court had the whole of the items disputed between the parties before it. A comparison of the schedule to the plaint with the schedule to the written statement clearly shows this, and really the only point which it had to decide on the merits was, how much of the money alleged to have been spent by the defendant out of the money he admittedly received had really been spent by him for the benefit of the plaintiff. It was a matter which the Courts can well deal with without putting the parties to the expense of employing a Commissioner and having a separate investigation of accounts.

It does not appear to us that any injustice has been done to the defendant and the appeal, is, therefore, dismissed with costs and the decree of the lower Appellate Court upheld.

Appeal dismissed.

MANORATH CHOUBE *v.* SUMERA.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 126 OF 1914.
February 15, 1915.
Present:—Mr. Justice Chamier and Mr. Justice Piggott.
MANORATH CHOUBE AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Musammat SUMERA AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 233K—Partition—Subsequent suit claiming a share, allotted at partition, by inheritance—Res judicata.

A suit in which the plaintiff claims to have become entitled, by inheritance as reversionary heir, to a share which had been dealt with in a particular way at a partition, is not barred by section 233K of the U. P. Land Revenue Act III of 1901.

Lachman Das v. *Hanuman Prasad*, 8 Ind. Cas. 807; 7 A. L. J. 1156; 33 A. 169, distinguished.

First appeal from an order of the Additional Subordinate Judge of Gorakhpur, dated the 12th May 1914.

Mr. *Haribans Sahai*, for the Appellants.
Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This was a suit for possession of a certain *zemindari* share, with regard to which it is sufficient to say that it was made up of shares which had at one time belonged to two brothers named Bhola and Ram Harak. The suit was contested on somewhat different grounds by two sets of defendants and the pleadings raised a number of issues of facts and law. At a late stage of the trial in the Court of first instance, a special plea was put in to the effect that the suit as brought was barred by section 233 of the Land Revenue Act (Local Act III of 1901). An issue having been framed on this point, the learned Munsif came to the conclusion that the suit was so barred, and he dismissed it accordingly. On appeal the lower Appellate Court, following out a train of reasoning which we do not think it necessary to describe in detail, came to the conclusion that the suit was barred by the aforesaid section in so far as it related to the share which had been Ram Harak's, but not barred in respect of the share which had been Bhola's. The learned Additional Subordinate Judge accordingly passed an order remanding a portion of the suit, as originally brought, for trial on the merits under the provisions of Order XLI, rule 23, of the Code of Civil Procedure. The plaintiffs appeal against this order in so far as it confirms the dismissal of a portion of their claim, namely the claim relating to the share which had been Ram Harak's. It is obvious that no part of the suit as originally brought is barred by section 233K of the Land Revenue Act. The case of *Lachman Das* v. *Hanuman Prasad* (1) has been misapprehended by the Courts below. The plaintiff in that suit was seeking to disturb the allocation of certain lands which had been made at a partition before a competent Revenue Court. In the present case the plaintiffs are not seeking to interfere in any way with the proceedings of the partition Court. They claim to have become entitled, by inheritance as reversionary heirs, to a share which had been dealt with in a paticular way at a certain partition. What the learned Subordinate Judge probably had in his mind was the question whether a certain order passed by the Court effecting the partition might not have the effect of *res judicata* between the present parties in respect of a portion of the plaintiffs' claim or in respect of one or more of the questions put in issue between the parties. This may or may not be so, but the issues of titles raised by the pleadings require to be tried on the merits, taking into consideration also what was decided by the Revenue Court during the partition when certain questions of title were raised as between the present plaintiffs on the one hand and *Musammat* Gajraji, widow of Bhola, on the other. With these remarks we accept this appeal, set aside so much of the order of the lower Appellate Court as refers to the share of Bhola, and remand the entire suit to the Court of first instance for decision on the merits. Costs of this appeal will be costs in the suit.

Appeal accepted.

(1) 8 Ind. Cas. 807; 7 A. L. J. 1156; 33 A. 169.

MUZAFFAR KHAN *v.* GHULAM MUHAMMAD KHAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 905 OF 1912.

March 27, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shah Din.

MUZAFFAR KHAN AND OTHERS, REPRESENTATIVES OF *Malik* GUL SHER KHAN, DECEASED—PLAINTIFFS—APPELLANTS

versus

GHULAM MUHAMMAD KHAN—DEFENDANT—RESPONDENT.

Abatement—Suit for damages—Death of plaintiff-appellant pending second appeal—Appeal, whether abates—Costs.

Rights of action for merely personal injuries do not survive the injured party, though his personal representative can maintain an action for any damage done to the personal estate in his life-time. [p. 455, col. 2.]

Where, therefore, the plaintiff brought a suit for Rs. 5,250 as damages alleging that defendant had, by making false statements and insinuations to the local Police, seriously injured his (the plaintiff's) reputation and obtained a decree for Rs. 4,000 which amount being reduced to Rs. 50 by the lower Appellate Court he filed a second appeal to the Chief Court but died pending the appeal, the names of his sons being substituted for his:

Held, (1) that the claim being based on a personal wrong the plaintiff's appeal abated by his death and his sons could not move the Court to grant to them, on account of a personal wrong done to their father, a further sum as damages. [p. 455, col. 2.]

(2) that the second appeal could not be allowed merely because the lower Appellate Court had directed the plaintiff to pay the defendant's costs. [p. 456, col. 1.]

Sakyahani Ingle Rao Sahib v. *Bhavani Bozi Sahib*, 27 M. 588, *Muhammad Hussain* v. *Khushalo*, 9 A. 131; A. W. N. (886) 322; *Gopal* v. *Ramachandra*, 26 B. 597, 4 Bom. L. R. 325 and *Paramen Chetty* v. *Sundaraja Naick*, 26 M. 499, explained and distinguished.

Second appeal from the decree of the Divisional Judge, Attock Division, dated the 8th March 1912, modifying that of the District Judge, Attock, dated the 21st November 1911, decreeing the claim.

Messrs. *Fazl-i-Hussain* and *Bhagat Ram Puri*, for the Appellants.

Dr. *Muhammad Iqbal*, for the Respondent.

JUDGMENT.—The claim here was made by Khan Bahadur Malik Gul Sher Khan of Pindi Gheb Tahsil. It was for Rs. 5,250 as damages, it being alleged that defendant, who is a Lambardar, had, by making false statements and insinuations to the local Police, seriously injured plaintiff's reputation and that this was the defendant's intention. The first Court gave plaintiff a decree for Rs. 4,000 but the lower Appellate Court, thinking the damages should be nominal, reduced the figure to Rs. 50. Plaintiff started a second appeal here and then died, the names of his three minor sons being substituted for his.

On behalf of defendant the preliminary objection is raised that the appeal abates, the claim being based on an alleged *personal* wrong; and we have heard arguments and have considered the authorities, with the result that we find we must allow the objection. We think that, while the existing decree for Rs. 50 in favour of the deceased Malik enures for the benefit of his sons, they cannot move the Court to grant to them, *on account of the personal wrong done to their father*, a further sum as damages.

The English Law on the subject is well known and has been much criticised in certain aspects of it. It will be found stated in Ratan Lal on English and Indian Law of Torts (1908 Edition), page 62, where it is laid down that according to Common Law executors, administrators, etc, cannot maintain actions for personal wrongs done to their predecessor, *e.g.*, libel, false imprisonment, and that such causes of action based on personal suffering die with the sufferers. Also in Lord Halsbury's Laws of England, Volume 14, paragraph 518, and Volume 18, paragraph 1164, where we find it stated that the general rule of law is that rights of action for merely personal injuries do not survive the injured party, though his personal representative can maintain an action for any damage *done to the personal estate* in his life-time. In the present case it has not been contended that defendant's actions damaged the late Malik's personal estate in any way. The distinction is clearly drawn in *Hatchard* v. *Mege* (1).

Of the Indian cases quoted in argument the first, *Sakyahani Ingle Rao Sahib* v. *Bhavan Bozi Sahib* (2), was not a case of personal wrong and is hardly in point. In *Muhammad Hussain* v. *Khushalo* (3), what was held was

(1) 18 Q. B. D. 771; 56 L. J. Q. B. 397 56 L. T. 662; 35 W. R. 576; 51 J. P. 277.

(2) 27 M. 588.

(3) 9 A. 131; A. W. N. (1886) 322

that a *decree* for damages for personal wrong survived the death of the injured man: this is not sufficient for appellant's purpose. Then in *Gopal* v. *Ramachandra*(4) and in *Paramen Chetty* v. *Sundaraja Naick* (5), the facts were roughly identical. Plaintiff had got a decree for damages for libel and had applied for execution. Defendant judgment-debtor appealed, but died before the hearing, and it was held that his son could prosecute the appeal. Similarly in *Bhagwant Singh* v. *Pandit Joti Sarup* (6), plaintiff got partial decree for damages for wrongful prosecution, etc. Both parties appealed, defendant died, and it was held that his son could go on with the appeal. The distinction between these three cases and the present is not obscure, for in each of them defendant's son found himself confronted by what he considered an unjust decree, *calculated to injure his estate*, and he, of course, had the right to appeal to remove the wrong coming upon himself. The question of abatement of suit or appeal in connection with claims for damages on account of personal wrongs has to be decided on quite different principles according as the party who has died is the plaintiff or the defendant.

It has been suggested to us that the appeal should not abate because the lower Appellate Court has directed that plaintiff should pay defendant's costs in that Court, but we cannot allow a second appeal on a question of costs alone.

For these reasons we hold that the appeal abates. Parties to bear their own costs.

Appeal dismissed.

(4) 26 B. 597; 4 Bom. L. R. 325.
(5) 26 M. 499.
(6) 4 P. R. 1897.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1197 OF 1913.
November 24, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

NARAINA PAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

APPU *alias* ANNAYYA SHAMBOGUE, MINOR, BY HIS MOTHER AND NEXT FRIEND RATNA BAI *alias* TARA BAI—PLAINTIFF—RESPONDENT.

Contribution, suit for—Government revenue, a joint charge on two lands—Payment by owner of one—Right to claim proportionate share · Liability, whether personal—Contract Act (IX of 1872), *ss.* 69, 70, *applicability of.*

If a person who owns one of two lands on both of which the Government revenue is jointly made a charge by Statute pays the whole revenue, he is entitled to claim contribution for the proportionate sum due by the other land. [p. 457, col. 2.]

But neither section 69 nor section 70 of the Contract Act is applicable as the liability of the owner of the land is not personal. [p. 457, col. 1.]

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 203 of 1912, preferred against that of the Court of the District Munsif of Kundapur, in Original Suit No. 110 of 1911.

FACTS.—The facts of the case appear clearly from the following judgment of the District Judge.

"The plaintiff brought the suit to recover the assessment paid by him for defendants. The Munsif gave him a decree. The defendants appeal.

The plaintiff's father purchased certain property belonging to a co-sharer of defendants and the defendants' property is also included in the *pattah* issued to the plaintiff. The plaintiff paid assessment on the entire holding and brought this suit to recover the assessment due on the defendants' property.

It is contended in appeal that as the plaintiff is the registered *pattahdar*, he alone is liable to pay assessment and cannot recover any portion thereof from the defendants, and reliance is placed on *Subramania Chetty* v. *Mahalingaswami Sivan* (1) and on *Yogambal* v. *Naiana Pillai Mara-*

(1) 3 Ind. Cas. 624; 33 M. 41; 6 M. L. T. 198; 19 M. L. J. 627.

kayar (2). In the lower Court this contention was not specifically raised. *Subramania Chetty* v. *Mahalingaswami Siran* (1), in my opinion, decides that the only person liable to the Government is the registered *pattahdar* and that under section 69 of the Contract Act, he cannot recover it. If the facts are shown to come under section 70 of the Contract Act, I think that the decision does not go against the plaintiff. The plaintiff and defendants are practically co-sharers. The defendants admittedly have been paying assessment on their share of their holding through their tenants, and the plaintiff has given credit for such amounts. In the lower Courts, their objection was that the plaintiff's father objected to the separate registry of the share held by the defendants in their names, and the Munsif found against their contention: I think these facts disclose an implied obligation on the part of the defendants to recoup the plaintiff."

Messrs. *K. P. Madhava Rao* and *K. P. Lakshmana Rao*, for the Appellants.

Mr. *K. Sundara Rao*, for the Respondent.

JUDGMENT.—So far as the personal liability of the defendants is concerned, the plaintiff cannot claim to make the defendants so liable personally unless he can take advantage of section 69 or section 70 of the Contract Act. Though one of us in *Gajapathi Kristna Chendra Deo* v. *Srinivasa Charlu* (3) was inclined to hold that section 70 might be extended to cases like the present, the trend of recent decisions has gone the other way [See *Raja of Pittapur* v. *Secretary of State* (4)]. Section 69 is clearly not applicable.

Coming, however, to the question of the right to recover the plaint amount on the charge of the lands belonging to the defendants, the Full Bench decision in *Rajah of Vizianagaram* v. *Setrucheral Somasekharaz* (5) and the principle underlying section 82 of the Transfer of Property Act, read with section 100 of the same Act and with section 2 of Madras Act II of 1864, create a charge on the defendants' lands in respect of the revenue thereon, and make them liable to contribute a proportionate share of the entire sum paid by the plaintiff to get rid of the charge in Government's favour, which rested both on his lands and on the defendants' lands.

The decisions in *Kasturi Gopala Aiyangar* v. *Anantharam Thivari* (6) and Second Appeal No. 2245 of 1912 are, however, relied on by the defendants' learned Vakil, Mr. Lakshmana Rao. Those cases decided merely that an assignee of a portion of the amount of the Government Revenue, who has not proved that the Government intended to assign also their right to a charge on the lands in respect of which that revenue was payable, was not entitled to claim such a charge on those lands. They did not deal with the question whether if a person who owned one of two lands *on both of which the Government revenue was jointly made a charge by Statute* pays the whole revenue, he is or is not entitled to claim contribution on the charge of the other land for the proportionate sum due by that land.

In the result we modify the decrees of the lower Courts by striking out the words "personally and" from the District Munsif's decree and by adding before the description of the property, "In default of payment within three months from this day the plaintiff shall be at liberty to apply for a final decree for sale of the under-mentioned property to realise the decreed amount." The decree will be further modified by allowing only half of the plaintiff's costs in all Courts to be added to the amount charged on defendants' property, the defendants bearing their own costs.

Decree modified.

(2) 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 489.

(3) 20 Ind. Cas. 445; 25 M. L. J. 433; 14 M. L. T. 20; (1914) M. W. N. 99.

(4) 25 Ind. Cas. 783; 16 M. L. T. 375.

(5) 26 M. 686.

(6) 26 M. 730; 13 M. L. J. 248.

KANIZ KUBRA v. BANDE HUSSAIN.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 151 OF 1914.

December 22, 1914.

Present:—Mr. Lindsay, J. C.

Musammat KANIZ KUBRA—DEFENDANT—APPLICANT

versus

BANDE HUSAIN—PLAINTIFF—OPPOSITE PARTY.

Pre-emption decree—Extension of time fixed by decree for payment of purchase-money—Civil Procedure Code (Act V of 1908), s. 148.

A Court cannot extend the period granted by a pre-emption decree for the payment of the purchase-money, even if the application for extension of time be made before the expiry of the said period, inasmuch as the provisions of section 148, Civil Procedure Code, apply only to acts prescribed by the Code and not to acts prescribed by decrees which have become final. p. 459, col. 1.

Bachchu Lal v. *Raja Ram*, 19 Ind. Cas. 347; 16 O. C. 5, referred to.

Application against the order of the Subordinate Judge, Bara Banki, dated the 12th October 1914.

Mr. *Muhammad Wasim*, for the Applicant.

JUDGMENT.—This is an application for revision of an order of the Subordinate Judge of Bara Banki. The facts are that the applicant here was the defendant in a suit for pre-emption brought by the opposite party-plaintiff, Bande Husain. On the 17th of March 1914 a compromise was filed which was accepted by the Court and on which a decree was given. Under the terms of that compromise it was settled that the plaintiff should pay Rs. 2,350 within six months to expire on the 17th of September 1914. This money was to be paid either to the second defendant or to be deposited in Court. In the event of such payment the claim of the plaintiff was to be decreed. It was further stipulated that if the payment was not made within the specified period, the plaintiff's claim for pre-emption was to stand dismissed. On the 12th of October 1914 the plaintiff, Bande Husain, appeared before the Subordinate Judge and put in a petition in which he recited the fact that he was bound to deposit Rs. 2,350 on account of the pre-emption decree by the 17th of September. He stated that the Civil Court holidays had commenced on the 12th of September and that the 12th of October, the day on which he was presenting this petition, was the first day on which the Court re-opened. Bande Husain, however, did not bring the money into Court on the 12th of October, but applied for a fortnight's extension to deposit the money saying that on the 11th of October he had gone to the banker with whom he had arranged for an advance of the money and that the banker had refused to give the loan. This application purported to be under section 148 of the Code of Civil Procedure. The learned Subordinate Judge accepted the application and gave Bande Husain the extension he had asked for. It is claimed here in revision that the order of the Judge was illegal and without jurisdiction, and there can be no doubt on the previous rulings of this Court that this objection is well taken. I have before me a record of another Revision Case, No. 143 of 1914, decided by a Bench of this Court on the 16th of November last, *Musammat Habib-un-nissa* v. *Musammat Muhammad-un-nissa* (1).

That application was also against an order of the Subordinate Judge whose order is questioned in the present proceedings and in that case too, in circumstances somewhat similar to those of the present case, the Subordinate Judge granted an extension of time. The decision of the Bench was that such an extension could not be granted and that section 148 had no application to such cases. A reference was also made in the judgment in that case to the case reported as *Bachchu Lal* v. *Raja Ram* (2), in which it was held by a Judge of this Court that a Court cannot extend the time granted by a pre-emption decree for the payment of the purchase-money after the time fixed by the decree has expired. In this present case the Subordinate Judge may have thought that the application having been made on the 12th of October 1914, the day upon which the Court re-opened after the vacation, the application for extension of time was within the period limited by the decree. But in *Musammat Habib-un-Nissa* v. *Musammat*

(1) 27 Ind. Cas. 419; 17 O. C. 377.
(2) 19 Ind Cas. 347; 16 O. C. 5.

Muhammad-un-nissa (1), which I have just mentioned, this point was dealt with and it was there held that even if an application for extension of time be made before the period limited by the decree has expired, the Court has no jurisdiction to extend the period, the principle being that the provisions of section 148 of the Code apply only to acts prescribed by the Code, and not to acts prescribed by decrees which have become final. Bande Husain is here in person and his argument before the Court is that the opposite side played a trick on him. He represents that the banker with whom he had originally made negotiations was quite willing to lend him money, but he failed him at the last moment by reason of the threats which were held out to him by the opposite party. I am not in a position to investigate this allegation at this stage, but all I need say is that in the petition of the 12th October 1914, presented by Bande Husain, nothing is said about the banker having been subjected to any intimidation by the opposite party. I must, therefore, allow this application and set aside the order of the learned Subordinate Judge. The applicant is entitled to her costs in this Court as against the opposite party.

Application accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 423 OF 1914.

February 15, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Sayyid MAHOMED SAHIB—DEFENDANT No. 3—APPELLANT

versus

Sayyid SYED SAHIB (DIED) AND OTHERS PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Religious office, suit for possession of—Functions must be recognised by Muhammadan Law—Test—Civil Procedure Code (Act V of 1908), s. 9.

The existence of an office involves the existence of some duties to be performed by the holder of the office. [p. 460, col. 1.]

Therefore a suit for the possession of an alleged hereditary office, the functions appurtenant to which are the digging up and burying up a pot, distributing *sherbet*, collecting money and distributing a small portion of the collection and reciting portions of the Koran is not maintainable as it is not for a religious office and a claim in regard thereto is not a suit of a civil nature cognisable by a Civil Court. [p. 460, col. 2, p. 461, col. 1.]

A religious office as known to Muhammadan Law must in its nature be for the performance of certain functions which are recognised by the Muhammadan Law as necessary or at any rate as proper to be performed in connection with the religion of Islam. [p. 460, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Negapatam in Appeal Suit No. 320 of 1911, preferred against that of the Court of the District Munsif of Negapatam in Original Suit No. 344 of 1909.

Mr. *R. Vembu Aiyar* for Mr. *R. Kuppuswami Aiyar*, for the Appellant.

Messrs. *K. N. Aiya* and *S. Satyamurthi*, for the Respondents.

JUDGMENT.

TYABJI, J.—This appeal arises out of a suit in which the plaintiffs claim possession and an injunction restraining disturbance of what is alleged to be a hereditary office. Particulars of the functions of this alleged office are given in paragraph 1 of the plaint. The plaintiffs have obtained a decree as prayed from the lower Appellate Court.

The only question on which we heard arguments in this Court was whether a suit on the cause of action alleged in the plaint could be considered to be a suit of a civil nature within section 9 of the Code of Civil Procedure. It was argued before us that there was a contest between the parties as to the right to a religious office and that, therefore, the suit fell within the explanation to section 9 and must be considered to be a suit of a civil nature cognizable by the Civil Courts.

The parties are Mussalmans and it is admitted that the Muhammadan Law is applicable.

The initial difficulty in the way of the plaintiffs against which the learned Pleader who appeared for them struggled very hard, was that the functions referred to in paragraph 1 of the plaint are not functions which the Muhammadan Law recognises as forming part of the duty of a person holding any of those offices which are known to that law; as for instance of *qazi*, *muezzin* or *pesh-imam*. I do not attempt to enumerate all the offices that are known to the

Muhammadan Law. Other offices that are religious in their nature must, I apprehend, be for the performance of certain functions which are similary recognized by Muhammadan Law as necessary or, at any rate, as proper to be performed, in connection with the religion of Islam. The existence of an office involves the existence of some duties to be performed by the holder of the office. The religious texts of every sect of Islam are embodied in well-recognised and authoritative texts which contain particulars of the religious duties recognised in Islam. When, therefore, the question is whether any alleged religious office is known to Muhammadan Law, there ought to be no difficulty in ascertaining whether the alleged functions of the office form part of the religious life of a Muhammadan, whether the performance of the acts in question is made a duty or at least recognised as a proper and usual act by Muhammadan Law, and whether any person is required or expected to perform those functions in his capacity as the holder of an office. Thus the duties of the *muezzin* to call to prayers, of a *pesh-imam* to lead at prayers, of a *qazi* originally to adjudicate upon disputes but now mainly to officiate at marriages and keep a record of divorces —these are functions which find a recognised place in the religious life of a Mussalman. Nobody challenges that calling to prayers and leading at prayers are functions recognized by Islam as proper to be performed, and as forming part of the duties of the *muezzin* and the *pesh-imam*. Any such challenge could be answered without any difficulty by referring to the texts.

No attempt has been made in the present case to establish that the functions referred to in paragraph 1 of the plaint—I speak of them as functions though I do not know whether they ought to be dignified with that term—have any recognition in the religious system of Islam. There was no citation from the Hidaya or the Fatawa Alamgiri or from any of the numerous books on Muhammadan Law based on those authorities, and recognized by the decisions of the Courts. I do not restrict myself to these two texts: I mention them merely as examples of the class of books that might have been referred to; and I mention them as they are available in English translations.

The functions referred to in paragraph 1 of the plaint (which consist of about twenty different acts described in great detail) may be classified under three or four heads: such as digging up and burying a pot, distributing *sherbet*, collecting money and distributing a small portion of the collections and reciting portions of the Quran. The last is evidently thrown in order to give to the whole proceeding the garb of religious rituals.

As I have already said, not the slightest attempt has been made—and I think that any attempt, if it had been made, would have been entirely unsuccessful—to show that these functions are recognized as religious rites of Islam in the sense that they have any religious significance.

If any person, therefore, chooses to do these acts, there may be nothing to prevent him from doing them, or to prevent others from participating in these acts, or thinking that they derive benefit therefrom and desiring them to be done; and it may be that the acts have been done for a long time. But the existence of these circumstances does not make the doing of the acts such a duty in Muhammadan Law as is connoted in the expression "office."

It was argued that these acts were done in a mosque and during Muharram and that, therefore, they became invested with some religious aspect. I am not now considering the propriety of the conduct of the *mutawalli* of the mosque in allowing such acts to be done in the precincts of the mosque. Assuming that the acts are harmless or even meritorious and that there is no breach of trust on the part of the *mutawalli* of the mosque in allowing them to be done in the mosque, that is not enough to create an office.

A number of decisions were cited to us which seem to me to be inapplicable for several reasons, to two of which I may refer.

Some of the decisions cited have reference to the question whether property dedicated for particular purposes or objects can be considered to be properly or validly dedicated by way of *waqf*, and whether its administration can, therefore, be supervised in the manner in which the administration of *waqf* property

is supervised by the Court. The present suit, from what I have already asid, appears to be entirely different from such a suit.

Other decisions cited to us are not applicable as they are decisions under the Hindu Law. A great number of offices connected with temples are no doubt recognized in Hindu Law. They exist for the due performance of religious ceremonies, or recitation of *mantrams*, or other functions recognized by the Court as being attached to offices under Hindu Law. In this case the functions which are alleged to be performed by the office-holder are, as I have already said, so far as I can see, quite foreign to Islam. There is no warrant for holding that Islam requires these acts to be done, or that the doing of them is considered meritorious or efficacious in any religious or legal sense.

It has been argued that on the facts before us, on which both the lower Courts would appear to have given their decision, we must assume that these functions have been performed for a great number of years, and that the presumption must be in favour of such performance being proper. But even so, the performance of the functions would not thereby become the fulfilment of the duties of an office. Not every thing that a person chooses to do, albeit for a long time, not everything that other people have permitted him to do or encouraged him in doing, would necessarily constitute the functions of an office. As a necessary part of that which is connoted in the term 'office' the existence of something which may be described as the duties of the person holding the office is absent. I need not consider whether there is anything to show in what manner the person purporting to be entitled to perform the functions has been entitled to hold the office, anything to indicate the persons to whom he owes the duty of performing the functions or the persons who will be entitled to superintend or supervise the due performance of those functions. In the present case, I have not the slightest hesitation in saying that the particulars referred to in the plaint cannot be said to be duties appurtenant to an office, and that is fatal to the existence of an office.

With reference to the suggestion that we should call for a finding on the issue whether there is such an office as is referred to in the plaint, that is not a question which can be decided by any evidence. Assuming all the allegations in the plaint to be true the question is one of law, whether a person who purports to perform the acts referred to in the plaint and who says he has been doing them for a number of years in the past can be said to hold any office. That question must be decided on the bases which I have endeavoured to explain.

In my opinion, therefore, the appeal must be allowed and the plaintiff's suit dismissed; but inasmuch as this point was not taken by the appellant either in this Court or in the lower Courts, the parties will bear their own costs throughout.

AIYLING, J. I agree.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEALS NOS. 110 AND 48 OF 1914

January 28, 1915.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

BHARMA SHIDAPPA PUJARI—DEFENDANT—APPELLANT

versus

BHAMAGAVDA SHIVAGAVDA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata, preliminary decision as to—Preliminary decree—Appeal.

A decision that a matter is not *res judicata*, and that, therefore, the trial can proceed is not a preliminary decree and no appeal lies from such a decision.

Second appeals against the decision of the First Class Subordinate Judge of Belgaum, in Suit No. 633 of 1910.

Mr. *S. R. Bakhale*, for the Appellant.

Mr. *S. M. Kaikini* (for Mr. *Nilkanth Atmaram*), for the Respondent No. 1.

JUDGMENT.—Applying the Full Bench ruling in *Chanmalswami* v. *Gangadharappa* (1), we hold that a decision that a matter is not *res judicata* and that, therefore, the trial can proceed, is not a preliminary decree from which an appeal will lie at this stage. We dismiss both the appeals. Costs costs in the cause.

Appeals dismissed.

(1) 26 Ind. Cas. 885; 16 Bom. L. R. 954.

MANACKJEE PALLANJEE *v.* MEYAPPA CHETTY.

LOWER BURMA CHIEF COURT.

[FIRST CIVIL APPEAL NO. 162 OF 1911.

March 2, 1914.

Present:—Sir Henry Hartnoll, KT., Offg. Chief Judge, and Mr. Justice Twomey.

MANACKJEE PALLANJEE—DEFENDANT—APPELLANT

versus

S. A. MEYAPPA CHETTY—PLAINTIFF—RESPONDENT.

Mortgage—Moveable property—Subsequent incumbrancer with possession preferred to prior incumbrancer, if bona fide *without notice—Burden of proof.*

A *bona fide* incumbrancer without notice who is in possession of moveable property is to be preferred to an incumbrancer whose security is of prior date. [p. 463, col. 1.]

The person alleging notice must prove it. [p. 463, col. 1.]

Mr. *Bilimoria*, for the Appellant.

Mr. *Clifton*, for the Respondent.

JUDGMENT.

TWOMEY, J.—The parties to this appeal are rival mortgagees of a steam launch called *Mahomed*. It was first mortgaged by registered document together with several other parcels of property, moveable and immoveable, for Rs. 10,000 in 1901 to the respondent firm S. A., but was allowed to remain in possession of the mortgagor who continued to ply the launch in the delta. It was afterwards mortgaged by another registered document to the appellant, Manackjee Pallanjee, for Rs. 7,000 in 1904. Manackjee sued on his mortgage in 1906 and got a decree from the Chief Court in June of that year. The Official Receiver was appointed Receiver and took possession of the launch, and an order for sale was passed on 25th October 1906 as the time allowed for payment had expired. The launch was subsequently sold and the sale-proceeds are in deposit in the Court.

The respondent firm filed their suit in the Pyapon District Court on 3rd November 1906. They joined Manackjee as co-defendant with the mortgagors, alleging that when he took his mortgage in 1904 he was aware of the prior mortgage of 1901. The District Court has decided this point in favour of the respondent firm and the only question which it is necessary to decide in this appeal is the question of notice.

It is settled law that a *bona fide* incumbrancer without notice who is in possession of moveable property is to be preferred to an incumbrancer whose security is of prior date, and in this case it is not disputed that the appellant obtained possession of the launch through the Court and is now through the Court in possession of the sale-proceeds. If Manackjee had notice of the S. A. firm's earlier incumbrance, the latter is entitled to priority and not otherwise.

The burden of proof was on the plaintiff-respondent. The direct evidence consists of the statements of Arunachellem, the Manager of the S. A. firm at Pyapon at the time of the mortgage to the firm and forsome years later. Arunachellem's evidence is in the words of the District Judge "somewhat corroborated" by the evidence of Mutiya, a chetty clerk of Arunachellem. Arunachellem says that he went to Wakema in 1901 and 1903 and met Manackjee and in the course of conversation with him, Manackjee asked if Syed Abdulla, the owner of the launch, had borrowed money from the S. A. firm. Arunachellem thereupon told him of the Rs. 10,000 mortagage, which included the launch *Mahomed*. When he gave his evidence on 15th May 1911 Arunachellem mentioned "Mutiya" as being present at the conversation with Manackjee, but he said that Mutiya was away in Madras. The hearing was adjourned to 26th May 1911 for the issue of a commission on behalf of Manackjee and on the 26th May 1911 Mutiya appeared as a witness. This man's evidence shows that he was not in Madras on the 15th May. He said that he returned to Rangoon on the 17th or 18th May and I gather from his evidence that he was at Pyapon on or about the 15th May and might have been cited as a witness then. At any rate, it must be said that Mutiya's admissions in cross-examination show Arunachellem's statement as to Mutiya's absence in Madras to be very disingenuous. Moreover, Mutiya's evidence as to the conversation between Arunachellem and Manackjee is extremely vague. He says it took place in 1901, 1902 or 1903. Others were present, but he does not remember who. (Arunachellem did not say that any others were present.) It is not clear why Manackjee should make inquiries about Syed Abdulla's borrowings in 1901 1902 or 1903, for it was not till 1904 that Manackjee advanced his money to Abdulla. I think it would be unsafe to accept the evidence of the Manager Arunachellem and his clerk Mutiya as to this alleged conversation. It is also improbable that

Manackjee would have advanced such a large sum if he knew the launch was already hypothecated to the chetty firm. The District Judge's remarks on this point do not seem to me to carry much weight.

When the respondent firm's lawyers wrote to Manackjee in August 1906 (after Manackjee had obtained his decree), they made no allegation as to Manackjee's knowledge of the prior mortgage. They wrote informing him of it and asking whether Manackjee denied their clients' claim. They said nothing about Arunachellem's alleged conversation with Manackjee in 1901, 1902 or 1903.

It is a weak point in the appellant's case that he did not go into the witness-box and submit himself to cross-examination. He is said to have been absent in India at the time of the hearing, but there is no proof of this on the record. As, however, the burden of proof was on the respondent firm, I think it was for them to show beyond reasonable doubt that Manackjee had notice of the prior mortgage. In my opinion the evidence produced by the respondent firm was insufficient to establish this allegation and, moreover, I think it is contrary to the probabilities of the case.

I would, therefore, reverse the decree of the District Court as regards the appellant Manackjee Pallanjee and dismiss the plaintiff firm's suit as against him with costs in both Courts.

HARTNOLL, OFFG. C. J.—I concur.

Decree reversed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL NO. 70 OF 1913, IN SUIT NO. 567 OF 1912.

May 2, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief, Justice and Mr. Justice Stephen.

MADRAS STEAM NAVIGATION CO., LD. —PLAINTIFF—APPELLANT

versus

SHALIMAR WORKS, LD.—DEFENDANT —RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 1 (e) Plaint, cause of action to be stated in—Arrest of ship—Suit for trespass, if lies—Proof of malice or its equivalent—High Court as a Colonial Court of Admiralty, powers of—Detention—Damages, liability for—Admiralty Court Act, 1840 (3 & 4 Vict. C. 65)—Admiralty Court Act, 1861 (24 & 25 Vict. C. 10), ss. 5, 35—Colonial Courts of Admiralty Act, 1890, (53 & 54 Vict. C. 27), s. 2 (3)(a)—Interpretation Act, 1889, (52 & 53 Vict. C. 63), s. 18 (2)—Maritime necessaries—Action in rem—Wrongful seizure—Limitation Act (IX of 1908), Sch. I, Art. 29, scope of.

Under Order VII, rule 1 (e), the plaint must contain, in addition to other particulars, "the facts constituting the cause of action and when it arose." [p. 464, col. 2.]

An ordinary suit for trespass, in the absence of proof of malice or its equivalent, does not lie for the rest of a ship. [p. 465, col. 1.]

The Walter v. *D. Wallet*, (1893) P. 202; 62 L. J. Adm. 88; 1 R. 627; 69 L. T. 771; 7 Asp. M. C. 398; *The Evangelismos, Xenos* v. *Aldersley*, (1858) 12 M. P. C. 352; 14 E. R. 945; 124 R. R. 95; Swabey 378 and *The Strathnaver*, 1875) 1 A. C. 58 at p. 67; 34 L. T. 148; 3 Asp. M. C. 113, referred to.

The arrest of a ship consequent on a suit *in rem* instituted in the High Court as a Colonial Court of Admiralty, for an amount alleged to be due for maritime necessaries, is a judicial act of the Court and an ordinary step in an action *in rem*. [p. 465, col. 1.]

When possession of the subject of controversy is with the Court, the competing parties are simply preferring their claims in the ordinary course of law, and any damages which the successful party may suffer from the continuance of litigation are due to the law's delay and not to any legal wrong perpetrated by his unsuccessful competitor. [p. 465, col. 2.]

Peruvian Guano Co. v. *Dreyfus Brothers and Co.*, (1892) A. C. 166 at pp. 187, 195; 61 L. J. Ch. 749; 66 L. T. 536; 7 Asp. M. C. 225, followed.

In England previous to the passing of 3 & 4 Vict. C. 65, the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship, though perhaps it occasionally purported to exercise the jurisdiction where not prohibited. [p. 466, col. 2.]

The Two Ellens, Johnson v. *Black*, (1872) 4 P. C. 161; 8 Moore P. C. (N. S.) 398; 41 L. J. Adm. 33; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208; 17 E. R. 361; *The Heinrich Bjorn, Northcote* v. *Heinrich Bjorn, Owners*, (1886) 11 A. C. 270, 55 L. J. Adm. 80; 55 L. T. 66; 6 Asp. M. C. 1, referred to.

Murray v. *Langford*, (1842) Fulton 95; 1 Ind. Dec. (O. S.) 701; *Murray and Stracnan* v. *Longbord*, (1847) Fulton 131; 1 Ind. Dec. (O. S.) 723 and *The Asia, In re*, 5 B. H. C. R. (O. C.) 64, referred to.

Whether the extended powers under 3 & 4 Vict. C. 65 and 24 & 25 Vict. C. 10 have become vested in Indian High Courts by virtue of the several Letters Patent? [p. 466, col. 2.]

The Portugal,; *In the matter of the Ship*, 6 B. L. R. 323; *The Bardot* v. *The Augusta*, 10 B. H. C. R. 110, referred to.

Assuming that the extended powers under 3 & 4 Vict. C. 65 and 24 & 25 Vict. C. 10 did not vest in Indian High Courts by virtue of the several Letters Patent, the jurisdiction of the Calcutta High Court in relation to necessaries rests on the Colonial Courts of Admiralty Act, 1890, which vests in it (among other things) the powers described in section 5 of 24 & 25 Vict. C. 10, providing that the High Court of

Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the part to which the ship Court belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales. [p. 466, col. 2; p. 467, col. 1.]

As it is provided by the Colonial Courts of Admiralty Act, 1890, section 2 (3) (a), that any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction in England when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales and as by the Interpretation Act, 1889, section 18 (2), it is provided that the expression "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, British India and Burma thus take the place of England and Wales for the purposes of this case. [p. 467, col. 1.]

To take away jurisdiction it is not enough that the owner was domiciled in Burma, but that domicile must be alleged and proved to the satisfaction of the Court, before judgment. [p. 467, col. 1.]

Ex parte Michael, (1872) 7 Q. B. 658; 41 L. J. Q. B. 349; 26 L. T. 87; 1 Asp M. C. 337, followed.

Assuming that a person aggrieved by the arrest of his ship is entitled to compensation even in the absence of proof of malice or its equivalent, the action would be for wrongful seizure under legal process and as such would be barred by Article 29 of the Limitation Act if not brought within one year of the date of seizure. [p. 467, col. 2; p. 468, col. 1.]

Mr. *B. C. Mitter* (with him Mr. *H. C. Mazumdar*), for the Appellant Company.

Mr. *S. P. Sinha* (with him Mr. *Cubitt*), for the Respondent Company.

JUDGMENT.

JENKINS, C. J.—On the 4th June 1910, a company called the Shalimar Works, Limited, instituted a suit *in rem* against the vessel, *Clan Macintosh*, for an amount alleged to be due to them for that which is described in the plaint in this suit, and has throughout been treated, as maritime necessaries.

On the same day the vessel was arrested, and she thenceforth remained under arrest until her release on the 31st January 1912, the suit *in rem* having been dismissed two days earlier.

On the 4th June 1912, the present suit was instituted on the ordinary original side of this Court claiming damages for the wrongful arrest.

In the plaint it is alleged that the plaintiff company is the owner of the ship, that the defendant company instituted the suit *in rem* "falsely alleging therein that a sum of Rs. 89,187-12 was due to the defendant company for maritime necessaries supplied to the said vessel and maliciously and without reasonable or probable cause procured a warrant of arrest from the said Court" and that "therefore in pursuance of the said order the defendant company caused to be sued out of the said Court and in the said action the said warrant of arrest directed to the Marshal of Calcutta and caused the said vessel, her tackle, apparel and furniture to be wrongfully arrested and detained from the said 4th day of June 1910 until the time hereinafter mentioned." (paragraph 2).

The plaintiff company then alleges the dismissal of the suit *in rem* for want of jurisdiction (paragraph 3) and submits "that the said warrant of arrest was issued without jurisdiction . . . and was absolutely void and inoperative and of no effect in law and that by reason of wrongful and malicious arrest and detention of the said vessel . . the plaintiff company has been deprived of the use and of the possession of the said vessel from the said 4th day of June 1910 till the said 31st day of January 1912 and has suffered damages to the extent of Rs. 5,85,630-6-0." (paragragh 4).

In form the suit is essentially one for the malicious abuse of the process of the Court [*see* Bullen and Leake's Precedents, 3rd Edition, pp. 353—356, and *Redway* v. *Mc. Andrew* (1)]. But no attempt was made at the trial to prove malice, and before us this aspect of the case has been deliberately abandoned from the outset, for no mention or even suggestion has been made of malice, or the absence of reasonable and probable cause, or *crassa negligentia* or bad faith.

The only case made before us was trespass pure and simple; I will, therefore, limit myself to that.

It may be a question whether a plaint, framed as this is, fairly supports a claim based on trespass, more especially as the plaint is defective in an important particular. [*See* the declaration in *Redway* v. *Mc. Andrew* (1), to which there was a general demurrer]. It is imperative under Order VII, rule 1 (*e*), that the plaint should contain, in addition to other particulars, "the facts constituting the cause of action and when it arose." There is no specific allegation in the plaint

(1) (1873) 9 Q. B. 74; 29 L. T. 421; 22 W. R. 60.

when the cause of action arose; and yet if the plaint is to be treated as permitting an alternative claim on the ground of trespass, there would be a different date according as it was treated as a suit for malicious prosecution or a suit for trespass.

But apart from that, I am not at present prepared to hold that an ordinary suit for trespass lies for the arrest of a ship. There is no trace of any such suit in the books, and yet the occasion for it must have frequently arisen.

The only reference to such a suit that I have been able to find is in *The Walter* v. *D. Wallet* (2), where an action was brought for an alleged trespass on a vessel and for its wrongful arrest. Sir Francis Jeune in disposing of the case said that the claim for trespass clearly could not be maintained. The reason of this decision, however, does not appear, and it may be it has no application in the circumstances of this case.

The arrestment of the ship is a judicial act of the Court and an ordinary step in an action *in rem*, so, where it constitutes a legal grievance, it is not an independent wrong, but an integral part of an action *in rem* in which there was malice, or its equivalent, entitling the aggrieved person to seek compensation either in the Admiralty proceedings or by separate action.

In the case of *The Evangelismos, Xenos* v. *Aldersley* (3), a ship was arrested, and in *The Strathnaver* (4) the result of that case was summed up as follows: "Their Lordships came to the conclusion, though the case was certainly a very strong one, inasmuch as the wrong vessel had been seized, that in the absence of proof of *mala fides* and malicious negligence, they ought not to give damages against the parties arresting the ship."

The principle enunciated in *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.* (5) may fairly be cited in this connection. One of the questions there considered was whether the wrongful possession of the defendant continued after the appointment of a Receiver so as to give a claim for damages. It was held it did not, and Lord Watson in the course of his judgment said: "The order of the 17th December 1880 for the appointment of a Receiver had the immediate effect of making the company bare custodiers for the Court; and the appointment of the 23rd of February 1881 transferred the actual possession of the cargoes or their proceeds from the company to an officer of Court. In my opinion, detention by the company, whether it had been legal or illegal, ceased at the first of these dates. That circumstance would not affect the quantum of damages due by the company, if it could be shown that the law regards loss arising to the party ultimately successful from the possession of the Court as stake-holders, as loss directly and naturally resulting from the previous wrongful acts of his adversary. I know of no principle, and of no authority, for that proposition. It appears to me that from the time when the order of the 17th of December 1880 was made, the company and Dreyfus Brothers stood towards each other in the same position in which they would have been placed if the eleven cargoes had never come into the possession of the company, and had been thrown into Court by the captains of the carrying vessels. When possession of the subject of controversy is with the Court, the competing parties are simply preferring their claims in the ordinary course of law; and any damages which the successful party may suffer from the continuance of litigation are due to the law's delay, and not to any legal wrong perpetrated by his unsuccessful competitor."

Lord Macnaghten too remarked:—"But it appears to me that the detention of these cargoes by the company came to an end when the order was made for the appointment of a Receiver. From the date of that order possession was taken out of the hands of the company. Thenceforth the possession was the possession of the Court. I do not think that the possession of the Court can be regarded as detention by the company, nor do I think that any loss or diminution of profit, which may be attributable to the circumstance that the property in question in the action was placed in the custody of the Court is the direct

(2) (1893) P. 202; 62 L. J. Adm. 88; 1 R. 627; 69 L. T. 771; 7 Asp. M. C. 398.

(3) (1858) 12 M. P. C 352; Swabey 378; 14 E. R. 945; 124 R. R. 95.

(4) (1875) 1 A. C. 58 at p. 67; 34 L. T. 148; 3 Asp. M. C. 113.

(5) (1892) A. C. 166 at pp. 187, 195; 61 L J. Ch. 749; 66 L. T. 536; 7 Asp. M. C. 225.

or natural result of the detention by the company."

Here too it may fairly be said that under the arrest the custody and possession was with the Marshal as an officer of the Court, and cannot be regarded as a detention by the defendant company. The damage, if any, suffered from the continuance of the officer's custody and possession was due not to default of the defendant company, but to the law's delay.

The English decisions must be our guide in dealing with maritime matters here, and, therefore, I feel justified in citing them.

This Court's general Admiralty jurisdiction rests on clause 32 of the Letters Patent of 1865, which continues clause 31 of the Letters Patent of 1862; and the effect of these clauses is to vest in the High Court such civil and maritime jurisdiction as might be exercised by the Supreme Court as a Court of Admiralty, or by any Judge of that Court as Commissary of the Vice-Admiralty Court.

The Admiralty jurisdiction of the Supreme Court is defined as follows in the Charter of 1774, clause 26: "And it is Our further will and pleasure, and We do hereby grant, ordain, establish and appoint, that the said Supreme Court of Judicature at Fort William in Bengal shall be Court of Admiralty, in and for the said provinces, countries or districts of Bengal, Bihar and Orissa and all other territories and islands adjacent thereunto, and which now are or ought to be dependent thereupon; and We do hereby commit and grant to the said Supreme Court of Judicature at Fort William in Bengal full power and authority to take cognizance of, hear, examine, try and determine all causes, civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance accounts, charter-parties, agreements, loading of ships and all matters and contracts, which in any manner whatsoever relate to freight or money due for ships hired and let out, transport-money, maritime usury or bottomry, or to extortions, trespasses, injuries, complaints, demands and matters, civil and maritime, whatsoever between merchants, owners and proprietors of ships and vessels employed or used within the jurisdiction aforesaid, or between others, contracted, done, had or commenced in, upon, or by the sea or public rivers, or ports, creeks, harbours and places overflown within the ebbing and flowing of the sea and high water mark, within, about and throughout the said three provinces, countries or districts of Bengal, Bihar and Orissa and all the said territories or islands adjacent thereunto and dependent thereupon, the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents, and dependencies annexed and connexed causes whatsoever, and to proceed summarily therein, with all possible despatch, according to the course of our Admiralty of that part of Great Britain called England, without the strict formalities of law considering only the truth of the fact and the equity of the case."

It was ultimately settled to be the law in England that previous to the passing of 3 and 4 Vict. 65, the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship, though perhaps it occasionally purported to exercise the jurisdiction where not prohibited: *The Two Ellens, Johnson* v. *Black* (6), *The Heinrich Bjorn, Northcote* v. *Heinrich Bjorn, Owners* (7).

The same view has obtained in India [*Murray* v. *Longford* (8), *Murray & Strachan* v. *Longford* (9), *The Asia, In re* (10)]; but there is a difference of opinion as to whether the extended powers under 3 and 4 Vict., c. 65, and 24 Vict., c. 10, became vested in Indian High Court by virtue of the several Letters Patent: *The Portugal; In the matter of the Ship* (11), *The Asia, In re* (10), *Bardot* v. *The Augusta* (12).

For the purposes of this case I will assume they did not. If this be the true view, then this Court's jurisdiction in relation to necessaries rests on the Colonial Courts of Admiralty Act, 1890, which vests in it (among other things) the powers described in section 5

(6) (1872) 4 P. C. 161; 8 Moore P. C. (N. S.) 398; 41 L. J. Adm. 33; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208; 17 E. R. 361.

(7) (1886) 11 A. C. 270; 55 L. J. Adm. 80; 55 L. T. 66; 6 Asp. M. C. 1.

(8) (1842) Fulton 95; 1 Ind. Dec. (o. s.) 701.

(9) (1843) Fulton 131; 1 Ind. Dec. (o. s.) 723.

(9) 5 B. H. C. R. (o. c. J.) 64.

(11) 6 B. L. R. 323.

(12) 10 B. H. C. R. 110.

of 24 Vict., c. 10. That section provides that the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship Court belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales. Under section 35 the jurisdiction conferred by the Act may be exercised either by proceedings *in rem* or by proceedings *in personam*.

By the Colonial Courts of Admiralty Act, 1890, section 2 (3) (*a*), it is provided that any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales. By the Interpretation Act 1889, section 18 (2), it is provided that the expression "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and local Legislature, all parts under the central Legislature shall for the purposes of this definition be deemed to be one British possession.

British India and Burma thus take the place of England and Wales for the purposes of this case.

It is conceded that when the suit *in rem* against the *Clan Macintosh* was instituted, the ship was elsewhere than in the port to which the ship belonged.

To that extent then the suit was in order.

It is, however, contended that the owner was domiciled in Burma, and that the suit was thus beyond the jurisdiction of this Court. But to take away jurisdiction it is not enough that the owner was so domiciled.; this domicile had to be shown to the satisfaction of the Court. Blackburn, J., dealing with section 5 of 24 Vict., Cap. 10, in *Ex parte Michael* (13) said:—"That seems clearly enough to enact that the Admiralty Court shall have jurisdiction when the necessaries are supplied in England, just as if they had been supplied abroad; but then it is added, unless it be shewn to the Court that the owner be domiciled in England; but *that must be alleged and proved* to the satisfaction of the Court before judgment; and it is too late afterwards."

In the same case Cockburn, C. J., thus described the position: "It is conceded that the County Court had jurisdiction over the subject-matter of the suit, and the only ground on which the Court could be called upon *to proceed no further* is the exception in the section which gives the jurisdiction, that it be shewn to the satisfaction of the Court, that is, the Court in which the suit is pending, that the defendant is domiciled in England or Wales."

When the arrest in this case was made it had not been shown to the Court that the owner was domiciled in Burma at the time of the institution of the suit; it was, to use the language of Blackburn, J., neither alleged nor proved, and so that exception which would have made it imperative on the Court to proceed no further had not been established at that stage.

No doubt the plaintiff company contends that by paragraph 1, T. W. F. Bremner's affidavit, the owner's domicile was shown to the satisfaction of the Court; but the fact is that it was not so shown, and the statement in that paragraph is taken from the agreement and is not an independent allegation of the state of affairs at the institution of the suit. And here I may point out that the rule, which prescribes what the affidavit leading to a warrant of arrest should state, does not require any statement of the owner's domicile. Had the present plaintiff company so desired, it could have made such a statement and have procured the release of the ship at any time. It, however, did nothing of the kind, and Counsel for the present plaintiff company has admitted before us, that even in its written statement in that suit it did not specifically allege that its domicile was in Burma.

It is true that the suit *in rem* was dismissed, and the decree contains a recital of the Court's opinion that it had no jurisdiction. But on what materials this result was reached does not appear.

Assuming for the purpose of the case that a person aggrieved by the arrest of his ship is entitled to compensation even in the

(13) (1872) 7 Q. B. 658; 41 L. J. Q. B. 349; 26 L. T. 871; 1 Asp. M. C. 337.

absence of proof of malice or its equivalent, it remains to be seen what would be the nature of his suit: it would be for a seizure under legal process.

But if the seizure was lawful, no suit would lie; if unlawful it would be governed by Article 29 of the Limitation Act, and that in the circumstances of the case would be a bar to this suit.

It has been argued that the seizure was not under legal process, for that as the suit was dismissed for want of jurisdiction, the order for arrest was *coram non judice*.

But the order for arrest was an usual step in a suit *in rem*, and at the time when it was made the Court had jurisdiction over the subject-matter and the exception had not been established. Therefore, the order of arrest cannot (in my opinion) be treated as *coram non judice* or a nullity.

It has been further contended that as this was a trespass to goods, Article 36 should be applied; but Article 29 is specific and fits the case, and it is a rule of construction of long application that a general Article does not govern where there is a particular Article which covers the case.

Nor do I think can Article 49 be treated as governing this case rather than Article 29. It was the seizure, if wrongful, that was the cause of action and the plaintiff cannot treat the suit as one for trespass apart from the seizure for the purpose of evading Article 29.

The conclusion then to which I come is, that this suit as framed is based on malice or its equivalent: that in the absence of proof of malice or its equivalent the suit, if treated as one for trespass, will not lie in the circumstances of this case: and that if such a suit did lie, it would fall under Article 29 and would be barred. I, therefore, would dismiss this appeal with costs.

STEPHEN, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST APPEAL No. 157 OF 1913.

December 10, 1913.

Present:—Justice Sir Henry Hartnoll, KT., Offg. Chief Judge, and Mr. Justice Twomey.

PALANEPPA CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

M. S. SOMASUNDRAM CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2—Payment out of Court not certified—Suit for declaration that decree has been satisfied and should not be executed, barred.

A suit for a declaration that a particular decree has been satisfied by payment out of Court and can no longer be executed, is barred by the provisions of section 47 of the Code of Civil Procedure. [p. 469, col. 1.]

Maung Myaing v. Maung Shwe Hmon, L. B. R (1893-1900) 621, distinguished

Mr. *N. S. Aiyer*, for the Appellants.

JUDGMENT.

HARTNOLL, OFFG. C. J.—Plaintiffs-appellants sue respondents under the following circumstances. They state that they and the 3rd and 4th respondents are partners in the firm of P. L. P. carrying on business at Pegu, that on the 29th September 1911 the firm of V. E. N. K. R. M. A. (2nd respondent) obtained a decree for Rs. 8,890-2-5 against the P. L. P. firm in a suit filed in the Ramnad Court at Madura, that the decree was subsequently adjusted by a payment of Rs. 6,600 in consequence of an arrangement made between M. A. R. R. M. Annamalai Chetty, the 3rd respondent, and the V. E. N. K. R. M. A. partners, the payment being made by 1st respondent as agent of the M. A. R. R. M. firm to the V. E. N. K. R. M. A. firm on the 31st January 1912, that the 3rd respondent has repaid the Rs. 6 600 to the M. A. R. R. M. firm out of monies belonging to the P. L. P. firm, that the V. E. N. K. R. M. A. firm has not certified the adjustment of the decree passed at Ramnad to that Court, that as the result of misunderstandings between appellants and respondents Nos. 3 and 4 the third respondent, in collusion with the V. E. N. K. R. M. A. firm and M. A. R. R. M. Annamalai Chetty, got the Ramnad decree fraudulently transferred by the V. E. N. K. R. M. A. firm to the first respondent, the agent of the M. A. R. R. M. firm, and that the first respondent applied to the Ramnad Court to be recognized as the

assignee of the decree and for a transfer to the Pegu District Court, and is now proceeding with the execution in the latter Court. The appellants pray for a declaration that the decree passed in the Ramnad Court has been satisfied and can no longer be executed. The District Court rejected the plaint and so this appeal has been laid. Order XXI, rule 2, deals with payments out of Court in satisfaction of a decree. It lays on decree-holders the obligation of certifying such payments to the Court and allows the judgment-debtor to apply for the recording as certified of such payments. The rule then lays down that such a payment which has not been certified or recorded as certified shall not be recognized by any Court executing the decree. Section 47 of the Code says: "All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit." The present suit most certainly deals with a matter relating to the satisfaction of the Ramnad decree, for the appellants rely on an alleged uncertified payment of Rs. 6,600, which they say satisfied it. The relief asked for is a declaration that the decree has been satisfied and can no longer be executed. This relief is one that comes directly within the terms of section 47, which expressly enacts that it must not be determined by separate suit but in the execution proceedings.

The law has been discussed in many cases and the view I hold has been followed in the following cases: *Azizan* v. *Matuk Lal Sahu* (1), *Laldas Narandas* v. *Kishordas Devidas* (2), *Bairagulu* v. *Bapanna* (3). In the case of *Maung Myaing* v. *Maung Shwe Hmon* (4) it was held that the proper remedy in a case like this was by a separate suit for damages and the decision does not conflict with the Calcutta case quoted above. This is not a suit for damages but one to restrain the decree from being executed.

It was then urged that in any case the plaint should not have been rejected. There was, in my opinion, no other course open to the Judge. The suit was barred by section 47 of the Civil Procedure Code.

I would dismiss the appeal.

TWOMEY, J.—I concur.

Appeal dismissed.

(1) 21 C. 437.
(2) 22 B. 463.
(3) 15 M. 302; 2 M. L. J. 112.
(4) L. B. R. (1893-1900) 621.

CALCUTTA HIGH COURT.

APPLICATION IN INSOLVENCY SUIT No. 50 OF 1912.

May 18, 1914.

Present:—Mr. Justice Chitty.

In re J.M. LUCAS AND ANOTHER—INSOLVENTS.

Presidency Towns Insolvency Act (III of 1909), s. 36 (4), (5), applicability of—Summary procedure—Contentious matter.

An order under section 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent. [p. 470, col. 1.]

Section 36 (4) and (5) is intended to provide a summary procedure for ordering payment of debts due, and delivery of property belonging to an insolvent when there is no dispute; it is never intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment. [p. 470, col. 2.]

Messrs. *Avetoom* and *A. N. Chaudhuri*, for the Official Assignee.

Messrs. *B. Chakravarti* and *B. K. Lahiri*, for Mrs. Zemin, and Mr. *Langford James*, for G. E. Pereiro.

JUDGMENT.—This is an application presented under section 36 (5) of the Presidency Towns Insolvency Act, 1909, by the Official Assignee, praying that Mrs. Amy Zemin, who was examined under that section in the matter of C. J. and J. M. Lucas, insolvents, should be ordered to deliver over to the Official Assignee certain immoveable property situate in Elliott Road, Calcutta, as being the property of the insolvent J. M. Lucas and now in her possession.

The insolvents were so adjudged on their own petition on February 21st, 1912. Admittedly the property in question was conveyed to the witness, who is the mother-in-law of J. M. Lucas, by deed dated September 26th, 1911, less than five months before the adjudication. The conveyance purports to have been made (subject to a mortgage and further charge of the Phœnix

In re J. M. LUCAS.

Assurance Co., Ld.), for a consideration of Rs. 50,000 paid by Mrs. Zemin to J. M. Lucas. The story of the witness, as disclosed on her examination, was that Rs. 30,000 was actually paid, the other Rs. 20,000 being a debt due to her by her son-in-law for two loans of Rs. 12,000 and Rs. 8,000 made by her to him in 1904.

Mrs. Zemin was examined on March 8, 1913. Subsequently J. M. Lucas was proceeded against under section 103 of the Act, one of the charges relating to this transfer. He was tried before me and found guilty. He has appealed, and the hearing of the appeal has been postponed until orders have been passed on this application. In my opinion, the two matters are in no way dependent one upon the other. An order under section 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent. A charge under section 103 may be substantiated by oral and documentary evidence and the notes of the examination of the insolvent may be used against him. In this particular case, Mrs. Zemin was not examined in the proceedings under section 103, either for or against the insolvent. This application must be decided on her statement and her statement alone. The criminal charge depended upon altogether separate evidence.

Section 36 is copied from section 27 of the Bankruptcy Act, 1883, with this difference. The English Act says:—"If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may, on the application of the Official Receiver or Trustee, order him to deliver," etc. Here the words are:—"If, on the examination of any such person, the Court is satisfied that he has in his possession," etc. In my opinion, there is very little distinction to be drawn between the two modes of expression. Under the Indian Act, it may not be necessary to have an express admission from the witness as it is in England, but the fact of possession must appear from his examination, which amounts to very much the same thing, because the Court can only proceed on the witness' statements and no evidence can be called to contradict them.

In this case it was argued that Mrs. Zemin's statements could not be accepted as true, that what she said was so improbable that no Court could believe her. I agree, but even assuming that she is not worthy of credit, it does not follow that the converse of what she has stated can be held to be proved *on her examination*, and that is what is necessary for an order under this section. It is not suggested that Mrs. Zemin has made any statement which could be construed into an admission or be taken as satisfactory proof that this was a bogus transaction. It may well have been that, and in the criminal proceedings on other evidence I have held that it was. It cannot, however, be said to be satisfactorily established on her examination.

I regret this result, but in my opinion the Official Assignee has adopted the wrong procedure. What he should have done was to make such an application as is provided for by rule 5 (*d*), on which evidence could have been taken for and against, and the question of title properly decided. In my opinion, section 36 (4) and (5) was intended to provide a summary procedure for ordering payment of debts due, and delivery of property belonging, to an insolvent when there was no dispute. It was never intended for contentious matters such as the present, or for following property the subject of fraudulent preference or dishonest concealment. It appears to me unnecessary to refer to section 26 of the Indian Insolvency Act, 1848, or to cases decided upon it. The procedure now introduced is not the same, and is manifestly taken from the English Act of 1883. The application must be refused, but in the view that I take of Mrs. Zemin's evidence I make no order in her favour for costs.

The application for an order under section 36 (4) against George Edmond Pereiro must fail for the same reasons. In this case it is asked that he be ordered to pay to the Official Assignee four sums, Rs. 640, Rs. 901-12-9, Rs. 5,750 and Rs. 6,750, aggregating Rs 14,041-12-9 received by him from the insolvents and also Rs. 4,000, being the amount advanced to him by the insolvents for the purchase of their respective shares in their

father's estate. I am of opinion that this application must fail for the reasons given above in Mrs. Zemin's matter. The first four sums are said to be payments made by way of fraudulent preference to Pereiro, who is entered in the insolvents' schedule as a creditor for Rs. 10,991-1. One of these sums, Rs. 5,750 or the shellac representing it, has been made the subject of a charge in the criminal case, and J. M. Lucas has been convicted on that charge. It is true that Pereiro has mentioned these four sums, but there is nothing in his answers amounting to an admission or satisfactory proof that these sums or any of them belong to the insolvent. As regards the Rs. 901-12-9 he did say that if the Court ordered, he would pay it; but that is all.

As I have said above, in my opinion the procedure laid down by section 36 is inappropriate in dealing with cases of fraudulent preference. I must not be regarded as accepting Pereiro's statements as correct. I have litle doubt that they are false.

As to the Rs. 4,000, I do not think that the Official Assignee could claim this in any case. Subsequently to the examination, which closed in April 1913, *viz.*, on June 5, 1913, the Official Assignee has executed a conveyance in favour of Pereiro of the shares of the insolvents in their father's estate. He cannot now be allowed to say that the insolvents and not Pereiro were the purchasers.

This application also fails but, as in Mrs. Zemin's case, I make no order as to costs.

Application refused.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 35 OF 1908.

March 19, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

Sri Raja VADREVU RANGANAYA-KAMMA GARU ZEMINDARNI OF VEGAYAMMAPETA ESTATE—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FAR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

*Madras Irrigation Cess Act (VII of 1865), s 1—Power to make rules—*Mamool *wet—Engagement exempting landholder from liability—Permanent Settlement—Land assessed with wet revenue—Documents showing extents cultivated with wet crops--Relevant evidence Mere omission to cultivate does not affect—Water available for irrigation before anicut system—Property of* zemindar *—No need of engagement.*

Government's right under section 1 of Act VII of 1865 to make rules having the force of law is only with respect to the rates at which water-cess should be levied and the manner in which it should be collected. It does not extend to the decision of the question whether there is an engagement exempting any landholder from liability from the tax. Any orders or rules framed by Government as to the mode in which the extent of *mamool* wet should be settled are *ultra vires* and not binding. [p. 473, col 1.]

Permanent Settlement should be treated as an engagement of t e kind contemplated by Act VII of 1865. [p. 472, col. 2.]

In order to entitle a proprietor of a permanently settled estate to free irrigation with regard to a certain piece of land, he must prove that the land was assesssd with wet revenue at the Settlement. [p. 472, col. 2.]

Documents showing the extents cultivated with wet crops in subsequent years may be relevant evidence on the question of the extent under wet cultivation at the time of the Settlement. [p. 472, col. 2.]

The mere omission to cultivate with wet crops any land on which wet assessment was levied at the Settlement would not deprive the proprietor of the right to exemption from cess. [p. 472, col. 2.]

In cases where the water available for irrigation prior to the anicut system belonged to the *zemindar*, no proof of any engagement would be necessary. [p. 472, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Cocanada, in Original Suit No. 33 of 1905.

Mr. *P. Nagabhushanam*, for the Appellant.

The *Government Pleader*, for the Respondent.

This appeal came on for hearing in the first instance, on the 19th April 1912, before Benson and Sundara Aiyar, JJ., who delivered the following

JUDGMENT.—"The plaintiff, the proprietrix, of the permanently settled estate of Vegayammapet, instituted the suit against the Secretary of State for India in Council for a declaration that a certain definite extent in each of a number of her villages is not liable to the payment of water-cess under Act VII of 1865 to Government and to recover the amount paid by her under protest on account of water-tax for the *Fasli* year 1314. The defendant denied the right to the exemption claimed. The suit was dismissed by the Subordinate Judge of Cocanada and the plaintiff has preferred this

beneficially" at his death by the testator as prescribed in Annexture *B* of Schedule III of the said Act. [p. 476, col. .

Where the matter in question is Probate, the parties claiming under the Will cannot go behind its terms or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the Will itself, but with the express statements made therein. [p. 476, col. 2.]

Collector of Kaira v. *Chunilal*, 6 Bom. L. R. 652; 29 B. 161, distinguished.

First appeal from the decision of the District Judge of Sholapur, in Miscellaneous Application No. 239 of 1912.

Mr. *Setalvad* (with him Messrs. *Payne & Co.*), for the Appellants.

Mr. *D. G. Palsi*, for Respondent No. 2.

This appeal first came up for hearing on June 29th, 1914, when the following judgments were delivered:

BEAMAN, J.—Owing to the position taken up by Banks and Limited Liability Companies, difficulties were experienced in cases in which joint Hindu families had invested part of their joint funds in the shares of such Banks and Companies. Shares had to stand in the name of one member of the family. He might or might not be the general manager. But, on his death, these portions of the joint family wealth could not be realized by the survivors without either getting probate of a Will or Letters of Administration to the deceased member in whose name they stood. This has led in practice to a great deal of theoretical absurdity. Wills admittedly made by members of a joint Hindu family purporting to dispose, as of self-acquired property, of joint family property in favour of the survivors have been solemnly propounded. Probate has seemingly been given as a matter of course. In this way the funds of the joint family invested in the shares of Companies have been obtained by the survivors. But the question early arose whether survivors thus seeking to obtain their own property under the fiction of a devise should be called on to pay the full duty. The Court Fees Act exempts from payment of duty any such part of the estate of the deceased testator or person to whom Letters of Administration are sought as could be shown to have been held by him as bare trustee without himself having any beneficial interest therein or any power of beneficial disposition. In the class of cases I have described executors or survivors (calling themselves here next of kin) have contended, and on the whole successfully, that the portion of joint family property, they are thus seeking to obtain, falls within the exemption. A bench of this High Court appears to have held in the case of *Collector of Kaira* v. *Chunilal* (1) that a member of a joint Hindu family had no beneficial interest in any part of the joint estate, and, therefore, that survivors propounding his Will, in order to be able to obtain shares standing in his name, were entitled to claim exemption on the ground that the deceased in his life-time had had no beneficial interest in the said shares, etc. This part of the judgment is not reasoned, but is professedly based on the decision in the case of *In the goods of Pokurmull Augurwallah* (2), which Jenkins, C. J., said he thought had been rightly decided. If that decision implies the general proposition (which it appears to imply) that no member of a joint Hindu family governed by the *Mitakshara* has any beneficial interest during his life in any part of the joint family property, we feel unable to assent to it. And if the decision does not imply that proposition, it appears to rest on no reason at all.

The case has come before us in this wise. There was admittedly a joint Hindu family consisting of a father and a minor son. The father made a Will in effect bequeathing the whole property to his minor son. No one has disputed that the family was joint and that the property covered by the Will was joint family property. On the authority of *Collector of Kaira* v. *Chunilal* (1), the executors require us to say that the deceased testator had no beneficial interest in any part of the property devised, and, therefore, that they are exempt from the payment of any duty. In our opinion, this contention is unsustainable.

Those who propound a Will and claim under it can hardly be heard to say that the testator had no powers of beneficial disposition. When, *ex concessis*, the alleged testator was a member of a joint Hindu family and the whole property covered by the Will was joint family property, one would have thought that there was no legal founda-

(1) 6 Bom. L. R. 52, 29 B. 161.

(2) 23 C. 980; 1 C. W. N. 31.

tion for the Will, no need of probate. It is not a satisfactory answer that in probate proceedings the Court has no further concern in the matter than to see whether in fact the Will was made, and whether in all other respects it was a valid Will. That is of course true, but it does not exhaust the question. If those seeking probate mean to include the whole of the property devised under the exemption clauses, it does become the duty of the Court to enquire so far at least as to satisfy itself that the conditions upon which exemption is granted have been fulfilled. Where, in the circumstances mentioned, the whole property is given to the sole survivor, who again *ex concessis* would take it in his own right, Will or no Will, the Will propounded is, on the face of it, a mere nullity to which no effect could be given. Had it been necessitated owing to the testator having invested the joint family funds in the shares of Banks and other Companies, then it appears to us that however anomalous the position, which is thus reached, may be, it cannot be contended that since a Will is necessary under which the nominal testator hands on this part of the joint family property to the survivor, he had not at the date of his death any beneficial interest in that property, and was never more than a bare trustee of it for the survivor or survivors. The reason for the exemption is clear. But neither that reason nor any consideration of policy, which occurs to us, would warrant its extension to this length. Although the devisee under the Will takes but what is his own, if he needs a Will to get it, we do not see why he should not pay the ordinary duty. He cannot be allowed to blow hot and cold, and say in one breath that a Will was and was not necessary. It is only by adopting the general proposition, which we find ourselves entirely unable to adopt, that no member of an undivided Hindu family has any beneficial interest in any part of the joint family property during his life-time, that the decision upon which the cross-appellants here rely could be supported. Were it merely a question of policy we should be disposed to take an exactly opposite line, and say that all Hindus taking by survivorship ought to pay duty on the value of the estate so taken, just as all other subjects not governed by the Hindu law of the joint family have to pay duty to the State on property devised or coming to them as heirs.

In our opinion, the cross-appellants ought to pay duty on the whole estate covered by the Will.

HAYWARD, J.—The petitioners obtained probate of a Will purporting to dispose of property held jointly between the testator and his minor son as members of a joint family under Hindu Law. The petitioners thereupon claimed exemption from probate duty, on the ground that the property was "property whereof the deceased was possessed as trustee" under section 19D and was not liable to Court-fee being "property held in trust not beneficially" within the meaning of Annexure B of Schedule III, Court Fees Act, 1870, relying on the cases of *In the Goods of Pokurmull Augurwallah* (2) and *Collector of Kaira* v. *Chunilal* (1).

The District Judge decided that the testator's undivided half share in the joint family property could not, but that the minor son's undivided half share in the property could, be regarded as "property held in trust not beneficially" within the meaning of Annexure B of Schedule III of the Court Fees Act, 1870, relying on the cases of *Collector of Ahmedabad* v. *Savchand* (3) and *In re Desu Manavala Chetty* (4).

This Court has been asked, on first appeal, to decide that the whole of the joint family property was "property held in trust not beneficially" by the testator within the meaning of Annexure B of Schedule III of the Court Fees Act, 1870, on the strength of the last four lines of the judgment in the case of *Collector of Kaira* v. *Chunilal* (1). It appears to me, however, with due deference, that that judgment conflicts with the views of joint family property theretofore accepted. It was said in *Appovier* v. *Rama Subba Aiyan* (5) that "according to the true notion of an undivided family...no individual member...can predicate of the joint and undivided property that he...has a certain definite share" and it was ob-

(3) 4 Bom. L. R. 974; 27 B. 140.

(4) 4 Ind. Cas. 1064; 33 M. 93; 6 M. L. T. 286 (F. B.); 19 M. L. J. 591.

(5) 11 M. I. A. 75 at p. 89; 8 W. R. (P.C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30.

served in the case of *Ramchandra* v. *Damodhar* (6) that "each co-parcener is entitled to a joint benefit in every part of the undivided estate." It could not, therefore, be said that even the least part of the joint family property was held "in trust not beneficially" at his death by the testator as prescribed in Annexure B of Schedule III of the Court Fees Act, 1870.

It appears to me what has to be looked at in such cases is the estate actually specified in the Will, and not the estate which could legally be disposed of by the Will. It is an accepted principle that the legal effect of the Will is not a matter for consideration. The factum of the Will alone can be established by proceedings in probate. The estate here specified was the whole joint property. It would not be admissible to consider whether the testator had or had not power to dispose of such property by Will. He purported to do so and those desiring to establish the factum of the Will must pay the full duty leviable on such property in the necessary proceedings in probate. The case might, no doubt, have been different if the estate specified had been not the whole joint property, but only a limited interest in the joint property—if, for instance, the estate specified had excluded the beneficial interests of the members of the family in the property and had strictly been limited to the legal right to parade as proprietor under such statutory provisions as sections 22 and 23 of the Presidency Banks Act, 1876, or sections 30 (2), 33 and clauses 21 and 22 of Table A of the first Schedule of the Indian Companies Act, 1913. The possibility of such a case would appear from the remarks in the case of *Bank of Bombay* v. *Ambalal Sarabhai* (7). That would perhaps have been the appropriate manner of meeting the difficulties presented by such statutory provisions as those of the Presidency Banks and Companies Acts.

The Court calling upon the Revenue Authorities, who had not appealed, to give their representation of the matter, the appeal was re-heard on October 3rd, 1914.

(6) 20 B. 467 at p. 468.
(7) 2 Bom. L. R. 167 24 B. 350 at p. 359.

S. N. DAR. B. A. LL. B.
Vakil High Court.
SRINAGAR (KASHMIR)

Mr. *Jardine*, Acting Advocate-General, with him Mr. *S. S. Patkar*, Government Pleader, for Revenue Authorities.

Mr. *Setalvad*, (with him Messrs. *Payne & Co.*), for the Appellants.

Mr. *D. G. Dalvi*, for Respondent No. 2.

JUDGMENT.—When we dealt with this case, we were under the impression that the view which commended itself to us was in direct conflict with the decision of a Division Bench in *Collector of Kaira* v. *Chunilal* (1). Furthermore, at that time the Revenue Authorities were not represented before us. We have, therefore, re-considered the matter after hearing the Advocate-General for the Revenue Authorities. While adhering to the view we expressed in our former judgment, and dissenting from what we conceived to be the principle underlying the decision in *Collector of Kaira* v. *Chunilal* (1) as well as in that of *In the Goods of Pokurmull Augurwallah* (2), which appears to have been approved by the Judges who decided *Chunilal's* case (1), we think that there is a sufficient ground of distinction, namely, that in *Chunilal's* case (1) the application had been for Letters of Administration, here we are dealing with probate. Possibly different arguments may be drawn from those premises, but we are clearly of opinion that where the matter in question is probate, the parties claiming under the Will cannot go behind its terms or claim any exemption whatsoever upon allegations utterly inconsistent not only with the fact of the Will itself, but with the express statements made therein, nor do we conceive that there is any difficulty created by the fact that we have ourselves been obliged to call upon the Advocate-General to protect the interests of the Revenue. When the cross-appeal was before us the Collector was not a party to it. The matter, therefore, so far as the only substantial counter-interest was concerned, was entirely *ex parte*, and it is the business of Courts to see that the Revenue is not defrauded. Now, however, having called upon the Advocate-General and heard his representations in the matter which are in the nature of an appeal, against the order made by the Court below, we are clearly of opinion that the executors must pay full probate duty

upon the Will, and we decree accordingly. Costs of Government and the executors to come out of the estate.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3215 OF 1911.

January 14, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

LALA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Mir LATIF HOSSEIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Presumption—Possession goes with title—Evidence equally unworthy of credit on either side—Presumption, whether raised.

Where the evidence of possession is equally unworthy of credit on either side, the presumption that possession goes with title does not apply. [p. 478, col. 1.]

Runjeet Ram Panday v. *Goburdhun Ram Panday*, 20 W. R. 25 (P. C.), referred to and followed.

Dharm Singh v. *Hur Pershad Singh*, 12 C. 38, referred to.

Thakur Singh v. *Bhogeraj Singh*, 27 C. 25, referred to.

Babu Kasturi Singh v. *Rajkumar Babu*, 8 C. W. N. 876, referred to.

Appeal against the decree of the Additional Sub-Judge of Patna, dated the 22nd of August 1911, reversing that of the Munsif of Barh, dated the 27th of July 1910.

Babus *Provash Chandra Mittra* and *Susil Madhab Mullick*, for the Appellants.

Babu *Kulwant Sahay*, for the Respondents.

JUDGMENT.—This point which is raised in this second appeal raises the ancient controversy regarding the effect of presumption of continuous possession from title. It was laid down by the Privy Council in the case of *Runjeet Ram Panday* v. *Goburdhun Ram Panday* (1) that the ordinary presumption would be that possession went with the title, but that presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary. But where there is strong evidence of possession, as it is here on the part of the respondent, opposed to evidence apparently strong also on the part of the appellant, their Lordships think that in estimating the weight due to the evidence on both sides, the presumption may in the peculiar circumstances of that case be regarded. Upon that a Bench of this Court in the case of *Dharm Singh* v. *Hur Pershad Singh* (2) refer to this presumption arising on title found to be in the plaintiff, and they say that if the Judge had disposed of the case solely with reference to this presumption he would have been in error. There must be some positive evidence of the plaintiff's possession on the record. Following this and explaining the dictum of the Privy Council, Ghosh and Stevens, JJ., in the case of *Thakur Singh* v. *Bhogeraj Singh* (3) laid down that where evidence was equally strong on both sides and apparently equally balanced, preference should be given to the evidence on the side of the parties with whom title was found, thus following the course which was actually taken by the Privy Council in the case we have above cited. But where, as in the case before them, the evidence of the witnesses on both sides was equally unworthy of reliance, no such presumption can be made, thus approving the dictum of Mr. Justice Field that the presumption could not take the place of all evidence. This case was cited with approval by Bodilly and Mukerjee, JJ., in the case of *Babu Kasturi Singh* v. *Rajkumar Babu* (4) and we are asked to find that one of the Judges who decided that case has since laid down the opposite dictum in the case of *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (5). What Mr. Justice Mukerjee says there is that when the District Judge deals with this part of the case he may, if the state of the evidence justifies it, apply the principle laid down by their Lordships of the Judicial Committee in the case of *Runjeet Ram Panday* v. *Goburdhun Ram Panday* (1), namely, where the evidence of possession is equally unsatisfactory on both side, the presumption may be made that possession was with the true owner. Now the first remark that we have to make is that the learned Judge

(1) 20 W. R. 25 (P. C.).

(2) 12 C. 38.
(3) 27 C. 25.
(4) 8 C. W. N. 876.
(5) 3 M. L. T. 212; 12 C. W. N. 273 at p. 280; 7 C. L. J. 414.

carefully guards his directions with the condition "if the state of the evidence justifies it," which is precisely what was laid down by Mr. Justice Field; and as regards the dictum of *Ranjeet Ram Panday's* case (1), it would appear that the judgment has been either misreported or a clerical error has crept into it because Mr. Justice Mukherjee is not citing the dictum of the Judicial Committee where he says: "namely, where the evidence of possession is equally unsatisfactory on both sides," and it cannot, therefore, be said that the learned Judge intended to reverse what he himself was a party to in the previous case which we have cited.

It appears to us that it is not an error of law on the part of the learned Subordinate Judge in the Court below to say that when the evidence of possession is equally unworthy of reliance on either side, as he found it is here, the presumption cannot apply. There being no such error of law, the appeal must be dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 50 OF 1913.

October 5, 1914.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Hayward.

BALARAM VITHALCHAND GUJAR—PLAINTIFFS—APPELLANTS

versus

MARUTI DEVJI DUBAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48, scope of, compared with s. 230 of the old Code--Limitation Act (IX of 1908), Sch. I, Art. 82.

In 1884 a decree was passed in favour of *N* upon a compromise, and according to its terms certain instalments were payable, and upon default, *N* was entitled to claim possession of a share in certain property. Default was made in 1892 and an application for possession was made. In 1898 the judgment-creditor died, and the execution proceedings were carried on thereafter by his brother as his representative. In 1902 that brother died leaving his minor sons, who by their next friend applied to be brought on the record, but their application was rejected and the original application for execution made by *N* was struck off. In 1909 a fresh application to execute the original decree was presented on behalf of the sons, one of them having attained majority:

Held, that the application was barred under section 48 of the Civil Procedure Code of 1908. [p. 478, col. 2.]

The fresh periods which could be obtained under Article 182 of the Limitation Act do not escape the provisions of section 48. [p. 479, col. 1.]

Section 48 is more extensive in its application than the previous section 230 of the old Code, and it is wide enough to cover compromise decrees. [p. 479, col. 1.]

Second appeal against the decision of the acting District Judge of Satara, in Appeal No. 245 of 1911, reversing the order passed by the Subordinate Judge of Karad in Darkhast No. 481 of 1909.

Mr. *Coyaji*, (with him Mr. *P. D. Bhide*), for the Appellants.

Mr. *Jayakar*, (with him Mr. *S. R. Bakhale*), for the Respondents.

JUDGMENT.--On the 29th of July 1884, a decree was passed in favour of one Naro upon a compromise, and according to its terms certain instalments were payable, and upon default, as provided in the decree, the judgment-creditor was entitled to claim possession of a share or shares in certain property. Default having been made in 1892, the judgment creditor became entitled to apply for possession and he, therefore, made an application for execution of the decree. In 1898 he died, and the execution proceedings were carried on thereafter by his brother as his representative. In March 1902, that brother died leaving the present appellants, his minor sons. On the 27th of June 1902, by their guardian or next friend, they applied to be brought on the record as representing their father for the purpose of continuing the execution proceedings, and in September 1902 their application was rejected and the original application for execution which had been instituted by Naro was struck off. On the 1st of September 1909, a fresh application to execute the original decree was presented on behalf of the appellants, one of them having attained majority.

The objection is taken on behalf of the respondents that the application being a fresh application for execution, made after the expiration of twelve years from the date of the default mentioned in the consent decree in respect of which the applicants sought execution, was barred by section 48 of the Code of Civil Procedure.

It is contended by the appellants that their case should succeed if they show that there was a fresh step-in-aid of execution

made under the Indian Limitation Act of 1877, Article 179, or the present Indian Limitation Act, Article 182, which gave a fresh starting point to limitation, and that from that starting point time would not run against them until after they attained majority. Unfortunately, however, for that argument, Article 182 of the Indian Limitation Act, which was in force at the time of the last application to execute the decree, shows that the fresh periods which could be obtained under the provisions of that Article do not escape the provisions of section 18 of the Civil Procedure Code, the words of Article 182 being "For the execution of a decree of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908." Section 48 of the present Code is more extensive in its application than the previous section 230 of the Code of 1882, and it is wide enough to cover the compromise decree of which execution is sought in the present case. The fresh application, therefore, with which we are concerned, being made more than twelve years from the date of the default, the appeal must fail. We affirm the decision of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 62 OF 1912.

November 30, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier

NAMBURI VENKATARAMA CHETTY AND OTHERS—PETITIONERS—APPELLANTS

versus

VEMUR THIRUVENGADATHAN CHETTY AND OTHERS—COUNTER-PETITIONER RESPONDENTS.

Trust—Management—Application for alteration of existing scheme—Grounds.

An application to alter a scheme of management under which the affairs of a temple are administered even if based on grounds of malversation, should, unless accompanied by a fresh scheme to prevent such malversation, be dismissed. The mere fact that some mismanagement has resulted through the misconduct of the Committee members and the trustees, is not a ground to modify a scheme which contains provisions which if properly worked are sufficient to protect the interests of the trusts. [p. 480, col. 2.]

Appeal from the judgment of the Hon'ble Mr. Justice Bakewell, dated the 6th August 1912, in the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 222 of 1895.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswamy Aiyar* and *K. B. Ranganatha Aiyar*, for the Appellants.

Messrs. *A. Suryanarayana Aiyar*, *M. A. Tirunarayanachari* and *Short* and *Bewes & Co.*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—This is an appeal from an order of Bakewell, J., on the original side refusing to give leave to the applicants to bring forward a new scheme in place of the scheme which was settled in Suit No. 222 of 1895 on the 10th November 1896. The application made by the petitioners was not accompanied by any kind of draft scheme which the petitioners wanted to be substituted for the present scheme. The affidavit which was put in along with the application does not, except in a few places, deal with any defects in the scheme, but merely contains allegations as to how the charities have been mismanaged in the opinion of the applicants by the committee members and by the *dharmakartas*.

In paragraph 11 of the affidavit it is alleged that the scheme requires modification because the Colla family, out of the male members belonging to which the *dharmakarta* has to be chosen, is not a family out of which it is desirable in future to so select *dharmakartas*. It is further alleged that it is necessary that the powers of the *dharmakarta* to be chosen from that family, if that family is to be retained as the faimly out of which the *dharmakarta* is to be chosen, should be curtailed. It is also alleged that the scheme does not make it clear by whom such *dharmakarta* is to be chosen.—The allegations in paragraph 11 of the affidavit proceed upon a mistaken footing that the question as to who was to be *dharmakarta*, from what family the *dharmakarta* was to be chosen and how he was to be chosen, was intended to be part of the scheme settled in the former suit. It is

part of the decree itself that the *dharmakarta* should be chosen from the Colla family and the scheme was not intended to contain any provisions as to how the person was to be chosen from out of the male members of the Colla family. As regards the curtailing of the powers of the *dharmakarta*, the scheme only provides that he should be in possession of the funds which are allocated by the committee in respect of the specific expenditures to be incurred in connection with the trusts. That a hereditary *dharmakarta* should be deprived even of this power is no doubt a strong step to take, but if a Court is satisfied that it is necessary in the interests of the institution to deprive him even of this power and that it is necessary to appoint a treasurer who should, in supersession of the *dharmakarta*, handle the moneys allocated for the expenses, paying out those sums which the trustee asks him to pay out, it may be necessary to modify the scheme in that respect. But we are not satisfied from the affidavits filed on both sides that any such necessity has been shown to curtail the powers of the *dharmakarta* and to modify the scheme in that respect.

The only other paragraphs of the affidavit which really relate to the scheme are paragraphs 12 and 13. In these paragraphs it is contended that owing to the scheme providing that the two committee members who retire at the end of every three years are eligible for re-election, the out-going members have been, as a rule, re-elected by the remaining members of the committee and that this gives room for lack of efficient supervision by the committee over the affairs of the trust.

The counter-affidavit filed on behalf of the committee mentions some of the reasons why for some years after the scheme came into force, it was considered advisable to have the out going members re-elected without trying to bring in "fresh blood" and it also indicates that in recent years the scheme has not prevented desirable changes occurring in the constitution of the *personnel* of the committee members.

We are satisfied that the view taken by the learned Judge of the Court below is correct, namely, that the application by the present petitioners is not based really on the grounds that the scheme itself is defective, but that it is made for the purpose of making radical alterations in the original scheme so as to give the body of worshippers more opportunities to interfere in the management and control of the trusts and so to upset the very basis of the scheme as settled in 1896. Under these circumstances we think that the learned Judge used his discretion properly in not granting to the applicants, (who had no definite alternative scheme to put forward), leave to apply to alter the present scheme in an indefinite manner. The mere fact, even if it be true, that some mismanagement has resulted through the alleged misconduct of the committee members and the trustees, is not a ground for obtaining leave to modify a scheme which contains provisions which, if properly worked, are sufficient to protect the interests of the trusts. The fact referred to would only furnish grounds, as pointed out by the learned Judge, to have the members of the committee and the trustees removed from their offices in a suit properly framed and brought.

In the result we dismiss the appeal, with two sets of costs.

NAPIER, J.—I concur.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 175 OF 1913.

November 13, 1914.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.

THE AHMEDABAD MUNICIPALITY—DEFENDANT—APPELLANT

versus

SAKARCHAND MOHAKAMCHAND—PLAINTIFF—RESPONDENT.

Bombay District Municipalities Act (Bom. Act III of 1901), s. 76—Ahmedabad Municipality Rule 84—Goods brought in by postman—Octroi duty—Inspection of account books.

Under section 76 of the District Municipalities Act (Bom. Act III of 1901) and Rule No. 84 made under the old Act and still in force, goods brought into the walled city of Ahmedabad through the agency of the Post Office are subject to octroi duty. [p. 481, col. 1.]

DINBAI *v.* NUSSERWANJI R. MEHTA.

The terms of section 76 (1) (*b*) do not permit a Municipal officer to claim inspection of the private account-books of merchants. [p. 481, col. 2.]

Second appeal against the decision of the District Judge of Ahmedabad, in Appeal No. 403 of 1911, modifying the decree passed bythe Joint Subordinate Judge at Ahmedabad in Civil Suit No. 7 of 1911.

Mr. *T. R. Desai*, for the Appellant.

Mr. *N. M. Samarth*, for the Respondents.

JUDGMENT.—Two points have been argued on this appeal, one on behalf of the respondents and the other on behalf of the appellant. The respondents contend that octroi is not leviable upon goods introduced into the city through the agency of the Post Office. In support of that contention, reference is made to section 59 of the District Municipal Act, which says that subject to any general or special orders which the Governor-General in Council may make in this behalf, the Municipality may, after observing the preliminary procedure required by section 60, impose an octroi on goods brought within the Municipal limits for consumption or use therein, and section 60 provides that every Municipality, before imposing a tax, shall observe certain preliminary procedure. It is urged that the preliminary procedure required by section 60 has only been observed under the old Act at a time when the bye-laws framed under it indicated that the framers did not contemplate the possibility of the introduction into the city of goods by post. The rules under the old Code, which are still in force, include Rule No. 84 which imposes the octroi duty at present in force. That rule says, octroi duty shall be levied on goods coming into the walled city of Ahmedabad and the walled suburb of Saraspur in accordance with Schedule E, which prescribes the rate.

Now it cannot be contended that goods brought in by a postman are not goods coming into the walled city, and, therefore, those goods are, according to the terms of that rule, subject to octroi duty. Section 76 of the District Municipal Act gives Municipal officers certain powers for assessing the octroi duty upon goods so brought in and to the extent of these powers it does not appear to us that any further bye-laws are necessary for the purpose of assessing duty on articles brought in by post.

That disposes of the cross objection of the respondent.

Then, coming to the objection of the appellant, it is complained that the learned District Judge has enjoined the Municipality to refrain from calling for production of the account-books of the merchants receiving goods, and for the production of documents other than bills, invoices or documents of a like nature relating to the articles.

We are of opinion that the District Judge was perfectly correct in his decision. What section 76 (1) (*b*) permits is the calling upon the importer to exhibit to the officer the document accompanying the goods or the document sent by the sender of the goods. The bill is a document usually sent by a vendor, and the invoice is a document giving particulars of the goods which is so called because *envoye* to the vendee. A document of a like nature is that which accompanies the goods sent by the vendor. It seems to us clear that the terms of the section do not permit a Municipal officer to claim inspection of the private account-books of merchants.

We, therefore, affirm the decree of the lower Appellate Court and dismiss the appeal and cross-objections with costs respectively.

The injunction, as set out in the judgment, enjoins the Municipality not to call on "any such person", which no doubt means the plaintiffs. It ought to be so expressed.

Both appeal and cross-objections dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 82 OF 1914.

March 15, 1915.

Present:—Mr. Fawcett, A. J. C.

DINBAI, WIDOW OF JAMSETJI N. POCHAJI —PLAINTIFF

versus

Khan Bahadur NUSSERWANJI R. MEHTA AND OTHERS—DEFENDANTS.

Parsi Intestate Succession Act (XXI of 1865), ss. 3, 5, 6, 7—Succession Act (X of 1865), ss. 72, 80, 106—Direction in Will excluding particular heir or next of kin, how far effective—Construction of Will—Canons of construction—"Without any qualifying terms" in s. 80 of Succession Act, meaning of.

N, a Parsi, died leaving a son, *J*, two daughters and heirs of a predeceased daughter. By his Will *N* directed his executors to hold the residue of *N*'s estate upon trust to pay the net income thereof to his son, *J*, during his life-time. In the event of *J*,

DINBAI v. NUSSERWANJI E. MEHTA.

dying without leaving any issue but only a widow, the executors were directed to pay her rupees ten thousand (Rs. 10,000) absolutely and after providing for *J's* funeral expenses to appropriate half of the balance of the residuary estate to specified charitable objects and *to divide the other moiety amongst the heirs according to the law of intestate succession amongst Parsis, but excluding the widow of J from getting any share in such distribution. J* died leaving only a widow *D*, who claimed as an heir of *J* contending that though the above direction excluded her as an heir of *N*, it did not exclude her as an heir of *J*:

Held, that upon a reasonable construction of the above clause, the testator intended that *J's* widow should be entirely excluded from any share in the distribution, whether as an heir of *J* or otherwise. p. 483, col. 1.

Lee v. *Lee*, (1860) 29 L. J. Ch 788 at 790; 1 Dr. & Sm. 85; 6 Jur. (N. S.) 621; 8 W. R. 443; 62 E. R. 310; 127 R. R. 28; 2 L. T. (N. S.) 532, referred to.

Pestonji v. *Khurshed Bai*, 7 Bom. L. R. 207 at p. 217, distinguished.

The words "without any qualifying terms" in section 80 of the Succession Act refer to the heirs, and not to the bequest. p. 484, col. 1.]

Mr. *Rupchand Bilaram*, for the Plaintiff.

Mr. *Nadirshah Naoroji*, for Defendants Nos. 1 and 2.

Mr. *Wadhumal Udharam*, for Defendants Nos. 3, 4 and 5.

JUDGMENT.—The suit relates to the construction of the Will of one N. N. Pochaji, who died at Karachi in August 1908. His wife was alive at the date of the Will but died before the testator. He left a son by name Jamsetji, two daughters (defendants Nos. 3 and 4) and the widower and children of a pre-deceased daughter (defendants No. 5). Jamestji died in May 1913, leaving a widow (plaintiff), but no issue. Under the Will a life interest in the residuary estate is given to the testator's wife (clause 6) and on her death to Jamsetji (clause 7). The latter clause further directs that on Jamestji's death, the estate should come to Jamsetji's widow and children in certain proportions. Clause 8 provides for the event, which has happened, of Jamsetji dying without leaving any issue but only a widow. It directs the executors to pay the widow Rs. 10,000 absolutely and after providing for Jamsetji's funeral expenses to appropriate the half of the balance of the residuary estate to specified charitable objects and to divide the other moiety amongst the heirs according to the law of the intestate (succession) amongst Parsis, *but excluding the widow of Jamsetji from getting any share in such distribution.* The dispute is regarding the effect of this last provision as to the exclusion of Jamestj's widow. Plaintiff claims that though it excludes her from sharing as an heir of the testator Pochaji, it does not exclude her as an heir of the testator Jamestji, and seeks a declaration that she is entitled to a half of Jamsetji's four-sevenths share under sections 3 and 6 of the Parsi Intestate Succession Act, 1865.

The defendants dispute this construction, though the executors (defendants Nos. 1 and 2) say they are ready to carry out whatever the Court may order. The point at issue has been very fully and ably argued, and I have been referred to a large number of English authorities. I do not, however, think it necessary in this judgment to refer to and discuss them in detail. The main principles applicable are well settled and the Indian Succession Act, as modified by the Parsi Intestate Sucession Act, is the real authority to look to in this country. The contention of Mr. Rupchand for plaintiff is that, under the ordinary canons of construction applicable in such a case, the class of heirs who come in under this clause 8, are ascertained as existing *at the date of the testator's* death, and that they, therefore, include Jamsetji who is excluded by the fact that a life-interest in the property is expressly given him. This no doubt is the general rule, but it is subject to exceptions (*a*). A testator may of course direct the class of "heirs" or "next of kin" to be ascertained at any time or in any manner he chooses; and if the context require the class to be ascertained as if the testator had died at some other period or if it is clear that the testator intended to except a particular heir or next of kin, then the effect must be given to the context or intention accordingly (*b*). In this particular case, the plaintiff could not come in *as an heir of Pochaji*, except in the event of Jamsetji's predeceasing the testator and taking his share under section 5 of Act XXI of 1856. Mr. Rupchand contends that it was to meet this contingency that the testator added the provision excluding the plaintiff, but

(*a*) Theobold's Law of Wills, 5th Edn., pp. 311, 312

(*b*) Halsbury's Laws of England, Vol. 28, p. 756 sec. 1388. See also sec. 1273 at p. 662.

this is absurd on the face of it (c), because clause 8 clearly deals with the case of Jamsetji surviving the testator and then dying without issue. In my opinion, therefore, this is not a reasonable construction of the provision in question. But under section 72 of the Succession Act no part of a Will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it. The restricted meaning which plaintiff's Pleader seeks to put upon it being rejected, there can, in my opinion, be no doubt that the testator intended that plaintiff should be entirely excluded from any share in the distribution, whether as an heir of Jamsetji or otherwise, and the canon of construction already referred to does not debar the Court from giving effect to this intention (d). It is not certainly unreasonable to suppose that the testator intended such an exclusion, in view of the provision in the same clause for the payment to plaintiff of Rs. 10,000, which he might have deemed adequate for her if she had no children.

It is immaterial in this view of the case to consider whether Jamsetji had vested interest as an 'heir' in this residuary bequest, for it is not alleged that he has willed the whole or any part of such interest (if any) to the plaintiff, and so far as her rights under the law of intestate succession are concerned, she is (on the construction put by me alone) excluded from any share she might get as an heir to such vested interest. Also this question does not affect the amount of the shares of defendants Nos. 3, 4 and 5, for they will each get one-third, whether Jamsetji is excluded as an heir, so that they get this under section 3 of Act XXI of 1865, or he is treated as an heir, and they each get 1/7th *plus* 1/3rd of 4/7ths (Jamsetji's share) under section 7.

This suffices to dispose of the point at issue, but I may briefly notice some further matters referred to in argument. Sections 80 and 106 of the Succession Act were rightly relied on by Mr. Rupchand in support of his contention, but each of these sections allows for an exception, if shown to be intended by the Will. Section 80 recognises that the class of "heirs", etc., there defined may be modified by "qualifying terms," as they are modified in this instance by the provisions excluding the plaintiff from sharing in the distribution and section 106 gives a legatee a vested right of the kind specified "unless a contrary intention appears by the Will." In this case even if Jamsetji had a vested right, plaintiff is debarred from benefiting thereby on account of the absolute exclusion, of her which the testator saw fit to make. Sections 80 and 106, therefore, in no way differ from the English Law allowing exception, on which I have relied above.

No doubt, as laid down in *Lee* v. *Lee* (1), "as a general rule if a testator bequeaths property to a class by a particular description, and a question arises whether a certain individual, who comes within the description ought or ought not to be excluded, it is not sufficient, in order to exclude him to show the absence of a special intention to include him; you must show a clear and unambiguous indication of an intention to exclude plaintiff from sharing in the distribution which the executors have to make under this residuary bequest. "It is difficult to see how it could have been made clearer or less unambiguously. The testator might, no doubt, have added the words "whether as an heir of mine or as an heir of Jamsetji," but this would be really surplusage; the words "any share in such distribution" are *prima facie* exhaustive and in either case plaintiff really comes in only as a representative of Jamsetji. Mr. Rupchand contended that the executors had nothing to do with the actual distribution of Jamsetji's share, supposing he comes in as an heir and so the words "such distribution" should be construed as limited to the distribution to Jamsetji and the testator's other heirs. But such a construction is absurd, because Jamsetji's death is pre-supposed by the terms of the bequest and (as already mentioned) the exclusion of plaintiff is meaningless, if it is not intended to extend

(c) Watson's Compendium of Equity, 2nd Edn. Vol. II, pp. 1405-6, *Lee* v. *Lee*, (1860) 29 L. J. Ch. 788 at p. 790; 1 Dr. and Sm. 85; 6 Jur. (N. S.) 621; 8 W. R. 443; 62 E. R. 310; 127 R. R. 28; 2 L. T. (N. S.) 532.

(d) Halsbury's Laws of England, Vol. 28, Sec. 1273 at p. 662.

(1) (1860) 29 L. J. Ch. 788 at p. 790; 1 Dr. & Sm. 85; 6 Jur. (N. S.) 621; 8 W. R. 443; 62 E. R. 310 at p. 312; 127 R. R. 28; 2 L. T. (N. S.) 532.

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to her rights as a representative of Jamsetji on his death after surviving the testator. Also the executors would under sections 326, read with sections 91, 98, and 106 of the Succession Act, have been bound to pay plaintiff her share but for this exclusion. The words "such distribution" must clearly be given their natural and ordinary meaning, *viz.*, as referring to the *actual* distribution which the executors would have to make to the persons *then* entitled under the bequest.

It may be noted that it would not have been sufficient for the testator, if he wanted to exclude plaintiff, to have provided that the other moiety should be divided amongst "the persons who shall then be my heirs," etc., because in such a case the class is to be ascertained as if the testator had lived upto and died at the time referred to [Theobold 1 c. p. 312, citing *Sturge* v. *Great Western Railway Co.* (2)], and plaintiff might accordingly have claimed a share under section 5 of Act XXI of 1865, even though Jamsetji himself was excluded from the class of heirs". It was better and safer for him to exclude her expressly, as he has done.

With regard to my reference to section 80 of the Succession Act, I am aware that there is an *obiter dictum* of Tyabji, J., in *Pestonji* v. *Khurshed Bai* (3) that the words "without any qualifying terms" refer to the bequest and not to the relations, *i. e.* that the bequest must not be conditional. I venture, however, to think that the reference would more naturally be to the heirs, etc., and am supported in this opinion by the 3rd paragraph of the notes appearing on page 119 of Henderson's Law of Succession, 3rd Edition, as well as by the corresponding English Law to which I have referred. It is to be remarked that there is a special Part XVI of the Succession Act dealing with "conditional bequests", and if Tyabji, J.'s view is correct, the Legislature would surely have used words such as "where an unconditional bequest is made" or a "bequest other than a conditional one" to express its meaning. Further in that case if the words "without any qualifying terms" were used, they would probably have appeared after the word "bequest". It is also to be noted that these words "without any qualifying terms" do not appear in the analogous section 81, though if section 80 was intended to be limited to an unconditional bequest we should expect section 81 to be similarly limited. But why should not the words in question cover both things, *viz.*, a qualification which affects the property passing without any liability for debts, as it otherwise does under the section? And even if Tyabji, J.'s view be the correct one, it does not really affect this case. Section 80 does little more than say that in the case referred to, the property bequeathed shall not be liable for the payment of the testator's debts. The main section which supports the plaintiff's contention is section 106 and this expressly excepts cases where "a contrary intention appears by the Will."

For the above reasons I hold that plaintiff is not entitled to the declaration sought. The issues framed are accordingly answered as follows:—

1. Defendants Nos. 3, 4 and 5 became entitled to share the moiety of the residuary estate under clause 8 of the Will of the deceased N. N. Pochaji after the death of Jamsetji in the following shares *viz.*, defendants Nos. 3 and 4 each 1/3rd, and defendants No. 5 sharing 1/3rd between them in accordance with sections 2 and 5 of Act XXI of 1865.

2. It is unnecessary to answer this issue since the plaintiff is excluded, the sharers get the same share, whether they claim as heirs of Jamsetji or not.

3. There is now no dispute on this point, *i. e.* only a moiety of the residue is divisible among the heirs of N. N. Pochaji under clause 8 of the Will.

4. Plaintiff is entitled to only Rs. 10,000, but as plaintiff appears to have brought the suit under good legal advice and the executors support the request that her costs should come out of the estate, this may be done, with the exception of the costs incurred in the application already mentioned, which defendant No. 3 must bear. Pleader's fees allowed at Rs. 300 for the suit and Rs. 115 for appearance on the application for a commission. Defendants Nos. 3 to 5 can have

(2) 19 Ch. D. 444; 51 L. J. Ch. 185; 45 L. T. 787; 30 W. R. 456.

(3) 7 Bom. L. R. 207 at p. 217.

only one Pleader's fees under rule (6) at page 152 of the Court Rules.

Suit dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 197 OF 1913.

November 26, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

DATTAJIRAO SHIDHOJIRAO GHORPADE—PLAINTIFF—APPELLANT

versus

NILKANTRAO SANTAJIRAO GHORPADE—DEFENDANT—RESPONDENT.

Pensions Act (XXIII of 1871), s. 6—Saranjam—Presumption—Grant of land revenue and not of soil—Collector's certificate, necessity of—Admission by Pleader—Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Suit dismissed on preliminary point—Appeal—Remand, when possible.

In the absence of evidence to the contrary, the grant of a *saranjam* must be presumed to be a grant of land-revenue and not of the soil. [p. 486, col. 1.]

Where a Pleader in the lower Court makes an admission upon an issue regarding which evidence might be, but is not, given; in arguing the appeal, the client will be bound by the admission. [p. 486, col 2.]

Where the lower Court has disposed of a suit upon a preliminary point, the Appellate Court will not set aside the decree and remand the case, without a particle of documentary evidence, without any statement based upon affidavit, to induce the Court to hold that evidence is forthcoming which ought to have been produced in the lower Court in the interest of the plaintiff, and which would have been produced but for some grave error on the part of his Pleader. [p. 486, col. 2; p. 487, col. 1.]

First appeal from the decision of the First Class Subordinate Judge of Dharwar, in Suit No. 20 of 1912.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *Coyaji* (with him Mr. *N. V. Gokhale*), for the Respondent.

JUDGMENT.—The plaintiff alleged that one Shidhojirao was the full owner of all the lands in two villages, *namely*, Jigeri and Irapur of Ron Taluka, and one house at Gajendragad, that the two villages were *saranjam inams*, that the plaintiff's father died in 1899, that the plaintiff and his father were joint and the properties abovementioned were managed and enjoyed jointly by them up to the death of the plaintiff's father, that afterwards up to about June 1900 the plaintiff alone managed and enjoyed the property, and that about the month of June 1900 the father of the defendant, without having any right thereto, illegally took possession of all the land and was in enjoyment of it until five years ago, when he died, and since then the defendant had been enjoying the property. The plaintiff further alleged that his father bequeathed the property in suit to him by Will, in the year 1890, but the plaintiff brought the suit not merely relying upon the right which accrued to him under the Will but upon his right by his survivorship and as the son of Shidhojirao, and he prayed that the *saranjam* lands in tho two villages of Irapur and Jigeri should be given over by the defendant, that mesne profits should be awarded, and further profits from the date of suit until possession at the rate of Rs. 1,000 a year. The defendant by the sixth paragraph of his written statement pleaded that the suit was not maintainable without a certificate of the Collector under section 6 of the Pensions' Act (XXIII of 1871).

On the 13th September 1912, a preliminary issue was raised in the trial Court as follows:—"Whether the suit can lie without a certificate under the Pensions Act?" On the 22nd of October 1912, the Court passed its decision upon that issue, giving as its reason that "Mr. Kambli for the plaintiff agrees that a certificate is necessary and wants time to produce it." Time, accordingly, in accordance with the practice of Civil Courts in this Presidency, was given to the plaintiff's Pleader. On the 1st April 1913, the learned Judge disposed of the suit upon the preliminary issue, saying "after repeated adjournments for the production of the certificate, the plaintiff's Pleader now informs the Court that the Collector has refused to grant the certificate. He appears clearly to have refused the certificate on the strength of Government Notification No. 1455, dated the 10th February 1912, published in the *Bombay Government Gazette*, Part I, page 192. The plaintiff's Pleader wants time to appeal to the Commissioner, but no such remedy is given to him by law. The suit is, therefore, dismissed with costs."

Now the plea raised by the sixth paragraph of the written statement was based upon the provision of Pensions Act, section 4, "that no Civil Court shall entertain any suit rela-

ing to any possession or grant of money or land-revenue conferred or made by the British or any former Government:" and the subsequent provision is that to which I have already alluded, contained in section 6, "that a certificate by the Collector authorising to file the case must be produced." It is quite clear from the plaint that the plaintiff came to trial on the footing of the property which he seeks to recover being *saranjam*, and it is equally clear that the plea contained in paragraph 6 of the written statement is based upon the established rule that in the absence of evidence to the contrary, the grant of a *saranjam* must be presumed to be a grant of land-revenue and not of the soil. That is laid down in *Ramachandra* v. *Venkatrao* (1), and reference is made in the judgment in that case to the definition by Professor Wilson in his Glossary of the term "Saranjam." He defines *saranjams* as "temporary assignments of revenue from villages or lands for the support of troops or for personal service, usually for the life of the grantee, also grants made to persons appointed to civil offices of the State to enable them to maintain their dignity. They were neither transferable nor hereditary, and were held at the pleasure of the Sovereign." The judgment also quotes the statement of Mr. Steele in his Hindu Castes at page 207 that "Grants by the Native Government in *jaghir* were either *Fouj saranjam*, subject to the performance of military service, or *Jat saranjam*, personal *jaghir*. The subject of these grants were the whole or particular portions of the revenues of villages belonging to the Sirkar. Usually the grants depended upon the pleasure of the Sovereign, and the fidelity of the grantee. They were not, in general, hereditary."

There is, therefore, a strong presumption that the Pleader for the plaintiff in agreeing that a certificate was necessary under the Pensions Act was taking a correct view of the position. But if that was not correct, it could only be shown to be incorrect by the production of evidence which would establish that the grant was not the usual grant of revenue but a grant of the soil. However, time was given for the production of the certificate, and the reason for the refusal of the certificate appears to have been the rule laid down in the Government Notification cited by the Subordinate Judge that certificates shall not be given in the case of *saranjams*, probably because *saranjams* are not ordinarily hereditary in the usual sense of the word, that is to say, they do not pass except with the consent of the Ruling Power to the heir of the holder.

The plaintiff, however, has appealed from the decision, and his Pleader, as far as we can ascertain, without any materials whatever before him, has positively asserted that he could prove by evidence, if he were given the opportunity, that the grant in this case is a grant of the soil and not of the revenue. He says that, for the purpose of arguing the appeal, he cannot be concluded by the admission of the plaintiff's Pleader in the lower Court, because an admission of a Pleader on a point of law is not binding upon the client in appeal. Whether that is a correct statement in its unqualified form, where the admission is the direct cause of the dismissal of the suit, it is not necessary now to consider, for, upon the statement of the appellant's Pleader and upon the authorities to which I have just referred, it is clear that the plaintiff could only succeed in showing that the suit could be maintained without a certificate, if he called evidence to displace the ordinary presumption regarding the nature of *saranjam* grants; and where a Pleader in the lower Court makes an admission upon an issue regarding which evidence might be, but is not, given, we have the authority of the Privy Council for holding that the client will be bound: See *Raja Bommadevara Venkata Narasimha Naidu* v. *Raja Bommadevara Bhashyakarlu Naidu* (2). Let us, however, assume that the appellant is not bound by the admission of the Pleader in the lower Court, then we have before us an appeal where the lower Court has disposed of the suit upon a preliminary point. We cannot, then, remand the case under Order XXI, rule 23, unless we reverse the decree in this appeal. But what materials have we to justify us in reversing the decree? The presumption based upon high authority is that the decree was perfectly right, but the appellant has come to this Court to have the decree set aside and the case remanded without a particle

(1) 6 B. 598.

(2) 29 I. A. 76; 4 Bom. L. R. 543; 6 C. W. N. 641; 25 M. 367 (P. C.).

of documentary evidence, without any statement based upon affidavit, to induce us to hold that evidence is forthcoming which ought to have been produced in the lower Court in the interest of the plaintiff, and which would have been produced but for some grave error on the part of his Pleader. We cannot presume that this is the case. We, therefore, hold that the decision of the lower Court was right. We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 80 OF 1914.

January 7, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

VEERA REDDY—DEFENDANT No. 1—PETITIONER

versus

AKKA REDDY AND OTHERS—PLAINTIFFS—DEFENDANTS Nos. 2 & 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Withdrawal of suit—Appellote Court, power of, to permit withdrawal of suit—Non-joinder of parties, whether sufficient cause—Material irregularity—Revision.

An Appellate Court commits a material irregularity if it permits a plaintiff on appeal to withdraw his suit, after a decree has been passed against him by the Court of first instance, without assigning any reasons for acceding to the plaintiff's application.

Where it is urged that a suit is bad for non-joinder of parties, an Appellate Court has no jurisdiction to permit the plaintiff to withdraw his suit on that ground, as under the Civil Procedure Code no suit can be dismissed for non-joinder of parties and the Appellate Court can add the necessary parties and dispose of the appeal in some lawful manner.

Quære.—Whether an Appellate Court as such can permit the withdrawal of a suit?

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Chingleput, in Appeal Suit No. 29 of 1913, preferred against that of the Principal District Munsif of Chingleput, in Original Suit No. 130 of 1910.

Mr. *S. Doraiswami Aiyar*, for the Appellant.

Mr. *C. Narasimhachari*, for the Respondents.

JUDGMENT.—The learned Subordinate Judge on appeal has allowed the plaintiffs to withdraw the suit with liberty to bring a fresh suit. This civil revision petition is filed by the 1st defendant for revision of the said order. In *Tirupati* v. *Muthu* (1), this Court held that it was a material irregularity for a District Court to permit the plaintiff on appeal to withdraw his suit after decree has been passed against him by the Court of first instance without assigning any reasons for acceding to the plaintiff's application. In the present case, the Subordinate Judge has, without assigning reasons, acceded to the plaintiff's application.

The only ground mentioned in the plaintiff's application is that the plaintiff was advised that the suit was bad for non-joinder of some other persons as parties. Now under the Civil Procedure Code a suit cannot be dismissed on the ground of non-joinder and the Appellate Court, if it was of opinion that the suit was bad for non-joinder, could have added the necessary parties and disposed of the appeal in some lawful mode (including an order of remand, if necessary, after the addition of necessary parties). The petitioner further argued that the Subordinate Judge had no jurisdiction as an Appellate Court to permit the withdrawal of the suit. The petitioner is no doubt supported in this contention by the authority of *Choragudi Chinna Kotayya* v. *Raja Varadaraja Appa Row* (2). It is unnecessary for me to express a final opinion on that question for the purpose of deciding this revision-petition, as I hold on another ground that the order of the Subordinate Judge cannot be supported. I might, however, be permitted to say, with the greatest respect to the learned Judges who decided the case in *Choragudi Chinna Kotayya* v. *Raja Varadaraja Appa Row* (2), that, as at present advised, I think that the view enunciated in that case requires re-consideration. In the result I set aside the order of the Subordinate Judge in appeal, allowing the withdrawal of the suit, and direct him to dispose of the appeal before him in accordance with law. The plaintiffs must pay the petitioner's costs of this petition.

Petition allowed; Order set aside.

(1) 11 M. 322.

(2) 25 Ind. Cas. 388; 27 M. L. J. 244; 1 L. W. 612; 16 M. L. T. 186.

NIAMAT RAI v. KALU RAM.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 484 OF 1911.

March 10, 1915.

Present:—Justice Sir Donald Johnstone, Kt., and Mr. Justice Shah Din.

NIAMAT RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Principal and agent—Contract of sale—Notice to agent calling upon his principal to take delivery—Failure to do so, effect of.

The plaintiffs sued the defendants for Rs. 2,031-12-6 made up of earnest money on a contract for the supply of wheat by the defendants and of damages for non-delivery. The defendants repudiated the liability, on the ground that the plaintiffs had failed to take delivery although a notice had been served upon their agent calling upon them to do so:

Held, that notice to the agent was sufficient notice to the plaintiffs and as they had failed to take delivery when offered, the defendants were not liable.

Second appeal from the decree of the Divisional Judge, Gujranwala Division, at Lahore, dated the 16th March 1911, reversing that of the District Judge, Montgomery, dated the 29th August 1910, decreeing plaintiffs' claim in part.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Rai Bahadur Pandit *Sheo Narain*, for Respondents Nos. 1 to 3.

Lala *Radha Kishen*, for Respondent No. 1.

JUDGMENT.—In connection with a *satta*, dated 3rd *Sawan Sambat* 1964, with a modifying endorsement of the following day, plaintiffs, traders of Fazilka, sued eleven defendants for Rs. 2,031-12-6, made up thus:—

	Rs.	A.	P.
Earnest money on contract for supply of wheat to plaintiffs	11	0	0
Advances on same account	200	0	0
Damages for non-delivery based on current rate of 25th *Asauj Sambat* 1964, the date of demand by plaintiffs	1,820	12	6

Defendants' case was that defendants Nos. 4 to 11 were not liable in any circumstances being agents merely, and that none were liable, inasmuch as defendants Nos. 1 to 3 had, by a notice dated 12th *Bhadon Sambat* 1964, called upon plaintiffs to take delivery and that they had not done so. To this plaintiffs demurred that no such notice was sent at all, and if sent at all, was not served on plaintiffs but at most on defendant No. 11, and that this was no sufficient service. As a matter of fact the notice, if it was such a notice as defendants allege, was sent by registered post to defendant No. 11, who, however, swears that he passed it on to the plaintiffs.

The first Court refused to believe that the notice had been communicated to the plaintiffs and held also that service of it on defendant No. 11 or defendants Nos. 4 to 10 was insufficient. It then held plaintiffs entitled to recover against defendants Nos. 1 to 3 alone, the principals, and gave a decree for Rs. 1,200, assessing damages at Rs. 990 only.

Both parties appealed—defendants Nos. 1 to 3 for complete absolution and plaintiffs for Rs. 495 more as damages. The lower Appellate Court held that notice to the agent, defendant No. 11, was sufficient notice to plaintiffs, and that defendants Nos. 1 to 3 were justified in asking plaintiffs to take delivery as early as 12th *Bhadon*, and thus he dismissed the claim with costs throughout.

Plaintiffs have come up here with a further appeal, under the old law, and we have heard arguments and have examined the record. As to the facts we think there can be no reasonable doubt that notice to plaintiffs to take delivery before 1st *Asauj* was served on defendant No. 11 by defendants Nos. 1 to 3 on 15th *Bhadon* by a letter dated 12th *Bhadon*. This letter is not forthcoming, defendant No. 11 saying it was handed to Narsingh Das, plaintiff No. 4; but the oral evidence and subsequent events leave little doubt in our minds as to this. But even if defendant No. 11 did not hand on the notice, we think that service on him was sufficient. We have read the plaintiffs' notice of 25th *Asauj*, mentioned above, and we have taken note of the allegations against defendants Nos. 4 to 11 in the plaint, see especially paragraph 4, and in Narsingh Das's oral statement that the contract was entered into on plaintiffs' behalf on 3rd *Sawan* by

defendant No. 11, agent for defendants Nos. 4 to 10. No doubt the alteration in the contract contained in the aforesaid endorsement on the *satta* of 4th *Sawan* was signed by Narsingh Das himself; but substantially the contract stood as before and subsequent events showed that defendants Nos. 4 to 11 were not by that alteration thrown overboard.

In these circumstances we are constrained to agree with the lower Appellate Court. We dismiss this appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL NO. 96 OF 1912.
November 30, 1914.
Present:—Mr. Justice Heaton and Mr. Justice Shah.
BHAGWANDAS NAGINDAS—CLAIMANTS—APPELLANTS
versus
THE SPECIAL LAND ACQUISITION OFFICER—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 6, 49—Declaration of intention to acquire a part—Owner's desire that the whole should be taken—Fresh notification necessary—Waiver.

A part only of a crtain piece of land was notified under the Land Acquisition Act to be acquired for the Railway. Under clause (1) of section 49 the owners expressed a desire that the whole land should be taken and not a part. The Collector assented to the acquisition of the whole, but did not consider it necessary for Government to declare its intention for acquiring the whole. An award was made, objected to, and the matter was referred to the Court. There, in addition to objections relating to the amount of compensation, the owners alleged that the whole proceedings were *ultra vires*, as there was no notification to acquire the whole land:

Held, (1) that the proceedings were illegal and must be set aside; [p. 490, col. 1.]

(2) that the owners were not under any obligation to take the objection until the matter came before the Court and therefore there was no waiver. [p. 490, col. 1.]

First appeal from the decision of the Assistant Judge of Thana, in Reference No. 1 of 19 0.

Mr. *P. B. Shingne*, for the Appellants.

Mr. *S. S. Patkar*, (Government Pleader), for the Respondent.

JUDGMENT.

HEATON, J.—A certain portion of land situated near the Santa Cruz Station was notified under the Land Acquisition Act to be acquired for the Railway. The owners of this land took advantage of the provisions of clause (1) of section 49 of the Land Acquisition Act and expressed their desire that the whole should be taken and not a part. The declaration issued under section 6 had been of a part only. There is no dispute now that the owners acted rightly in this way and that they were entitled to have the whole and not the part acquired. We are only concerned with what followed. The Collector informed the owners and claimants that he accepted the claimants' statement as a declaration of the wish of the parties that the whole premises should be acquired. He said that he would act accordingly and would acquire the whole and that there was no necessity for Government to declare its intention of acquiring the whole. He then proceeded to make an award which was objected to by the claimants, and the matter was referred to the Court. Before the Court, in addition to objections relating to the amount of compensation, the claimants alleged that the whole proceedings were *ultra vires*, because there had never been any declaration under section 6 of the Act relating to the area of land which had been taken up.

The Assistant Judge who disposed of the matter held that this objection was made out and was a perfectly good objection in itself, but held that it had been waived by the conduct of the claimants.

Both points have been argued before us, that is, *first*, whether the proceedings are invalid or not and, *secondly*, whether there has been a waiver by the claimants. I think the proceedings are invalid and briefly for this reason. The Government have no right whatever and no power against the wishes of the owner to take this land except as provided by the Land Acquisition Act. Here they have taken the claimants' land without the declaration required. That seems to me to be fundamentally and absolutely wrong. An argument was advanced as to whether section 49 did not, by its terms, imply that the notification of the whole might be dispensed with although the whole was to be acquired, provided

that there had been a declaration regarding the part. I will not spend time in discussing the phraseology of this section, but will content myself with expressing the opinion at which I have arrived after carefully reading it. My opinion is that section 49 confirms the view that in a case of this kind acquisition or rather the taking up of land without a declaration relating to the land taken is absolutely illegal. I feel no doubt, therefore, that the acquisition was contrary to law and that the whole of the proceedings beginning with the Collector's award are bad, and must be set aside.

That there is no waiver I feel equally sure about. I really am unable to follow the reasoning of the Assistant Judge who arrived at the conclusion that there was a waiver. To begin with, I doubt whether there could, in any circumstances, be a waiver in a case of this kind. I do not think that an owner of land could waive the objection that the acquisition by Government was illegal. If it is illegal, it is so and cannot be made legal by the silence of the claimants, although, of course, if the claimants had accepted the compensation without objection, the illegality would never come to notice or it may be that there would then be an acquisition by agreement and not under the Act. Moreover, I do not think that, even if there could be a waiver in this kind of case, that there has been a waiver in this particular case. The evidence that has been recorded, so far as it has been brought to our notice, does not show that the claimants made up their minds to forego an objection which it was within their power to raise. The evidence does not show when it first occurred to them that this objection existed. The law does not show that they were under any obligation to take the objection until the matter came before the Court. The proceedings certainly do show that the Collector was in no way misled by the claimants. It was he who, I presume, on his reading of what the Land Acquisition Act provides, came to the conclusion that no further declaration was necessary although the claimants expressed their desire that the whole and not a part of the premises should be acquired. I am unable, therefore, to see that there are in this case the essential elements to constitute the waiver.

I think the order of the Court, therefore, must be that the whole of the proceedings including the award made by the Collector be set aside and it will be for the parties to determine for themselves how they are to extricate themselves from the very curious position in which they now find themselves.

The appellants have also taken objection to the amount of compensation awarded by the lower Court, but this is a matter which, of course, we have not dealt with.

The appellants must have their costs in both Courts, because they succeed in this appeal.

SHAH, J.—I concur.

Order set aside.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 85 OF 1914.

February 5, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

PICHAIKUTTIA PILLAI—PLAINTIFF—PETITIONER

versus

RENGANADAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 4—Succession and survivorship—Joint Hindu family debt—Certificate, if required—Promissory note in favour of a member of the family makes no distinction—Opportunity to be given for production of certificate.

In Hindu Law there is a clearly marked distinction between succession and devolution by survivorship, and as the succession certificate is designed to facilitate the collection of debts on succession, *prima facie* the cases of survivorship are not within the ambit of the Act. [p. 491, col. 1.]

The fact that a debt is due upon a promissory note in favour of a member of a joint Hindu family does not make any difference in the consrtuction of section 4 of the Act. In all such cases the question is whether the moneys sought to be recovered were advanced from joint funds, or were the individual earnings of the person in whose favour the document was executed. [p. 491, col. 2.]

There is nothing in the Succession Certificate Act to countenance the view that upon the face of the document the debt should appear to belong to the family. [p. 491, col. 2.]

On taking evidence if it appears that the moneys were not advanced from the funds of the joint family, the Court should give the plaintiff an opportunity of producing a succession certificate within a reasonable time, and then pass a final judgment in the case. [p. 492, col. 1.]

PICHAIKUTTIA PILLAI *v.* RENGANADAN.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Tiruvalur, in Small Cause Suit No. 1368 of 1913.

Mr. *T. R. Venkatarama Sastri*, for the Petitioner.

Mr. *K. S. Ganesha Aiyar*, for the Respondents.

JUDGMENT.—The plaintiff's case is that the promissory-note sued upon was executed to his undivided uncle for moneys advanced from the joint family property. The district Munsif held that without a succession certificate the suit upon the promissory note is not sustainable. It was not seriously contended that his conclusion can be sustained, in so far as he has not given the plaintiff an opportunity of producing a succession certificate. This procedure of the District Munsif is opposed to section 4 of the Succession Certificate Act and does not find support in any of the reported cases.

The important point argued by the learned Vakils on either side is as to whether a succession certificate is necessary in the case of debts due to a member of joint family, and secondly, whether the fact that the document sued upon is a promissory note should make any difference in regard to the law upon the subject. The Act itself is designed to facilitate the collection of debts on succession. In Hindu Law there is a clearly marked distinction betwen succession and devolution by survivorship, and as the preamble only refers to cases of succession, *prima facie* cases of survivorship are not within the ambit of the Act. It has been argued by Mr. Ganesa Aiyar that under section 4 of the Succession Certificate Act what the Court has to see is whether the debt which is sought to be recovered was recoverable by the person in whose favour the document was executed, irrespective of the question that the debt itself belonged to the joint family. He contended that in the case of promissory notes as the suit can be brought only by the payee or the endorsee, the property in the note vests in the person in whose favour the document has been executed; and consequently no question of the debt being due to the joint family can arise in such cases. I am unable to accede to this contention. As was pointed out by Mr. Venkatrama Sastriar, if moneys had been advanced upon a promissory note from joint funds, and if the manager of the joint family collusively and fraudulently purported to discharge the executant from liablity, it would still be open to the other members of the family to claim the debt from the person who had executed the document; therefore, the fact that it is a debt due upon a promissory note can make no distinction in the construction of section 4 of the Succession Certificate Act. In all cases the question will be, whether the moneys sought to be recovered were advanced from joint funds or were the individual earnings of the person in whose favour the document was executed.

There are a large number of cases bearing on this question. The earliest of them in this Court is that of *Venkataramanna* v. *Venkayya* (1). It was held in that case that unless the fact that the money was due to the joint family was apparent upon the face of the document a succession certificate was necessary. This view was apparently accepted in *Vaidyanatha Aiyyar* v. *Chinnasami Naick* (2). But in *Subramanian Chetti* v. *Rakku Sarvai* (3), the learned Judges pointed out that this qualification, that in order to enable a member of a joint family to sustain a claim for the debt due to the family without producing a succession certificate there should be something on the face of the document indicating that the debt was due to the family, was altogether an unnecessary reservation. In *Pallam Raju* v. *Bapanna* (4) the view of the learned Judges who decided 20 Madras was accepted as correct.

Speaking for myself, I fail to see upon what principle the qualification, that upon the face of the document the debt should appear to belong to the family, can be imposed. There is nothing in the Succession Certificate Act to countenance this view. And in other Courts this principle of the debt appearing upon the face of the document to be due to the family has not been accepted. *Pateshuri Partap Narain Singh* v. *Bhagwati Prasad* (5) is distinctly against

(1) 14 M. 377.
(2) 17 M. 108.
(3) 20 M. 232; 7 M. L. J. 100.
(4) 22 M. 380.
(5) 17 A. 578; A. W. N. (1895) 132.

this view. In *Jagmohandas Kilabhai* v. *Allu Maria Duskal* (6), *Beejraj* v. *Bhyropersaud* (7) and *Gurpershad Singh* v. *Dhori Rai* (8) the only question that was considered was whether the debt belonged to the joint family or was due to the deceased member in his individual capacity. The case in *Mathura Prasad* v. *Durgawati* (9), which Mr. Ganesha Aiyar very fairly brought to my notice, is a direct authority against the position that a document upon the face of it must have the impress of a joint family debt if a succession certificate is to be dispensed with. The most recent decision of this Court is that of the learned Chief Justice in *G. Perayya* v. *Ahmad Abdul Rahiman Sait* (10), in which he follows the earlier decision in *Venkataramanna* v. *Venkayya* (1) and points out that in the case of a promissory note unless the debt appears upon the face of the document to be due to the joint family, a succession certificate is required. The learned Chief Justice's attention was apparently not drawn to the later cases in *Subramanian Chetti* v. *Rakku Sarvai* (3) and *Pallamaraju* v. *Bappanna* (4), in which the learned Judges dissented from this view.

On principle and upon the language of section 4 of the Succession Certificate Act, the view taken in *Pallam Raju* v. *Bapanna* (4), which is also the view taken in all the other High Courts, seems to me to be sound. These are decisions of Benches and as my view is also in accordance with them, I must hold that the District Munsif was wrong in holding that a certificate was necessary in the circumstances of this case. Of course, on taking evidence if it appears to him that the moneys were not advanced from the funds of the joint family, he will give the plaintiff an opportunity of producing a succession certificate within a reasonable time and then pass a final judgment in the case. I must reverse the decision of the District Munsif and direct him to take the case on his file and dispose of it according to law. Costs to abide the result.

Petition accepted; Suit remanded.

(6) 19 B. 338.
(7) 23 C. 912.
(8) 7 Ind. Cas. 806; 38 C. 182; 13 C. L. J. 203.
(9) 24 Ind. Cas. 182; 36 A. 280; 12 A. L. J. 525.
(10) 25 Ind. Cas. 206; (1914) M. W. N. 671; 1 L. W. 612; 27 M. L. J. 236.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2318 TO 2330 AND 2332 TO 2345 OF 1912.

December 17, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

DEVI BHUKNOJI KASIDOSS SUBBARAYA DEVAGE GARU AND OTHERS —DEFENDANTS—APPELLANTS

versus

ALLAMADUGU NARAYANA REDDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 13 (3), applicability of—Payment of rent—Enhanced rate—Previous agreement—Payment for 7 years, whether proves agreement or contract—Consideration.

An *inamdar* cannot take proceedings under the Estates Land Act and say at the same time that his *inam* is not an "estate" under the Estates Land Act. [p. 492, col. 2.]

A *ryot* will become disentitled to the benefit of section 13 (3) of the Estates Land Act only if he had contracted himself out of his rights by a contract actually in force. [p. 493, col. 1.]

Venkata Perumal v. *Ramudu*, 27 Ind. Cas. 688; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129, refered to.

Payment of rent for seven years at the enhanced rate proves merely an agreement and not a contract when there is no consideration in support of it. [p. 493, col. 2.]

From a previous payment no presumption as to the fairness of rent can be raised under sections 27 and 28 of the Estates Land Act, when it is inequitable to do so. [p. 493, col. 1.]

Second appeals against the decrees of the District Court of North Arcot, in Appeal Suits Nos. 419, 415 to 418, 420 to 427 and 429 to 442 of 1911, preferred against those of the Revenue Divisional Officer of Chandragiri, in Summary Suit Nos. 789, 785 to 788 and 790 to 797, 799 to 812 of 1910.

Messrs. *A. Nanabhoy Deray* and *Krishnaswami Aiyar*, for the Appellants.

Mr. *L. A. Govindaraghava Aiyer*, for the Respondents.

JUDGMENT.—It is first argued that the lower Courts had no jurisdiction to entertain the suits as the lands do not form part of an estate under the Madras Estates Land Act. This objection was not taken in the Court of first instance. The appellant, an *inamdar*, has treated the lands as part of an "estate" by taking proceedings under the Act and there is certainly no presumption that an *inamdar* is entitled to both the *melvaram* and the *kudivaram*. If there is

any presumption in this case, it is that the *inamdar* is entitled only to the *melvaram*. We, therefore, disallow this contention.

The appellant is a land-holder who was receiving rents from his *ryots* at a certain rate for his *manavari* (rain-fed) lands. The tenants constructed wells on their lands and with water from those wells, they raised garden crops, for which the appellant for some years demanded and received rent at a higher rate. The tenants now refuse to pay rent at such enhanced rates. The question is whether the landlord is entitled to claim it.

The lower Appellate Court has decided that the landlord is not so entitled under section 13, clause 3, of the Estates Land Act.

The appellant contends this section does not apply and relies upon the judgments in *Venkata Perumal* v. *Ramudu* (1). In those cases, however, it was found that there was a contract between the parties that rent should be paid at the higher rate when land was cultivated with well-water. In the cases before us the appellant alleged that there was a *cist* rate and when it was reduced and he collected the *vasul* rate, it was under an agreement that if garden crops were raised with well water he should be paid the *cist* or *taram* assessment. This argeement has not been proved. The case, therefore, does not apply.

It was then argued that the plaintiff is entitled to the *varam* rate of rent. But there was no attempt to prove in this case that there is an established *varam* rate or that the plaintiff is entitled to recover at that rate in the absence of any contract.

It is also said that under sections 27 and 28 of the Madras Estates Land Act it should be presumed that the rent which was paid during the preceding *Fasli* must be presumed to be the fair rate. The appellant did not contend in the lower Courts that he was entitled to recover the amount as being a fair rent. It has been found by the Courts that the crops were raised with water from the wells constructed at the tenants' expense, and it is not shown why the appellant should get any share of the higher value of the crops raised.

(1) 27 Ind. Cas. 688; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129.

Payment for a period of seven years may be evidence of an agreement, but it will not be a contract unless there is any consideration for it and on the facts found, there is no consideration.

We dismiss the second appeals with costs.

Appeals dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 262 OF 1913.

December 2, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

SADASHIV VENKAJI JOSHI—DECREE-HOLDER - APPELLANT

versus

NARSINGRAO KONHERRAO—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Art. 182—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 47—Conciliator's certificate—Civil Procedure Code (Act XIV of 1882), s. 248—Notice, effect of.

An application for execution which is otherwise in accordance with law, is an application in accordance with law within the meaning of Article 182 of the Indian Limitation Act even though it is not accompanied with the Conciliator's certificate as required by the Dekkhan Agriculturists' Relief Act. [p. 494, col. 1.]

If an application for execution is presented and a notice is issued by the Court as provided by the Civil Procedure Code, the applicant is entitled to take advantage of the fact of the issue of such notice even though the application may be defective owing to the absence of a Conciliator's certificate. [p. 494, col. 2.]

First appeal from the decision of the District Judge of Belgaum, in Darkhast No. 1 of 1913.

Mr. *A. G. Desai*, for the Appellant.

Mr. *Nilkanth Atmaram*, for the Respondents.

JUDGMENT.

SHAH J.—The question in this appeal is one of limitation. The lower Court has dismissed the Darkhast as time-barred, on the ground that the Application No. 500 of 1906, which was presented on the 10th of November 1906, was not an application in accordance with law to the proper Court for execution. This application was held to be not in accordance with law, because under section 47 of the Dekkhan Agricul-

SADSAHIV VENKAJI JOSHI v. NARSINGRAO KONHERRAO.

turists' Relief Act it was not accompanied with a Conciliator's certificate as required by that section. In support of his conclusion the learned Judge has relied upon the case of *Manohar* v. *Gebiapa* (1). Apart from the decision, it seems to me that an application for execution which is otherwise in accordance with law is an application in accordance with law within the meaning of Article 182 of the Indian Limitation Act, even though it is not accompanied with the Conciliator's certificate as required by the Dekkhan Agriculturists' Relief Act. No doubt this view is in conflict with the decision which I have just mentioned. But several recent decisions of this Court support the view which I take of the meaning of the word 'entertained' in section 47 of the Dekkhan Agriculturists' Relief Act. The case of *Bando Sabrao* v. *Jambu Tarnappa* (2) and the unreported judgments in Civil Extraordinary Applications Nos. 155 of 1909 and 161 of 1909 and in Civil Reference No. 7 of 1910 all consistently point to the conclusion that the view taken in *Manohar's* case (1), cannot now be accepted. No doubt in case of a conflict of decisions ordinarily a reference to a Full Bench would be necessary: but having regard to the current of recent decisions of this Court, it seems to me to to be now settled that a suit or an application, though not accompanied with a Conciliator's certificate, can be legally presented to a competent Court. Without the certificate there may be difficulty in proceeding with the suit or the application in consequence of the provisions of section 47 of the Dekkhan Agriculturists' Relief Act. I am, therefore, of opinion that the appellant's contention that the application of the 10th of November 1906 was in accordance with law for the purposes of the Indian Limitation Act, must be allowed.

There is another ground also, upon which the present appeal should be allowed. It is not denied on behalf of the respondents that, on the application of the 10th of November 1906, a notice under section 248 of the Code of Civil Procedure of 1882 was issued, though not served upon the judgment-debtors. Under clause (5) of Article 179 of Schedule II of the Indian Limitation Act of 1877, time would commence to run against the appellant from the date of such notice. The learned District Judge has, however, held against the appellant, on the ground that if the application without a certificate could not be entertained by the Court, no notice would be necessary under the Civil Procedure Code and the issue of such a notice could not be of any use. It seems to me, however, that if an application for execution is presented and a notice is issued by the Court as provided by the Civil Procedure Code, the applicant is entitled to take advantage of the fact of the issue of such notice, even though the application may be defective owing to the absence of a Conciliator's certificate.

The result, therefore, is that the order of the lower Court is set aside and the application sent back to that Court for disposal according to law. Costs to be costs in the application.

HEATON, J.—I agree to the order proposed. But as there have been differences of opinion in the past, I will add a few words of my own, although the matter is not really of much practical importance now, seeing that conciliation has been abolished and apparently is unlikely to be revived.

Reading section 47 of the Act in the light of the everyday procedure of our Courts, I think it contemplates at least two classes of cases in execution: those in which the plaintiff or the decree-holder recognizes the necessity of a certificate from the Conciliator and produces it, and those in which he does not recognize or denies the necessity of a certificate. In the latter case it seems to me that he is acting entirely within the law in presenting his application or plaint without a certificate and obtaining the Court's decision as to whether the certificate is required, and when the Court decides that the certificate is necessary, I do not think that decision invalidates or renders inoperative anything that has gone before, but it compels the Judge to suspend operations until the certificate is furnished. That is my view of what section 47 means, as I say, in the light of everyday proceedings of our Court.

The only argument that has appealed to

(1) 6 B. 31.
(2) 7 Ind. Cas. 986; 12 Bom. L. R. 80.

me in favour of the contrary view is what the District Judge has written about the words "immediately preceding." But I think that the meaning to be attached to these words is that a certificate must be produced of a date within the year immediately preceding the production. That reading seems to me to give the words of the section a grammatical meaning, a perfectly correct grammatical meaning, and a meaning entirely in consonance with the requirements of our regular procedure. It follows from what I have said that in a case of this kind the issue of a notice calling on the judgment-debtor to show cause why the decree should not be executed is a legal and necessary proceeding, because the Judge is seized of a matter within his jurisdiction in which he may have to determine the validity of objections raised by the judgment-debtor, one of which might be that a certificate from a Conciliator was needed.

Order set aside.

MADRAS HIGH COURT.

CIVIL APPEAL No. 21 OF 1913.

February 3, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

NARAYANAN AND OTHERS—PLAINTIFFS Nos. 2 TO 4—APPELLANTS

versus

RANGASAMI CHETTY *alias* P. CT. PERUMAL CHETTY AND OTHERS—DEFENDANTS Nos. 1 TO 4—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 115—Mortgage in name of benamidar—*Money received by* benamidar, *suit by real owner to recover—Limitation—Suit, nature of.*

The plaintiff's predecessor obtained a mortgage bond executed *benami* in the name of the defendant's predecessor, on the understanding that the latter should have nothing to do with it and that the former should conduct all necessary proceedings in the latter's name and that after the amount was collected and got into the latter's hand, the latter should hold it at the former's disposal and act according to his directions. This amount was received from the Court at the instance of the latter's Vakil on the 3rd February 1908, who paid it to the latter on the 10th. The plaintiff filed a suit to recover the amount on the 6th February 1911:

Held, that the suit was governed by Article 62, Schedule I of the Limitation Act, and that as it was brought more than three years after the amount was received, it was barred. [p. 496, col. 1.]

Such a suit is neither one to follow trust property within the meaning of section 10 of the Limitation Act, nor is it a suit for damages for breach of contract under Article 115 of Schedule I of the Limitation Act, as it cannot be said that receipt of money of itself evidences a contract to re-pay without further consideration. [p. 496, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 89 of 1911.

Mr. *S. Srinivasa Iyengar*, for the Appellants.

Mr. *T. Rangachariar* (with him Mr. *Venkatachariar*), for the Respondents.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge, Ramnad, dismissing the plaintiff's suit on the ground that it was barred by limitation.

The plaintiff's case is that Krishnan Chetty, the managing member of his family, obtained the mortgage-bond (Exhibit A) executed *benami* in the name of Siva Chethambaram Chetty, on the understanding that the latter should have nothing to do with it and that Krishnan Chetty should conduct all necessary proceedings in the name of Siva Chithambaram and "that after the amount is collected and got into the hands of Chidambaram Chetty," the latter should hold it at the plaintiff's disposal and act according to the directions of Krishnan Chetty. It is alleged by the plaintiff that the amount was received from the Court at the instance of the said Krishnan Chetty by Siva Chithambaram's Pleader on the 3rd February 1908, who paid it to Siva Chithambaram on the 10th. The suit was filed on the 6th February 1911.

The Subordinate Judge held that Article 62 of the Limitation Act applied, and, therefore, the suit is barred.

That Article applies to all suits for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. In this case the money according to the allegations in the plaint was received in fact by the defendants' predecessor-in-title for the use of the plaintiffs' predecessor-in-title. The case of *Subbanna Bhatta* v. *Kunhanna Banta* (1) is directly in point. It is, however, argued before us that this Article applies to suits for 'money

(1) 30 M. 298; 17 M. L. J. 224; 2 M. L. T. 332.

JAMNA KUNWAR v. RAMHIT SINGH.

had and received' and where money is payable under a contract, the suit must be brought for breach of contract; that Article 115 of the Limitation Act, and not Article 62, applies and the decision cited above should not be followed. We are of opinion that the case before us is not one of contract. The fact that the defendant promised to pay the money to the plaintiff or hold it at his disposal does not by itself show there was a contract. No consideration is alleged; Article 115, therefore, does not apply. That the defendant did not receive the money improperly or wrongfully is, according to the plaint, true but we are not prepared to hold that for that reason Article 62 ceases to be applicable. No authority is cited in support of that argument. It was also argued that the defendant is a trustee and, therefore, section 10 of the Limitation Act applies. We are clearly of opinion that the facts set out in the plaint do not show that the defendant was entrusted with the money for any specific purpose or that there was any express trust. Nor is the suit one against an agent. If there was an agency, it was simply one to receive the money and the agency ceased with the collection. It was then argued that Article 132 applies. But the suit is not based on the mortgage instrument. The mortgage has been redeemed. For these reasons we follow *Subbanna Bhatta* v. *Kuhanna Banta* (1) and hold Article 62 applies. It was also urged that the receipt of money by the defendant's Pleader is not receipt by the defendant under the terms of Article 62. We think this contention is clearly unsustainable.

The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 962 OF 1913.

February 18, 1915.

Present:—Justice Sir George Knox, Kt.

JAMNA KUNWAR—DEFENDANT—APPELLANT

versus

RAMHIT SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Gift with consent of next reversioner, validity of.

Where a Hindu widow executed a deed of gift in respect of her husband's property, with the consent of her deceased husband's mother, in favour of those persons who were reversioners next to the mother at the date of the gift:

Held, that the gift was binding upon the mother. [p. 498, col. 1.]

Second appeal from the decision of the District Judge of Jaunpur, dated thet 23rd April 1913.

Mr. *L. M. Banerji*, for the Appellant.

JUDGMENT.—The property in dispute in this appeal is property at one time belonging to Bhagwan Singh. To this property some nine years ago *Musammat* Anari Kunwar, his widow, succeeded and came into possession of the same.

On the 13th of April 1909, *Musammat* Anari Kunwar and with her *Musammat* Jamna Kunwar, who was at that time, had the succession opened out, the next reversioner, executed a deed of gift in favour of Ramhit Singh and Phirae Singh. In this deed of gift they set themselves out as being entitled to and in possession of the property in dispute and they transferred the whole of their property in favour of the aforesaid Ramhit Singh and Phirae Singh. Ramhit Singh and Phirae Singh alleged that they came into possession and are in possession of the property in dispute; they add, however, that upon the death of *Musammat* Anari Kunwar, the *patwari* of the village made a report and had the name of *Musammat* Jamna Kunwar entered and their names removed. They applied to the Revenue Court for correction of this mistake but in vain. Thus they were forced to come into the Civil Court and to ask that a decree might be passed in their favour declaring that they are in proprietary possession of the property in dispute and if this be not found proved by the Court below, that a decree awarding possession in their favour may be passed.

In the written statement the execution of the deed of gift was denied. It was said that Ramhit Singh and Phirae Singh persuaded *Musammat* Anari Kunwar and *Musammat* Jamna Kunwar that they were better able to manage the *zemindari* property left by Bhagwan Singh, that the deed which was executed was understood by the two ladies to be merely a power-of-attorney conveying the right to Ramhit Singh and Phirae Singh to manage the estate. Jamna Kunwar said that the ladies had all along been in possession of the property in suit ever since the death of *Musammat* Anari Kunwar.

The Court of first instance dismissed the claim; it held that the fraud alleged by *Musammat* Jamna Kunwar was not proved, that execution of the deed of gift by the two ladies was established and that *Musammat* Jamna Kunwar had at the time of executing the deed only a right in expectancy which she could not legally transfer. The deed, therefore, under which Ramhit Singh and Phirae Singh sued conferred no title upon them.

The case was taken to the Court of the District Judge of Jaunpore. The view taken by that learned Judge was that the deed of gift was a deed properly and duly executed by the ladies with knowledge of what they were doing, that no fraud in this matter had been proved to the satisfaction of the lower Appellate Court. It went on to hold that the deed of gift was "not to a stranger, it was to the reversioners in expectancy, who would have been next reversioners" in the event of Bhagwan's mother pre-deceasing his widow. The mother was perfectly competent to relinquish her expectation of the life-interest, and by her doing so the plaintiffs became next reversioners and the widow became *ipso facto* competent to gift the property or, to be more exact to surrender her life-interest therein. It accordingly allowed the appeal and decreed the plaintiffs' claim for possession. There was a third defendant, who, it held, was unnecessarily impleaded, but we are not concerned with him in this appeal.

Musammat Jamna Kunwar has come to this Court and raised six pleas attacking the judgment of the lower Appellate Court. The sixth plea was not argued. Of the remaining pleas four attacked the deed of gift on the grounds that (1) it was not proved that the defendant had any independent advice, (2) that the gift had never been given effect to and the plaintiffs not having obtained possession under the deed cannot now sue for possession, (3) that the defendent had no interest in the property in suit on the date when the deed of gift was executed and the deed conveyed no title to the plaintiffs, (4) that the gift of the defendant was a gift of an expectancy and was invalid. The fifth plea raised was that the plaintiffs were estopped from bringing the present suit. No argument was addressed to the Court on this last plea.

It is found by the lower Appellate Court that *Musammat* Jamna Kunwar knew what she was doing when she executed the deed of gift. It is a finding of fact and if there was any necessity I agree that that finding of fact is a proper and right finding.

My attention was directed in the course of the arguments to the written statement. Paragraph 16 of that statement says that *Musammat* Jamna Kunwar and *Musammat* Anari Kunwar had been all along in possession of the property in dispute since the death of Bhagwan Singh and since the death of *Musammat* Anari Kunwar, Jamna Kunwar had alone been in possession; the plaintiffs had never been in possession of the property. The lower Appellate Court has also held that the plaintiffs never have been in possession. Viewed then from the standpoint taken by *Musammat* Jamna Kunwar in the written statement, the deed of gift was a deed of gift of the property in dispute executed by her when in possession of the property, by whatever means that possession was obtained. The deed was a deed executed by *Musammat* Anari Kunwar then in possession of her deceased husband's estate and assented to by *Musammat* Jamna Kunwar, the next reversioner, in favour of the present plaintiffs who were then reversioners and now are the next reversioners.

A great deal of argument was addressed to the Court upon the ground that when *Musammat* Jamna Kunwar executed the deed of gift, she was trying to effect a transfer of a right in expectancy. Such transfer is forbidden by the Transfer of Property Act and in consequence, it was urged, conveyed no title of any kind to the plaintiffs. It seems to me that this is practically an attempt to get this Court to look at the transaction from a wrong point of view. In *Ramphal Rai* v. *Tula Kuari* (1), a Full Bench of this Court did hold that the consent of the heir-presumptive to an alienation was not sufficient to defeat the rights of a more remote reversioner. The view taken by this Court was considered by their Lordships of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2). Their Lordships, however, held that the

(1) 6 A. 116: A. W. N. (1883) 293.
(2) 30 A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 0 .

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view taken by this High Court in the former case "is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the *Mitakshara* Law prevails." They considered that the Allahabad High Court was trying to establish an unnecessary limitation upon the widow's power of alienation. They preferred to follow the view taken in *Ridha Shyam Sircar* v. *Joy Ram Senapati* (3), where it was held "that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible."

In the present case *Musammat* Jamna Kunwar was the next heir, presumptive, she beyond all doubt consented to the transfer and is no longer entitled to oppose the same.

I agree with the lower Appellate Court that when the deed was executed and under the circumstances in which it was executed, *Musammat* Amari Kunwar could surrender her life-interest in the estate, if *Musammat* Jamna Kunwar consented to the transfer.

I accordingly dismiss this appeal with costs, which in this Court will include fees on the higher scale.

Appeal dismissed.

(3) 17 C. 896.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 235 OF 1912.

August 4, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

EJEL MULLICK—PLAINTIFF—APPELLANT

versus

FELAI MULLICK—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 30, 52, 28, 36 and 154—Excess land, additional rent for—Rent, enhancement of—Distinction—Decree for enhancement of rent, retrospective effect of—Prevailing rate, additional rent at—Measurement, presumption of—No mention of rate in kabuliat—*Court, reference to—No obligation to pay at higher rate—Suit to recover at higher rate, if maintainable.*

Where on the interpretation of a *kabuliat*, it was plain (1) that the area of the land demised was assumed to be 15 *bighas* without actual measurement; (2) that the rent was assessed at the lump sum of Rs. 15-10 on the assumption that the area was 15 *bighas*; (3) that the landlord reserved his right to have the lands measured and the rent assessed at the prevailing rate:

Held, per *Mookerjee, J.*—that under sections 52 and 30 of the Bengal Tenancy Act, the landlord was entitled to claim additional rent for excess land as also enhancement of rent; [p. 499, col. 1.]

that there is a fundamental distinction between the claim for additional rent and the claim for enhancement of rent; [p. 499, col. 1.]

that a decree for enhancement of rent can never have retrospective operation and back rent cannot be claimed at enhanced rate in the suit in which enhancement is sought; [p. 499, col. 2.]

that the Court is not bound to allow additional rent at the prevailing rate. [p. 499, col. 2.]

Per *Beachcroft, J.*—The mere fact that a rate per *bigha* is not mentioned in the *kabuliat* does not justify the inference that there must have been a measurement before the execution of the *kabuliat*. [p. 500, col 1.]

Where no provision is made in the *kabuliat* for the machinery by which "the rate of rent for lands paid in adjacent places" is to be ascertained or what would be the position if there are varying rates and if the parties are not agreed, the matter can only be settled by reference to Court. [p. 501, col. 1.]

Where there is no obligation on the tenant to pay a definite higher rate as each instalment of rent falls due, a suit to recover rent on the footing that he ought to have paid at the higher rate is not maintainable. [p. 501, col. 1.]

Appeal against the decree of the Subordinate Judge of Khulna, modifying that of the Munsif of Khulna, dated the 10th February 1911.

Babu *Jadu Nath Kanjilal*, for the Appellant.

Babu *Surendra Kumar Bose*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent for the period between the commencement of the year 1313 and the end of the first quarter of the year 1316. The plaintiff states that the defendant is in occupation of 22 *bighas* of land and is bound to pay rent therefor at the rate of Re. 1-8 per *bigha*, which is the prevailing rate for similar lands on the locality. The defendant contends that he holds only 15 *bighas* at a consolidated rental of Rs. 15-10 per year. The Court of first instance found that the defendant was in occupation of 20 *bighas* 11 *cottahs* 5¼ *chhataks* of land and made him liable for rent at the rate of Re. 1-8 per *bigha*, which was established to be the prevailing

rate. In this view, the original Court gave the plaintiff a decree at the rate of Rs. 3 ;-13-6 per year. On appeal by the defendant, the Subordinate Judge held that the plaintiff was entitled to rent at the annual rate of Rs. 22-8 calculated on the basis of a rate of Re. 1 8 per *bigha* on 15 *bighas*, which was stated in the lease of the defendant as the area of his holding. The plaintiff has appealed to this Court and has contended that the decree of the primary Court should not have been varied in any way. In my opinion, the decrees of both the Courts are erroneous, but the plaintiff has no grievance. as the Subordinate Judge has decreed in his favour a larger amount than what he is justly entitled to receive in the present suit:

The defendant holds under a *kabuliat* executed on the 1st April 1885. The material portion of the *kabuliat* is in these terms: "I take a settlement of 15 *bighas* of land as per boundaries at foot, lying within your purchased *ganti jama*. I will pay to you Rs. 15-10 in a lump as rent for the said land year by year, and I will continue to enjoy the profits thereof...Bringing into operation future measurement and assessment, I will pay rent according to rent of adjoining lands." On an interpretation of this *kabuliat* three points are reasonably plain, namely, *first*, that the area of the land demised was assumed to be fifteen *bighas* without actual measurement; *secondly*, that the rent was assessed at the lump sum of Rs. 15-10 on the assumption that the area was fifteen *bighas*' this indicates that the rate was Re. 1-0-8 per *bigha*; and, *thirdly*, that the landlord reserved his right to have the lands measured and the rent assessed at the prevailing rate. The landlord is consequently entitled to claim additional rent for excess land as also enhancement of rent. This, indeed, he is entitled to do under section 52 and section 30 respectively of the Bengal Tenancy Act. There is, however, a fundamental distinction between the claim for additional rent and the claim for enhancement of rent, which was not appreciated when the plaint was drawn up. As regards the claim for additional rent, it is well settled that the landlord can claim back rent for additional area under section 52 of the Bengal Tenancy Act, if such additional area was in the use and occupation of the *raiyat*: *Jagannath* v. *Jamman Ali* (1), *Assanullah* v. *Mohini Mohan Das* (2). On the other hand, if the landlord seeks enhancement of rent, the rent of the *raiyat* cannot be enhanced, as stated in section 28, except as provided by the Bengal Tenancy Act; the Court is required by section 154 to specify the date from which the decree for enhancement takes effect; section 36 further empowers the Court to order progressive enhancement. It is consequently plain that a decree for enhancement of rent can never have retrospective operation and back rent cannot be claimed at enhanced rate in the suit in which enhancement is sought. The plaintiff has not framed this suit as one for enhancement of rent; he has claimed arrears of rent at enhanced rate. This he cannot get, till rent has been enhanced in a suit appropriately framed for the purpose. He is, however, entitled to additional rent for such area in excess of fifteen *bighas* as may be found in the occupation of the defendant, and he can succeed in respect of such claim for a period antecedent to the suit. The defendant is thus *prima facie* liable to pay to the plaintiff, for the years in suit, rent at the rate of Re. 1 0-8 in respect of 20 *bighas* 11 *cottahs* $5\frac{1}{4}$ *chattaks*. This works out to a rate of Rs. 21 6-9, which is slightly lower than the rate allowed by the Subordinate Judge. I am not unmindful of the provision of sub-section 3 of section 52, which provides that in determining the amount to be added to the rent, the Court shall have regard to the rate payable by a tenant of the same class for land of a similar description and with similar advantages in the vicinity. The Court, however, is not bound to allow additional rent at the prevailing rate. In the present case though the prevailing rate is found to have been Re. 1-8 for some years past, the fact remains that the plaintiff has allowed the defendant to continue in occupation without any claim for advanced rent for nearly 25 years. It seems fair under these circumstances that the back rent claimed on the excess area, namely, 5 *bighas* 11 *cottahs* $5\frac{1}{4}$ *chhataks* should be assessed for the purposes of the present suit—and for that purpose alone—at the same rate as for the remainder of the holding. I hold accordingly that the Subordinate Judge

(1) 29 C. 247.
(2) 26 C. 739.

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should have decreed the arrears at the rate of Rs. 21-6-9 and not at the rate of Rs. 22-8 as he has done. The decree made in this suit will not stand in the way of a suit for enhancement of rent of all the lands comprised in the holding on one or more of the grounds mentioned in section 30 of the Bengal Tenancy Act.

The result is that the appeal fails and must be dismissed with costs.

BEACHCROFT, J.—This is an appeal by the plaintiff in a suit which is described in the plaint as a suit for rent at an enhanced rate. The defendant holds under a *kabuliat* dated 20th *Chaitra*, 1291, *i. e.*, before the passing of the Benegal Tenancy Act. The *kabuliat* described the land let out as being 15 *bighas* in area, the rent payable being Rs. 15-10 in a lump sum. There is a provision in the *kabuliat* that in case of measurement and assessment in the future, the tenant will pay rent at the rate paid for adjoining lands. The plaintiff in his plaint alleges that a measurement was made in the year 1312, the land was found to measure 22 *bighas* and not 15 *bighas*, the rate for adjoining land is Re. 1-8 per *bigha*, and consequently prays for a decree at the rate of Re. 1-8 for 22 *bighas* for the years 1313 to the *Asarh kist* of 1316.

It is admitted that the area in the tenant's occupation is the same as when the lease was granted, but the lower Courts have found that area is in fact 20 *bighas* 11 *cattahs* 5¼ *chhattaks*. They have also found that the prevailing rate is Re. 1-8 per *bigha*. The Munsif gave a decree for the area ascertained at the rate claimed. The Subordinate Judge was, however, of opinion that the area must originally have been ascertained by measurement, and as the area had not altered, he was of opinion that the plaintiff was entitled to rent at the prevailing rate of Re. 1-8 only for an area of 15 *bighas*.

I do not think the mere fact that a rate per *bigha* was not mentioned in the *kabuliat* justifies the learned Subordinate Judge's inference that there must have been a measurement before the execution of the *kabuliat*. On the other hand, there is every reason for thinking there was no measurement as the land measures considerably more than 15 *bighas*, whether the standard of measurement alleged by the plaintiff or that alleged by the defendant to be the standard in use in the locality be adopted.

I also agree with my learned brother that the clause in the *kabuliat* relating to measurement and assessment reserved to the landlord his right to have the land measured and rent assessed. It is argued that the clause can only have reference to land that might be encroached upon in future, and two arguments are advanced against the view contended for by the landlord, (1) that the landlord might in that view have demanded a measurement the very day after the lease were given, (2) that the practical effect is almost to double the rent.

I am not impressed with either of these arguments. As to the first, if the land were leased as being of an unascertained area, there is nothing either extraordinary or inequitable in the reservation by either party of the right to ascertain the area at any date. The defendant's agrument must further rest on the supposition that it was the intention of the parties that there should be no change for some time. Contracts are and must be based largely on mutual confidence, and assuming the supposition to be correct, it is clear that mutual confidence was not misplaced, as no attempt was made to vary the rent for about 25 years.

The second argument involves, to my mind, the curious theory that the longer a person has held at an inadequate rent, the longer is he entitled to contiune to do so. The defendant has for 25 years been paying rent for an area which turns out to be only ⅗ths of that actually in his possession, at a rate which is only a fraction over 2/3rds of what has been found by the Munsif to have been the prevailing rate for the last 10 or 12 years, and that fact is attempted to be used as an argument to defeat the landlord's rights under the *kabuliat*.

Then, what is the position? The *kabuliat* provides that on measurement, and it is not disputed that the measurement referred to is one made on behalf of the landlord, the tenant shall pay at the rates paid for adjoining land in respect of the correct area. The correct area has been found

the prevailing rate has been found, but the Courts have not come to any finding as to whether the contingency has happened, which, it is argued, by the terms of the *kabuliat* justifies the demand for rent at the prevailing rate. *viz.*, whether there has been a measurement or not before the period covered by the demand, *i. e.*, whether the landlord's allegation of measurement in 1312 is true or not. Had the *kabuliat* provided for a definite sum to be paid as rent after measurement, the proper course, to my mind, would have been to order a remand for a finding whether a measurement had been made or not as alleged.

But there is another difficulty in the way of the appellant. No provision is made in the *kabuliat* for the machinery by which "the rate of rent for lands paid in adjacent places" is to be ascertained, or what would be the position if there were varying rates. It is clear that if the parties were not agreed, the matter could only be settled by reference to Court. The Munsif's judgment shows that though Re 1-8 is the prevailing rate for adjacent land, it is not the universal rate. There was thus room for dispute as to what could be said to be the rate for adjacent land. Now, it is not alleged in the plaint that the parties ever came to any agreement as to what the rate for adjacent land was. There is no suggestion that any assessment, such as is referred to in the *kabuliat*, had been made. In the circumstances, even assuming a measurement was made in 1312, it cannot be said that there was any obligation on the tenant to pay at a definite rate other than that at which he had previously paid. And, if there was no obligation on him to pay at a definite higher rate as each instalment of rent fell due, a suit to recover rent on the footing that he ought to have paid at the higher rate must obviously fail.

No doubt, under section 52 of the Bengal Tenancy Act, the landlord could get rent for the area for which rent had not been paid, and under sub-section (3) the Court could allow rent at the prevailing rate. But appellant's Pleader in his argument expressly repudiated section 52 as the basis of his claim, relying entirely on the *kabuliat*. Now, even if section 52 (3) were applied to the extent of allowing rent at the prevailing rate for the excess area, the rent for the rest of the land being calculated at the original rate of Re 1-0-6 per *bigha*, the result would be only a small increase to the landlord above the rent allowed by the Subordinate Judge.

As it will be open to the landlord to bring a properly framed suit for enhancement, I agree in dismissing the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 319 OF 1912.

January 26, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

K. G. PASUPATHY IYER—PLAINTIFF—APPELLANT

versus

S. T. N. RAMAN CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 90—Promissory note, suit on—Executant, whether can plead payee to be only benamidar*—Conditional endorsement of promissory note to another—Failure of condition—Possession of note not parted with—Note not re-endorsed—Payee, right of, to sue—Endorsement in favour of one of the debtors, effect of—Holder not in his own right for consideration—Debt, whether discharged.*

The executants of a promissory note cannot plead that the payee named therein, is only a *benamidar* for another. [p. 502, col. 1.]

Subba Narayana v. Ramaswami Aiyar, 30 M. 88; 1 M. L. T. 377: 16 M. L. J. 508 (F. B.), followed.

A mere conditional endorsement of a promissory note in favour of another when not followed up by delivery up of the note, does not vest the title in the note in the endorsee and no re-endorsement is necessary to vest the title back in the original payee to entitle him to sue on it. [p. 502, col. 1.]

Muthar Sahib Maraikar v. Kadir Sahib Maraikar, 28 M. 544; 15 M. L. J. 384, followed.

An endorsement on a promissory note in favour of one of the debtors does not discharge the debt when the debtor is not a holder in his own right for consideration. [p. 502, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 152 of 1911.

Mr. *S. T. Srinivasagopal chariar* (with him Messrs. *J. L. Rosario* and *K. P. Madhava Rao*), for the Appellant.

Mr. *K. Srinivasa Iyengar* (with him Messrs. *C. Krishnamachariar* and *K. V. Krishnaswamy Aiyar*), for the Respondents.

JAWAHIR v. NEKI RAM.

JUDGMENT.—The suit was brought by the plaintiff to recover the amount due under a promissory note executed by one Nachiappa Chetty on behalf of the defendants Nos. 1 to 5 and by the 8th defendant on behalf of himself and his partners, defendants Nos. 6, 7, 9 and 10. The Subordinate Judge dismissed the suit, on the grounds that the plaintiff is only a *benamidar* for the 8th defendant, that the plaintiff had endorsed the promissory note in favour of the 8th defendant, and at the date of the suit, the plaintiff had no possession of the note. The plaintiff appeals.

The plaintiff being the payee named in the negotiable instrument, it is not open to the defendants to plead that he is only a *benamidar* and, therefore, not entitled to recover the amount due under the negotiable instrument. See *Subba Narayana* v. *Ramaswami Aiyar* (1). Nor is the absence of an endorsement back in favour of the plaintiff from the endorsee in itself a bar to the suit if the plaintiff, the endorser, has taken up the note by discharging his liability, if any, and is in possession thereof. See *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* (2). As to possession there is no evidence that the plaintiff ever parted with his possession. In the plaint he said that when he pressed the 8th defendant for payment, the latter represented that he would pay the amount due if the promissory note was assigned in his favour and it was accordingly assigned by an endorsement in his favour and sent to Rangoon—not to the 8th defendant as stated by the Subordinate Judge—but as the 8th defendant failed to pay the promissory note, the plaintiff cancelled the endorsement and sues on it. In his evidence as a witness he says it was always with him, or with his agent, Srinivasa, with whom he left it after endorsement in favour of the 8th defendant. The 8th defendant said in his examination-in-chief that it was never with him and in cross-examination that he got possession of it two years after execution. His evidence is, therefore, unreliable There is no other evidence as to possession. Nachiappa Chetty, the other executant, has not been examined to show that the promissory note was not delivered to the plaintiff but was in the possession of the 8th defendant. We may also point out that there was no issue on this point.

It was then argued that all rights of action on the promissory note were extinguished and the debt is discharged as there is an endorsement in favour of one of the debtors, 8th defendant, and section 90 of the Negotiable Instruments Act is relied upon. But we have held that he was never the holder thereof as it is not proved that the plaintiff delivered it to him, and he was clearly not a holder in his own right as there is no allegation that the endorsement was made for consideration, and he held it, if at all, only to collect the amount.

We think, therefore, the decree of the Subordinate Judge is not sustainable. We reverse it, direct him to restore the suit to file and dispose of it according to law. The appellant is entitled to the costs of this appeal. The costs in the lower Court will be provided for in the final decree.

Appeal allowed; Suit remanded.

(1) 30 M. 88; 1 M. L. T. 377; 16 M. L. J. 508 (F. B.).

(2) 28 M. 544; 15 M. L. J. 384.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 179 OF 1914.

December 14, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

JAWAHIR—PLAINTIFF—APPELLANT

versus

NEKI RAM—DEFENDANT—RESPONDENT.

Fraudulent decree, setting aside of—Decree obtained within jurisdiction of Court other than that in which suit filed—Court, jurisdiction of, to entertain suit—Cause of action—Fraudulent service of summons—Property attached, whether gives cause of action.

The plaintiff sued the defendant in Agra praying that a decree for money obtained against him by the defendant in Siliguri within the jurisdiction of the Calcutta High Court be set aside, on the ground that the defendant fraudulently prevented the institution of the suit from becoming known to him by causing the notice of suit to be served on some other person in Agra and an incorrect return to be made to the Court:

Held, that as part of the fraud was committed in Agra the cause of action arose in part at least in Agra and that, therefore, the Courts in Agra had jurisdiction to entertain the suit. [p. 504, col. 2]

Semble:—A suit to set aside a decree on the ground of fraud may be brought in a Court other than that by which the impugned decree was passed, if the property of the plaintiff situated in that Court is attached in that decree. [p. 503, col. 2.]

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In such a suit the execution of the decree and the application for the realization of the amount of it are acts of the defendant which infringe the rights of the plaintiff and afford him his principal cause of action. [p. 504, col. 1.]

A plaintiff in such a case cannot succeed merely on proving that the summons was not served on him. [p. 503, col. 1.]

Second appeal from a decree of the District Judge of Agra, reversing that of the Munsif of Fatehabad.

Mr. *Narmadeshwar Prasad* (for Dr. *Surendra Nath Sen*), for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This was a suit by the appellant praying that a decree for money obtained against him by the respondent in Siliguri might be set aside on the ground that it had been obtained by fraud, and that an injunction might be issued restraining the respondent from executing the same. The appellant alleged that the claim on which the decree rested was totally without foundation, that the respondent had taken steps to prevent the institution of the suit from becoming known to him, and that he knew nothing of it till October 8th, 1911, when the respondent caused some of his property to be attached within the jurisdiction of the Munsif of Fatehabad in the Agra district. The appellant alleged that a cause of action accrued to him on October 11th at the place where the attachment was effected. The Munsif decreed the claim, but on appeal the District Judge held that the suit was not maintainable at all. He seems to have thought that the whole of the appellant's case was that the summons in the suit had not been served on him, and he declined to consider whether there was any foundation for the respondent's suit. The learned Judge has, we think, misunderstood the case. A plaintiff in a case of this kind cannot succeed merely on proving that the summons was not served on him, but if he proves that the former suit had no foundation in fact but was the outcome of previous enmity, that the summons was not served on him, and that the person who is said to have been present at the service was not there at all, and if he proves other facts also which tend to show that the defendant was anxious to avoid a fair trial of the issue between the parties, it is certainly open to the Court to find that the decree was obtained by fraud. The Munsif found that the appellant had proved all this, and he held that the decree had been obtained by fraud. It seems to us that in a case of this kind the Court can and must go into the whole matter before it can decide the case with any satisfaction to itself or any one else. That was the view taken in *Lakshmi Charan Shaha* v. *Nur Ali* (1), and it is supported by ample authority. As was said by Lord Robertson in *Khagendra Nath Mahata* v. *Pran Nath Roy* (2), which was a suit of this kind, "the appellant's allegation is an attack, not on the sufficiency of the service of notice but on the whole suit as a fraud from beginning to end." So far as the merits of the case are concerned, we have no hesitation in saying that the proceedings in the lower Appellate Court were not satisfactory.

It is, however, contended, on the authority of the decision in *Dau Dial* v. *Munna Lal* (3), that such a suit as this does not lie at all, except possibly in the Court or district in which the decree impugned was passed.

That such a suit will lie is beyond doubt. See the remarks of Jenkins, C. J., in *Nanda Kumar* v. *Ram Jiban* (4) and the decisions of the Privy Council in *Radha Raman Shaha* v. *Pran Nath Roy* (5), [affirming the decision of the High Court reported in *Pran Nath Roy* v. *Mohesh Chandra Moitra* (6), and *Khagendra Nath Mahata* v. *Pran Nath Roy* (2)]. Other recent instances of such suits are *Thakur Prasad* alias *Shambhoo Narain* v. *Punkal Singh* (7) and *Abdul Haque* v. *Abdul Hafiez* (8). Incidentally these cases show also that a suit to set aside a decree on the ground of fraud may be brought in a Court other than that by which the impugned decree was passed, and we may observe that if it were otherwise no suit could be brought to set aside a decree obtained by fraud in a Court of Small Causes, however gross the fraud might be.

(1) 11 Ind. Cas 626; 38 C. 936; 15 C. W. N. 1010.
(2) 29 C. 395; 4 Bom. L. R. 363; 6 C. W. N. 473; 29 I. A. 99 (P. C.).
(3) 24 Ind. Cas 978; 12 A. L. J. 955; 36 A. 564.
(4) 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.
(5) 28 C. 475; 5 C. W. N. 757.
(6) 24 C. 546.
(7) 8 C. L. J. 485.
(8) 5 Ind. Cas. 648; 14 C. W. N. 695; 11 C. L. J. 636.

But in this Court there seems to be a conflict of opinion on the question whether a suit will lie in these Provinces against a resident of another Province to have a decree obtained by him in that Province set aside on the ground of fraud, even when property of the plaintiff in these Provinces has been attached in execution of the decree impugned. In *Banke Behari Lal* v. *Pokhe Ram* (9), it was held that a suit would lie in Cawnpore against a resident of Calcutta to have a decree obtained by him in the Calcutta Hight Court set aside on the ground of fraud, when property of the plaintiff in Cawnpore had been attached in execution of the decree impugned. But in *Kalyan Das* v. *Bakhshi Ram* (10), Knox and Griffin, JJ., held that a suit to set aside, on the ground of fraud, a decree obtained in Cachar by a resident of that place would not lie in Agra, even though the plaintiff had been arrested in Agra in execution of that decree; and in *Dau Dial* v. *Munna Lal* (3), Richards, C. J., and Tudball, J., held that a suit did not lie in Mainpuri against a resident of Calcutta to set aside, on the ground of fraud, a decree obtained by him in Calcutta in execution of which the plaintiff's property in Mainpuri had been attached. In the course of the principal judgment it is said that, "all that the plaintiff complains of happened in Calcutta and, therefore, the cause of action arose in Calcutta and no place else." As at present advised we are not prepared to take this view. In the plaint in that case the plaintiff complained specifically of the attachment of his property in the Mainpuri district, and he prayed for an injunction directing the defendant to release the property from attachment. It seems to us that the attachment of the property was an important part of his cause of action and that it gave the plaintiff the right to sue in Mainpuri. We agree with the observation made in the case of *Banke Behari Lal* v. *Pokhe Ram* (9) by Banerji, J., that "the execution of the decree and the application for the realization of the amount of it are acts of the defendant which infringe the rights of the plaintiff, and afford him his principal cause of action."

(9) 25 A. 48; A. W. N. (1902) 179.
(10) F. A. No. 14 of 1910.

In view of the conflict between the decisions in *Dau Dial* v. *Munna Lal* (3) and *Kalyan Das* v. *Bakhshi Ram* (10) on the one hand and in *Banke Behari Lal* v. *Pokhe Ram* (9) on the other, we have considered the propriety of referring this case to a larger Bench, but we have come to the conclusion that such a course is unnecessary. It is part of the plaintiff's case that the defendant fraudulently prevented the institution of the suit from becoming known to him by causing the notice of suit to be served on some other person and an incorrect return to be made to the Court. This is part and parcel of the fraud alleged, and if the allegation is found to be true part of the fraud was committed in the Agra district, and there can be no doubt that the cause of action arose in part at least in the Agra district, even if the attachment of the plaintiff's property is not part of the cause of action.

We, therefore, direct that the record be returned to the lower Appellate Court in order that a finding may be recorded upon the second issue. Further evidence will not be admitted except for good cause shown. On return of the finding 10 days will be allowed for objections.

Case remanded.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 126 OF 1914.

January 8, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

MARIA THANGATHAMMAL AND OTHERS —DEFENDANTS - APPELLANTS

versus

IRAVATHESWARA IYER—PLAINTIFF—RESPONDENT.

Pauper application—Power to extend time—Presumption when Court-fee paid and accepted by Court—Conversion of pauper application into regular suit—Relinquishment of part claim, effect of.

As a general rule when once a Court has admitted and registered a plaint, it cannot subsequently reject it; and a Court may be taken to have extended the time and to have treated the time when the Court-fees were actually paid as the time fixed for payment when it accepts them on that date. [p. 505, col. 1.]

RAMESHWAR SINGH *v.* BHEEKDHARI SINGH.

The mere relinquishment of a portion of the relief claimed in a plaint does not make it a new one. [p. 505, col. 1.]

A pauper suit can be converted into a regular suit and limitation reckons from the date when the pauper petition was filed. [p. 505, col. 2.]

Appeal against the order of the Court of the Sudordinate Judge of Trichinopoly, in Appeal Suit No. 171 of 1913, preferred against that of the District Munsif of Srirangam, in Original Suit No. 254 of 1914.

Mr. *T. R. Venkatarama Sastri*, for the Appellants.

Mr. *T. R. Krishnasawmy Iyer*, for the Respondent.

JUDGMENT.—It is first contended that the Court had no power to extend the time upon a pauper application, and that even if it had power to extend the time inasmuch as the party has not applied for and obtained an extension of time, the plaint must be regarded as presented only on the date of re-presentation, and secondly that there can be no implied extension of time. We think that the lower Courts were right in holding that the authority given by section 148 of the Code of Civil Procedure is sufficient to cover this case, and we agree with the observations of Maclean, C. J., in *Padmanund Singh* v. *Anant Lal Misser* (1), that as a general rule when once a Court has admitted and registered a plaint, it cannot subsequently reject it and that a Court may be taken to have extended the time and to have treated the time when the Court-fees were actually paid as the time fixed for payment, when it accepted them on that date. Section 149 of the Code of Civil Procedure also permits a Court in its discretion to allow a party to pay the whole of any Court-fee at a subsequent stage of the trial of a suit and to treat the payment as having been made in the first instance.

A thiird point has been raised, which is whether the plaintiff having given up a portion of the reliefs originally claimed by him should not be treated as having presented a new plaint on that date. The mere relinquishment of a portion of the relief claimed in a plaint does not, in our opinion, make the plaint a new one.

(1) 34 C. 20 at p. 24 (F. B.); 11 C. W. N. 38; 4 C. L. J. 421; 1 M. L. T. 355.

The decision of the Privy Council in *Stuart Skinner* alias *Nawab Mirza* v. *William Orde* (2), is sufficient authority for pauper suits being converted into regular suits and for reckoning limitation from the date when the pauper petition was filed.

We agree with the lower Appellate Court and dismiss this appeal against order with costs.

Appeal dismissed.

(2) 2 A. 241 (P. C.); 4 C. L. R. 331; 6 I. A. 126

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 208 AND 308 OF 1911 AND 530 OF 1912.

February 5, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

Maharaja SIR RAMESHWAR SINGH *Bahadur*—DECREE-HOLDER, OPPOSITE PARTY—APPELLANT (IN ALL)

versus

IN NO. 208 OF 1911 AND NO. 530 OF 1912

BHEEKDHARI SINGH AND OTHERS—JUDGMENT-DEBTORS—APPLICANTS—RESPONDENTS

IN NO. 308 OF 1911

TEKPUT SINGH—JUDGMENT-DEBTOR—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of, ground for—Just and convenient—Judgment-debtor will be reduced to poverty if his properties are sold, if ground for appointment of Receiver.

The fact that a judgment-debtor will be reduced to poverty if his properties are allowed to be sold is no ground for the appointment of a Receiver of his properties advertised for sale as in all cases in which a judgment-debtor's property is advertised for sale, he is liable to become poor. [p. 506, col. 2.]

An appointment of a Receiver in such a case is not just and convenient within the meaning of Order XL, rule 1, Civil Procedure Code. [p. 506, col. 2.]

Appeals against the orders of the Subordinate Judge, Darbhanga, dated the 22nd of February 1911 and the 13th of July 1912.

TRIBHOVANDAS NAROTAMDAS *v.* ABDULALLY HAKIMJI.

JUDGMENT.

IN A. No. 208 of 1911.

SHAREUDDIN, J.—This is an appeal against an order of the Subordinate Judge of Darbhanga, passed on an application under Order XL, rule 1, Civil Procedure Code. The Maharaja of Darbhanga is the decree-holder and the respondents are the judgment-debtors.

A preliminary objection was taken to the maintainability of the present appeal, on the ground that the order appealed against was really not an order for the appointment of a Receiver but one granting an application for such an appointment. Reference was made to an order in the order sheet, dated 22nd February 1911, which is to this effect: "judgment delivered, application for appointment of a Receiver is allowed. Case disposed of", and this is followed by the order dated 10th March 1911, which runs as follows: "Babu Ram Nihara Singh is appointed Receiver." The reply was that the order of the 22nd February was an order for the appointment of a Receiver and reference was made to Order XLIII, rule 1, clause (*s*).

We are of opinion that the appeal is in substance an appeal against the appointment of a Receiver and is maintainable.

The only ground on which the order was made was a ground not warranted by law. The judgment runs: "It is true there have been law suits between these parties for the last 5 or 6 years, but it has not been shown that these Babus are always in the wrong or ever committed any act of bad faith. The decree-holder, Maharaj, opposes this application and wants to sell even the houses in which his relatives (judgment-debtors) live immediately and would not agree even to a postponement of the sale. It is apparent that if the properties of the judgment-debtors are sold, there will be no other purchaser besides the Maharaj and it is apprehended with some show of reason that these properties will not fetch a proper price at the sale. Regard being had to this fact and to the fact that the Babus who are up to this time very respectable persons would be reduced to poverty if the properties are allowed to be sold, I am of opinion that it is just and convenient that a Receiver of all their properties be appointed."

This is no ground for the appointment of a Receiver and all the necessary elements for that purpose are wanting in this case. In all cases in which a judgment-debtor's property is advertised for sale, he is liable to become poor which can scarcely be a ground for the appointment of a Receiver. The rule on that point is laid down in Order XL, rule 1, and we do not see how the appointment can be considered just and convenient in the present case.

We, therefore, set aside the order and decree the appeal with costs of both Courts. We assess the hearing-fee at two gold *mohurs*.

IN A. No. 308 of 1911.

This appeal is governed by the above judgment.

IN A. No. 530 of 1912.

In consequence of the decision of appeals Nos. 208 and 308, this appeal no longer requires decision. It is dismissed without costs.

COXE, J.—I agree.

Appeals Nos. 208 & 308 *decreed*;
Appeal No. 530 *dismissed.*

BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT No. 102 OF 1913.
December 18, 1914.
Present:—Mr. Justice Beaman.
TRIBHOVANDAS NAROTAMDAS—PLAINTIFF
versus
ABDULALLY HAKIMJI PAGHDIVALLA AND OTHERS—DEFENDANTS.

Insolvency—Cause of action—Survival—Property vesting in Official Assignee—Insolvent incompetent to defend suit independently of Official Assignee.

No cause of action survives against an insolvent whose interest in the plaint property has devolved upon the Official Assignee The insolvent and the Official Assignee cannot both stand together on the array, and if the Official Assignee refuses to defend the suit, the insolvent cannot be allowed to do so independently of the Official Assignee. [p. 507, col. 1]

Messrs. *Rustam Wadia, Kanga* and *Setalvad*, for the Plaintiff.

Messrs. *Bahadurji* and *Weldon*, for Defendant No. 1.

FATIMA *v.* RANI.

JUDGMENT.- The facts material to the decision of the preliminary point are admitted to be these, that the suit was brought against the first defendant and while the suit was pending and after an *ex parte* decree had been made against him, he became an insolvent. About a month after his insolvency, he applied to have the *ex parte* decree set aside and the matter was argued before Davar, J., without any mention being made of the defendant No. 1 having been adjudicated an insolvent. Davar, J., set aside the *ex parte* decree, and about a month later, it appears to have come to the plaintiff's knowledge that the defendant No. 1 was an insolvent. Correspondence with the Official Assignee followed. Leave seems to have been obtained to bring the Official Assignee on the record under Order XXII, rule 10. That has been done. The Official Assignee subsequently refused to defend the suit. Defendant No. 1, however, has elected to defend independently of the Official Assignee and appears here by two Counsel. The question is, whether he can be allowed to defend the suit. Notwithstanding the elaborate decision of Sir Joseph Arnould in the case of *In re Hunt Monnet & Co.* v. *Bholagir Mangir* (1), upon which defendant No. 1's learned Counsel strongly relies, and the decision on the original side of the Calcutta High Court in the case of *Chandmul* v. *Rance Soondery Dossee* (2), following Sir Joseph Arnould's decision, it appears to me very clear, not only on principle but under the express words of our Statute, that no cause of action at present survives against defendant No. 1, and that the suit against him ought to be dismissed at once. It is a clear case of his interest in the plaint property having devolved upon the Official Assignee. The Official Assignee has been made a party to this suit with the leave of the Court. It is obvious, then, that both he and the defendant No. 1, from whom the said interest has devolved upon him, cannot, in reason, both stand together on the array. The only person at present who possesses any interest whatever in this property from the point of view of the plaint in the present suit is not the defendant No. 1, but the Official Assignee. It is, therefore, a case in which defendant No. 1 is being wrongly sued in the events that have happened and not a case in which it is unnecessary that the Official Assignee should be made a party defendant.

The only question remaining to be answered is, whether in thus dismissing the suit against the defendant No. 1 he should have his costs. Up to the appearance before my brother Davar, J., I see no reason why he should not have. But inasmuch as he there withheld from the learned Judge what ought to have been disclosed and what being disclosed would have rendered his further appearance on the record unnecessary, in my opinion, he is not entitled to the costs of that or subsequent proceedings.

I must, therefore, now dismiss the suit against defendant No. 1 with costs up to the application for the rule by Davar, J., and thereafter no order as to his costs.

I may say that I believe that the object of this strange procedure is simply to endeavour to get a decree from the Court in favour of defendant No. 1 without those who are supplying him with funds being under the risk of paying the plaintiff's costs, should the plaintiff succeed; for I understand no one has come forward to guarantee the Official Assignee's costs, should the Official Assignee have defended the suit in place of defendant No. 1.

Suit dismissed.

(1) 1 Bom. H. C. R. 251.
(2) 22 C. 259.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 2439 OF 1913.

February 16, 1915.

Present:—Mr. Justice Shadi Lal.

Musammat FATIMA—OBJECTOR—APPELLANT

versus

Musammat RANI—PETITIONER—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 7, 17—Minor girl—Re-marriage of her mother—Welfare of minor—Court not to proceed under Act where no necessity exists for appointing guardian.

The re-marriage of a mother is not a sufficient reason to deprive her of the custody of her children, for the question in cases of guardianship always is

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whether it is for the welfare of the minor to appoint a guardian. It is not for the Court to accept each and every application made for the appointment of a guardian.

Miscellaneous appeal from an order of the District Judge, Lahore, dated the 30th October 1913, appointing the respondent guardian of the minor.

Mr. *Badr-ud-Din Kureshi*, for the Appellant.

Chaudhri *Ghulam Muhammad*, for the Respondent.

JUDGMENT.—In this guardianship case the learned District Judge has preferred the grandmother to the mother of the minor girls on the sole ground that she (mother) has married again. He has, however, omitted to consider the fact that the grandmother too has re-married, though there is nothing to show that her second husband is or is not a collateral of the first husband.

Under section 17 of the Guardians and Wards Act, the Court in appointing the guardian of a minor is to be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In this case having regard to the fact set out above, I do not think there was any necessity for taking action under the Act. It is not for the Court to accept each and every application which is made to it for the appointment of a guardian. I have taken into consideration the welfare of the minors and I do not think that any good would accrue by separating them from their mother. I accordingly accept the appeal and reject the application of *Mussammat* Rani for her appointment as guardian of the minor girls. The minors who have been removed from the custody of their mother must go back to her. I direct the parties to bear their own costs in both the Courts.

Petition allowed.

B. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 4261 OF 1913 AND 72 TO 120 OF 1914.

March 24, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

BEHARI LAL MALLIK—PLAINTIFF—APPELLANT

versus

PRIYA NATH SARDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 103, 105, scope of—Rent, fair and equitable, settlement of—Co-sharer landlord, application of, whether maintainable—Landlord's challenging entry, effect of—Superior interest amongst landlord, partition of—Effect—Remedy.

An application under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent cannot be maintained at the instance of one out of several joint landlords, it must be presented by the entire body of persons who are joint landlords. [p. 509, col. 2.]

There is a fundamental difference between the scope of section 103 and section 105. Section 103 contemplates a record of existing facts, while section 105 contemplates an alteration of existing facts. [p. 509, col. 2.]

Maharaj Kumar Krishna Das Law v. *Girija Nath Roy Sardar*, 3 Ind. Cas. 472; 10 C. L. J. 458, referred to.

Where a landlord challenges the entry in the Record of Rights both as regards the status of the defendant and the area of the land comprised in his holding, before the Revenue Officer, who is competent under section 105A, to try and decide such an issue before the settlement of fair and equitable rent under section 105 the proceeding is in essence one under section 105 and not under section 106 of the Bengal Tenancy Act. [p. 510, col. 1.]

The mere circumstance that one of his co-sharers is not willing to join the plaintiff in an application for settlement of fair rent under section 105 does not dissolve the relationship of joint landlords amongst themselves, although it need not be disputed that the relationship can be severed by a partition of the superior interest amongst the landlords or by the creation of independent contractual obligations between each member of the body of landlords on the one hand and the tenant on the other. [p. 510, cols. 1 and 2.]

The obvious remedy of a co-sharer landlord intending to maintain a proceeding under section 105, Bengal Tenancy Act, when other co-sharers do not join him, is either to effect a partition with his co-sharers or to have a common manager appointed; but till this has been done, he cannot maintain a proceeding under section 105. [p. 510, col. 2.]

Appeals against the decrees of the Special Judge of Khulna, dated the 12th September 1913, affirming those of the Settlement Officer of Khulna, dated the 31st July 1913.

Babu *Jogendra Nath Mukherjee*, for the Appellant.

BEHARI LAL MALLIK *v.* PRIYA NATH SARDAR.

JUDGMENT.—This appeal is directed against an order by which a Special Judge, under Chapter X of the Bengal Tenancy Act, has in concurrence with the Settlement Officer dismissed an application by a landlord for settlement of fair and equitable rent under section 105 of the Bengal Tenancy Act. The applicant in his petition under section 105 stated that he had a one-fifth share in the revenue-paying estate of which eight other persons, who were joined as co-sharer defendants in these proceedings, held the remaining four-fifths share. The petitioner alleged that the tenant defendant had been recorded in the record-of-rights, which had been finally published on the 15th May 1913, as a *mourasi mokarari* tenant in respect of a certain area, thus the tenant was really in occupation of a larger quantity of land than what was comprised in his tenancy, and that the rent was enhanceable. The petitioner further stated that his co-sharers had refused his invitation to join him in the application, because they were in collusion with the tenant defendant and were anxious to have improper gain. On these allegations, the petitioner prayed that the Settlement Officer might settle fair and equitable rent payable by the tenant under section 105 of the Bengal Tenancy Act. The Settlement Officer dismissed the application on the ground, that it was barred under section 188 of the Bengal Tenancy Act which provides that where two or more persons are joint landlords, anything which the landlord is, under the Act, authorised to do must be done either by both or all those persons acting together or by an agent authorised to act on behalf of both or all of them. This order has been confirmed on appeal by the Special Judge. On the present appeal, the decision of the Special Judge has been assailed substantially on three grounds, namely, *first*, that inasmuch as the appellant had taken proceedings under section 103 of the Bengal Tenancy Act, he was competent alone to maintain a proceeding under section 105; *secondly*, that as the Settlement Officer was invited to settle fair and equitable rent after determination of the question of the status of the defendant and of the area of the land in his possession, the proceeding was not in substance one under section 105 but rather fell within the scope of section 106; and, *thirdly*, that as the co-sharer landlords had acted in collusion with the tenant and had refused to join the plaintiff in the institution of a proceeding under section 106, there had been a severance of the co-tenancy by operation of law, and that the parties occupied the position of separate landlords.

As regards the *first* contention, it may be conceded that section 103, as it stands in its amended form, authorises one or more of several proprietors to apply to a Settlement Officer to ascertain and record all or any of the particulars specified in section 102 with respect to the estate of which he is a proprietor. But it is worthy of note that although the Legislature has amended section 103 so as to make section 188 no longer applicable to bar an application under that section by one or more of several joint proprietors, there has been no corresponding change in section 105. Section 105 speaks of an application for settlement of fair and equitable rent by either the landlord or the tenant. If the application is by the landlord, it must obviously be presented by the entire body of persons who are joint landlords. It has been argued that this view is likely to cause hardship to innocent landlords, who are not able to obtain the concurrence of obstructive co-sharer landlords in the matter of an application under section 105. This, however, is a matter for the Legislature to consider. It is plain that there is a fundamental difference between the scope of section 103 and section 105. Section 103 contemplates a record of existing facts, while section 105 contemplates an alteration of existing facts; the Legislature may well have thought that while a record of existing facts may be permitted to be made at the instance of one or more of several joint landlords, the existing facts should not be allowed to be altered at the instance of a co-sharer landlord. But whatever the reason may be for the obvious distinction between section 103 and section 105, it is plain that, as pointed out in the case of *Maharaj Kumar Krishna Das Law* v. *Girija Nath Roy Sardar* (1), they do not stand on the same footing and, that, notwithstanding

(1) 3 Ind. Cas. 472; 10 C. L. J. 458.

the amendment of section 103, the rule still holds good that an application under section 105 for settlement of fair and equitable rent cannot be maintained at the instance of one out of several joint landlords.

As regards the *second* contention, it is plain that the question is not affected by the circumstance that in this particular case the landlord challenges the entry in the Record of Rights both as regards the status of the defendant and the area of the land comprised in his holding. Under section 105A the Revenue Officer is competent to try and decide such an issue before the settlement of fair and equitable rent under section 105. Consequently, the proceeding is in essence what it purports to be, namely, a proceeding under section 105 for settlement of fair and equitable rent.

As regards the *third* contention, we are unable to appreciate the argument that there has been a severance of joint tenancy amongst the landlords, because one or more of them has acted in collusion with the tenant. Reliance has been placed upon a familiar class of cases, of which the decisions in *Panchanan Banerji* v. *Raj Kumar Guha* (2), *Matangini Dassi* v. *Ram Das* (3), *Sailendra Nath* v. *Karali Charn Singh* (4) and *Bhabatarini Dasi* v. *Ekabbar Malita* (5) may be taken as examples, which it was held that where a tenant has agreed to allow one of several co-sharer landlords to deal with him as if that co-sharer was his sole landlord, without regard to the interest of the other co-sharers, the effect is to create a separate tenancy under such a fractional co-sharer so as to render section 188 inapplicable. This principle is of no assistance to the applicant before us. It may also be conceded that joint landlords may cease to be joint as laid down in *Rajnarain* v. *Ekadasi* (6). But the mere circumstance that one of his co-sharers is not willing to join the plaintiff in an application for settlement of fair rent under section 105, does not dissolve the relationship of joint landlords amongst themselves, although it need not be disputed that the relationship can be severed by a partition of the superior interest amongst the landlords or by the creation of independent contractual obligations between each member of the body of landlords on the one hand and the tenant on the other. We are consequently of opinion that the plaintiff and his co-sharer landlords are still joint landlords within the meaning of section 188 of the Bengal Tenancy Act. This, indeed, is the view upon which the present proceedings are founded. If it had been the case of the plaintiff that he was the sole landlord of the tenant defendant, the presence of the persons described as co-sharer defendants would be meaningless, and the explanations volunteered as to why they did not appear as co-plaintiffs would be equally superfluous. The obvious remedy of the plaintiff is either to effect a partition with his co-sharers or to have a common manager appointed; but till this has been done, he cannot maintain a proceeding under section 105.

The result is that the decree of the Special Judge must be affirmed and this appeal dismissed.

This judgment, it is conceded, will govern the other appeals (Nos. 72 to 120 of 1914), which are accordingly dismissed.

Appeals dismissed.

(2) 19 C. 610.
(3) 7 C. W. N. 93.
(4) 2 C. L. J. 534.
(5) 5 C. L. J. 235; 2 M. L. T. 155.
(6) 27 C. 479; 4 C. W. N. 494.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2212 OF 1912.

December 11, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Mullick.

KHETTERMANI DASI—DEFENDANT No. 1 – APPELLANT

versus

JIBAN KRISHNA KUNDOO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 52 (b), 179, 188 —Joint tenants—Suit by a co-sharer-tenant, validity of Abatement of rent—Diluvion, area reduced by— Kabuliat, *construction of*—Mourasi mokarari *settlement, nature of.*

Section 188 of the Bengal Tenancy Act has no reference to joint tenants and does not prevent a co-sharer-tenant from bringing a suit authorised by the Act unless his other co-sharers join him as plaintiffs. [p. 511, col. 2.]

Bhoopendra Narain Dutt v. *Romon Krishna Dutt*, 27 C. 417; 4 C. W. N. 107, followed.

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Jatindra Nath Chowdhuri v. *Prasanna Kumar Banerji*, 8 Ind. Cas. 842 (P. C.): 13 C. L J. 51; 38 C. W. 270; M. L. T. 1; 13 Bom. L. R. 1; 15 C. W. N. 74; 21 M. L. J 92; (1911) 2 M. W. N. 119; 8 A. L. J. 1, distinguished.

In a *Mourasi Mokarari* Settlement the most reasonable construction is that the tenant agreed not to claim reduction on the ground of diluvion. [p. 512, col. 1.]

The Sundarbans is a permanently settled area and permanent leases have been granted by the Government in respect thereof. [p. 512, col. 1.]

Tamasha Bibi v. *Ashutosh Dhur*, 4 C. W. N. 513, at p. 517, referred to and followed.

A permanent lease from a person who has made permanent improvement on the property confers permanent rights on the lessee. [p. 512, col. 2.]

Where a covenant is authorised by section 179 of the Bengal Tenancy Act, its validity cannot be impeached. [p. 512, col. 2.]

Appeal against the decree of the District Judge of Alipur, dated the 18th June 1912, reversing that of the 3rd Subordinate Judge of Alipur, dated the 19th August 1911.

Babus *Nil Madhab Bose* and *Sarat Chundra Ghosh*, for the Appellant.

Babus *Biraj Mohan Mojumdar*, *Mohini Mohan Chatterjee* and *Amarendra Bhusan Ghose*, for the Respondents.

JUDGMENT.

D. CHATTERJEE, J.—The predecessors-in-interest of the plaintiffs and the *pro forma* defendants took a *mourasi mokarari* lease of about 2,200 *bighas* of land in two plots, one of 800 *bighas* and the other of 1,400 *bighas* in the Sunderbans from the predecessor-in-interest of the appellant and executed a *kabuliat* dated the 23rd. of April 1890. Under the terms of the *kabuliat* there was a measurement in 1303 B. S. made by a Civil Court Amin and the *mokarari* was fixed at the full stipulated rate of 12½ annas per *bigha* on the quantity of land found. The plaintiffs, who by an amicable arrangement with the *pro forma* defendants hold the smaller plot, have brought the present suit for abatement of rent under section 52 (*b*) of the Bengal Tenancy Act in respect of the whole tenure, on the allegation that there had been a reduction of about 600 *bighas* in the area of the entire tenure by diluvion and joined the *pro forma* defendants as parties on the ground that they had refused to join as plaintiffs. The main objections to the suit pressed on behalf of the appellant are: (1) That the present suit for abatement is not maintainable by the plaintiffs alone; as they are admittedly part-owners of the tenure, and section 188 of the Bengal Tenancy Act is a bar to the suit; (2) that under the express terms of the *kabuliat* the plaintiffs are debarred from bringing a suit for abatement on the ground of diluvion.

The *first* objection is easily disposed of. Section 188 of the Bengal Tenancy Act prevents a co-sharer landlord from bringing any suit authorised by the Act unless his other co-sharers join him as plaintiffs. This section has no reference to joint tenants and cannot be applied by analogy to a co-sharer tenant who brings a suit authorised by the Act. This view is supported by an opinion expressed by Sir Francis Maclean, Chief Justice, and Banerjee, J., in the case of *Bhoopendra Narain Dutt* v. *Romon Krishna Dutt* (1). The decision of the Privy Council in the case of *Jatindra Nath Chowdhuri* v. *Prasanna Kumar Banerji* (2) has reference to a suit for enhancement by a co-sharer landlord and cannot be called in aid of the appellant's plea.

Then as to the *second* point, the condition in the *kabuliat* is: "we shall not object to the payment of rent on the ground of drought, inundation, death, desertion, overflow of saltwater, diluviation by river, etc." The learned Judge has got over this clause by holding that it refers to temporary impediment to the realization of rent and could not have been meant to apply to a permanent reducation of the area. The document, however, does not seem to make any distinction between temporary and permanent impediments. The judgment of the learned Judge has been supported by an ingenious argument advanced by the learned Vakil for the respondent. He argued first that the clause in question prevents the tenant from objecting to the payment of rent and cannot stand in the way of his bringing a suit for abatement, and, secondly, that the Sunderbans not being a permanently settled area, section 179 of the Bengal Tenancy Act has no application

(1) 27 C. 417; 4 C. W. N. 107.

(2) 8 Ind. Cas. 842 (P. C.); 13 C. L. J. 51; 38 C. 270; 9 M. L. T. 1; 13 Bom L. R. 1; 15 C. W. N 74; 2 M. L. J. 92; (1911) 2 M. W. N. 119; 8 A. L. J. 1.

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and the covenant in the lease, if it bears the meaning contended for by the appellant, is inconsistent with the provisions of section 52 and is, therefore, void under section 23 of the Contract Act. As regards the first branch of this argument I do not think it is sound. The only objection that the tenant could make on account of diluvion would be one of reduction of rent and seeing that the settlement is a *monrasi mokurari* one, the most reasonable construction is that the tenant agreed not to claim reduction on the ground of diluvion. As regards the second branch of the argument it assumes that the Sunderbans is not a permanently settled area. The learned Vakil for the appellant states that the appellant has got a permanent lease from the Government, but the learned Vakil for the respondent does not ultimately admit this, although he at first said that the lease of the appellant was of a permanent character. The learned Judge says: "The tenure being numerous in the Sunderbans, cannot in view of section 13, Regulation III of 1828, be held to be a permanent tenure." I do not quite understand what the learned Judge means. The section provides that the Sunderbans should be considered to be the property of the State not included in the arrangements of the Perpetual Settlement and the Governor-General in Council shall be competent to make grants of leases as heretofore, etc. The section, therefore, does not ignore or invalidate any grants made by the Government before 1828 and authorises further grants. In the case of *Tamasha Bibi* v. *Ashutosh Dhur* (3), Mr. Justice Banerjee is reported to have said: "I ought to add that though certain portions of Regulation III of 1828 go to show that the Sunderbans, up to that date, continued the property of the State and had not been parmanently settled with any one, that was intended to be said generally with regard to the tract of country known as Sunderbans taken as a whole, and it could not have been intended to undo the effect of any lease granted by any duly constituted Revenue Authority." The learned Judge is wrong, therefore, in holding that there could not be a permanent tenure in the Sunderbans. The case of *Tamasha Bibi* v. *Ashutosh Dhur* (3) further supports the contention that a part of the Sunderbans would be a permanently settled area even if settled after 1793, the definition in clause 12 of section 3 of the Bengal Tenancy Act notwithstanding. The question, therefore, is whether the appellants had a permanent lease from the Government in respect of the estate a part of which they settled with the predecessor of the plaintiffs. I think the matter was never contested in the Court below and was at first admitted in the Court. The *kabuliat* mentions the property of the appellant as *zemindari lat abad gatihara touzi mehal* No. 1374, and the very fact that the plaintiffs and *pro forma* defendants have taken a permanent lease from a person who had made permanent improvements on the property is an indication that the appellant had permanent rights. In any case the *patta* contains the condition and it is for the party who impeaches its legality to make out his case. The respondent has not in this case shown that the property is not in a permanently settled area and he cannot ask us to make a remand for a further investigation on that point. I think the covenant is authorized by section 179 of the Bengal Tenancy Act and the plaintiff cannot impeach its validity. In the view of the case I think the appeal should be allowed and the suit ought to be dismissed with costs in all Courts.

An application has been made by one of the *pro forma* defendants who was made a co-plaintiff in the Court below to be allowed to withdraw from the suit. If he is allowed to do so, he must continue as a *pro forma* defendant. In the view that I take of the case, however, it is not necessary to pass any order on this application.

MULLICK, J.—I agree.

Appeal allowed; Suit dismissed.

(3) 4 C. W. N. 513 at p. 517.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 26B OF 1914.

May 13, 1914.

Present:—Mr. Stanyon, A. J. C.

GOPAL—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 476, 537—Requisites of legal sanction—Notice to accused, whether necessary—Judicial proceeding, scope of—Taking action on extra-judicial information, legality of.

A sanction for prosecution which is not addressed to any one in particular, and does not, as far as practicable, specify the Court or other place in which and the occasion on which the offence was committed, is not a legal sanction under section 195 of the Criminal Procedure Code. [p. 515, col. 1.]

A Court, acting under section 195 (*b*), is competent to, and in a proper case should, give notice and make inquiry before granting sanction, but the law does not compel the giving of notice or the holding of any inquiry before granting sanction. [p. 514, col. 2.]

Section 537 of the Code can only be used to repair irregularities which have not occasioned any failure of justice. It cannot make legal that which is illegal. [p. 516, col. 1.]

The offence for which a prosecution can be ordered, under section 476 of the Criminal Procedure Code, must have been either committed before the Court making the order or brought to its notice in the course of a judicial proceeding pending before it. [p. 516, cols. 1 & 2.]

The calling up of a record under section 476 of the Criminal Procedure Code and the subsequent examination thereof do not constitute a "judicial proceeding" within the meaning of that phrase in the Code. [p. 516, col. 2.]

In re Subbaraya Vathyar, 15 M. L. J. 489; 3 Cr. L. J. 118; 2 Weir 599, followed.

A Magistrate taking action in respect of an offence notified to him extra-judicially commits an illegality not curable by section 537 of the Code. [p. 516, col. 2.]

Criminal revision against an order passed by the District Magistrate, Buldana, dated the 8th April 1914.

Mr. *M. R. Dixit*, for the Applicant.

Mr. *G. P. Dick*, for the Respondent.

JUDGMENT.—It is necessary to state the material facts of this case. On the 25th November 1912 a woman, named Sita Bai, was run over by a bullock cart belonging to one Wahedan and was seriously injured, three ribs being fractured. This incident having been reported by the village *patel* to the Tahsildar of Jalgaon, the latter passed it on to the Police for necessary action. This resulted in an investigation by Sub-Inspector Gopal Sakharam, who is the applicant now before me. On the 29th November 1912 he placed Balu, the son of the cart-owner Wahedan, before the Tahsildar for trial in respect of an offence punishable under section 279 of the Indian Penal Code, it being alleged that Balu was driving the cart when Sita Bai was run over. This case was registered as No. 129 of 1912 on the file of the Tahsildar, who was a Magistrate of the 2nd Class at Jalgaon. The case was compounded and the accused discharged on the 12th December 1912.

Subsequently, a departmental inquiry into the conduct of the Tahsildar, Mahomed Sirajuddin, was set on foot, and, in the course of this inquiry, the conduct of Sub-Inspector Gopal Sakharam came under suspicion and he was suspended. An inquiry was then made, *inter alia*, into the facts of Case No. 129 of 1912 above mentioned, which led the Assistant Superintendent of Police in charge of it to believe that, when the cart ran over Sita Bai, the persons in it were Parshia and Purnia, and not Balu, and that the case against Balu, and the evidence given by Sita Bai and others in support of it, had been fabricated by Sub-Inspector Gopal Sakharam. The matter was reported to the District Magistrate, who, on the 18th November 1913, made the following order:—

"It appears from the papers received from the District Superintendent of Police that Sub-Inspector Gopal Sakharam under suspension has committed an offence under section 193/114, Indian Penal Code. I, therefore, sanction his prosecution for abetment of false evidence. The Prosecuting Sub-Inspector, Khamgaon is appointed Public Prosecutor in the case. He should arrange to lay the complaint as usual."

This order was apparently sent to the District Superintendent of Police, who, on the 21st November 1913, endorsed it on to the prosecuting Sub-Inspector at Khamgaon thus:—

"The papers are herewith sent You should lay a complaint as directed."

It will be seen that neither the order of the District Magistrate nor the endorsement of the District Superintendent gave the smallest clue to the allegations upon which the charge under section 114 read with section 193 of the Indian Penal Code was to be based. The Prosecuting Sub-Inspector was left to evolve the offence

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from the departmental inquiry papers sent to him and to exhibit the same as the offence to which the so-called sanction of the District Magistrate referred. It is not surprising under the circumstances that he did nothing of the kind in the shape of a formal complaint. He took the papers to the Sub-Divisional Magistrate of Khamgaon on the 29th November 1913. That authority submitted a memorandum to the District Magistrate, pointing out that he was disqualified from trying the case, because he had taken part in the inquiries against the Sub-Inspector and reported unfavourably on him. On the 3rd December 1913 the District Magistrate endorsed on this memorandum as follows :—

" District Superintendent of Police,

Please have the case challaned in the Court of Mr. Bhat, Sub-Divisional Magistrate, Malkapur, who will try it. "

On the 4th December 1913, the District Superintendent of Police endorsed the order on to some Prosecuting Inspector in these words :—

" Please lay a complaint before Mr. Bhat, Extra Assistant Commissioner. "

The Prosecuting Inspector, now appointed to initiate the proceedings, was apparently Mr. Raghonath Dass of Buldana. He also did not draw up any written complaint. He appeared with his papers before the Magistrate appointed to try the case and was examined on oath as a complainant, and told the story which he found in the papers sent to him, not one word of his deposition being legal evidence. However, the statement was a valid complaint, and the Magistrate proceeded to take cognizance of the case on it. The Prosecuting Inspector filed a list of his witnesses on the 10th December 1913, and the Magistrate issued process and fixed the 19th December 1913 for the trial. On that day the accused appeared and asked for an adjournment on the ground that he had appealed against the sanction granted by the District Magistrate. This application was allowed, and the case was adjourned to the 24th January 1914. Before it could be taken up again, the record was called up by the Court of Sessions. On the 19th January 1914 the learned Sessions Judge revoked the sanction, but it was not till the 2nd April 1914 that the record found its way back to the Sub-Divisional Magistrate, who, on the following day, closed the trial and discharged the accused.

The learned Sessions Judge wrote:—

" It is impossible to sustain this sanction. The learned District Magistrate made no enquiry and gave no notice to the Sub-Inspector concerned of the proceedings, if any, taken under section 195, Criminal Procedure Code. He merely refers to some Police papers and bases his sanction on them as if it was an executive order given on some miscellaneous matter. It should have been based either on the record of the judicial proceeding in which the perjury is said to have been committed, or, if the record by itself does not disclose any such offence, on the result of an inquiry made by himself."

It appears to be manifest that so far the learned Sessions Judge both misinterpreted the law and misapprehended the facts. Assuming the proceedings of the District Magistrate to have been under section 195 of the Criminal Procedure Code, that section did not require him to give any notice to the accused or hold any independent inquiry before giving sanction : *Krishnanund Das* v. *Hari Bera* (1); *Manga Ram* v. *Behari* (2); *Queen-Empress* v. *Sheikh Beari* (3); *In the matter of Govindu* (4). No doubt, a Court acting under section 195 (*b*) is competent to, and in a proper case should, give notice and make inquiry before granting sanction: *Kedarnath Das* v. *Mohesh Chunder* (5): *Queen-Empress* v. *Motha* (6); *Shashi Kumar Dey* v. *Shashi Kumar Dey* (7); and in some cases the failure to give notice might be a sufficient ground for revoking sanction: *Pampapati* v. *Subba Sastri* (8). But the law does not compel the giving of notice or the holding of any inquiry before granting sanction. There was no charge against the Sub-Inspector of having

(1) 12 C. 58.
(2) 18 A. 358; 2 Weir 181.
(3) 10 M. 23[illegible]; 2 Weir 297.
(4) 26 M. 592.
(5) 16 C. 161.
(6) 20 M. 339; 2 Weir 175; 7 M. L. J. 311.
(7) 19 C. 345.
(8) 23 M. 2[illegible]6; 2 Weir 186.

himself given any false evidence in the aforesaid Case No. 129 of 1912, but of having committed the offence of abetment of false evidence out of Court, and been present while the abettors committed in Court the act abetted. The judicial proceedings contain no trace of the act of abetment, which depended for proof upon facts discovered by subsequent inquiry: and if that inquiry statisfied the District Magistrate that a *prima facie* case of abetment was made out, since such abetment was committed in relation to a proceeding in the Court of the Tahsildar, the District Magistrate, as a Court to which the Tahsildar as a Magistrate was subordinate, was competent to give sanction under section 195 (1) (*b*) read with sub-section (3).

The learned Sessions Judge was on firmer ground when he condemned the sanction as bad for non-compliance with the imperative provisions of sub-section (4) of section 195: and his revocation of the so-called "sanction" on that ground was quite legal though, as I shall hereafter show, inexpedient. A sanction for prosecution which is not addressed to any one in particular and does not, as far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed, is certainly not a legal sanction under section 195 of the Criminal Procedure Code. But having legally revoked the "sanction," the learned Sessions Judge added to the medley and confusion by making the wholly unnecessary observation that "this revocation is no bar to a complaint being made under section 476, Criminal Procedure Code, after a proper inquiry." How that section could legally be used in a case where the offence of abetment was neither committed before the District Magistrate nor brought under his notice in the course of a judicial proceeding, the learned Sessions Judge did not point out.

As might have been foreseen, the observation misled the District Magistrate into an illegal use of section 476. He sent for the record of Case No. 129 of 1912. Having perused it, he decided to examine certain witnesses and so, after obtaining the presence of the accused, on the 8th April 1914 he made an order, whereof it is only necessary to quote the following passage:—

"I think the inquiry held under section 476, Criminal Procedure Code, shows *prima facie* that Gopal Sakharam at the time of *challaning* Criminal Case No. 129 of 1912 before the (illegible) of the 2nd Class Magistrate, Jalgaon, fabricated and abetted the fabrication of false evidence in a judicial proceeding. I, therefore, direct that he be prosecuted under that section and proceeded against according to law."

The case was sent to, and the accused was bound over to appear before, the Sub-Divisional Magistrate of Malkapur, who took it up, as on complaint made by the District Magistrate, on the 14th April 1914; but further proceedings were held in abeyance by the prosecution, apparently owing to the present application for revision of the order of the 8th April 1914 having been preferred.

I have stated that the order of the Sessions Judge revoking the sanction was inexpedient. When the case reached him, a detailed complaint against the accused had already been recorded, and though the sanction for the prosecution was bad in form, there is no doubt that the case presented in the statement of the Prosecuting Inspector was the case which the District Magistrate intended to sanction. He undoubtedly had jurisdiction to give a sanction under section 195 of the Criminal Procedure Code. His failure to comply with the provisions of that section was an irregularity which, having regard to section 537 (*b*) of the same Code, did not affect the validity of the order of the Sub-Divisonal Magistrate for the issue of process against the accused, and the progress of the trial which had already been made before the Sessions Judge set aside the sanction. The revocation of the saction was, I think, rightly interpreted to involve a setting aside of all proceedings taken under that sanction, and though this was not illegal, section 537 being subject to all earlier provisions in the Code, including section 195 (6), the learned Sessions Judge would have done well, in this particular case, to have pointed out the irregularity in the sanction and allowed the trial to proceed. However, I have not been asked to revise the order of the Sessions Judge, nor does it involve any error of law which would justify me in doing so.

But the subsequent proceedings of the

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District Magistrate purporting to be under section 476 of the Criminal Procedure Code are not merely irregular—they are without jurisdiction and illegal: and section 537 cannot save such proceedings. That section can only be used to repair irregularities which have not occasioned any failure of justice. It cannot make legal that which is illegal, as pointed out by the Privy Council in *Subrahmania Aiyar* v. *King-Emperor* (9). Jurisdiction to act under section 476 is given by the express terms of the section in respect of offences committed in the presence of the Court exercising the jurisdiction, or brought to its notice in the course of a judicial proceeding. There has been some conflict of opinion between the several High Courts in India (*a*) as to the Court which can proceed under the section, and (*b*) as to the time within which the jurisdiction is to be exercised. In Calcutta and Madras the view has prevailed that the word 'Court' in section 476 means the Judge who tries the case in the course of which the offence is committed or brought to notice, and that the power to order prosecution must be exercised immediately after the conclusion of the case, so as to be a part of the same proceeding: *Begu Singh* v. *Emperor* (10), *Vigakanna Pillai* v. *Emperor* (11), *In re Rahimatulla Sahib* (12), all of which are Full Bench decisions. In Bombay and Allahabad the opinion is that the section imposes no time limit, and that the word 'Court' is not confined to the individual Judge before whom the offence was committed, but includes his successors and also Courts to which he is subordinate: *In re Lakshmidas Lalji* (13), *Girwar Prasad* v. *Emperor* (14), *Kamta Prashad* v. *Emperor* (15). But all the High Courts are agreed that the offence for which a prosecution can be ordered under section 476 must have been either committed before the Court making the order or brought to its notice in the course of a judicial proceeding pending before it. There is, and can be, no difference of opinion on this point, because the language of the section is perfectly plain. In the present case the alleged abetment of false evidence for which the District Magistrate wishes to prosecute the present applicant was admittedly not committed before his Court, and we have his own order of the 18th December 1913 to show that it was brought to his notice in a Police report, and not in the course of any judicial proceeding then pending before him. He could not afterwards set up a judicial proceeding for the purpose of again informing himself of what he already knew, so as artificially to create for himself jurisdiction under section 476. That would be a reducing of the law to absurdity. In respect of an offence already notified to him extra-judicially, he could not have jurisdiction to proceed under section 476.

But, let it be assumed, for the sake of argument, that the District Magistrate could close his eyes to the notice of the alleged offence already given to him by the Police in a departmental report and could look for a fresh notice in the course of a judicial proceeding, it is still manifest that he never received any such notice. In showing cause against the rule issued to him the learned District Magistrate seems to suggest that his calling up of the record of Case No. 129 of 1912 aforesaid was a "judicial proceeding." I am very clear that the calling up of a record under that section and the subsequent examination thereof do not constitute a "judicial proceeding" within the meaning of that phrase in the Code of Criminal Procedure. It may be conceded that the definition—if it can be so called—of a "judicial proceeding" given in section 4 (*m*) of the Criminal Procedure Code is not exhaustive; but common sense draws an easy distinction between the executive, or administrative, and the judicial powers and procedure of a Court. Every superior Court constantly examines the records of the Courts subordinate to it. This is an administrative act. On making such examination it may or may not find an error calling for interference in revision. In the former event, it registers a case and enters upon a judicial proceed-

(9) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257 (P. C.); 2 Weir 271.

(10) 34 C. 551; 5 C. L. J. 508; 11 C. W. N. 768; 5 Cr. L. J. 398; 2 M. L. T. 298 (F. B.).

(11) 1 Ind. Cas. 597; 32 M. 49; 4 M. L. T. 404; 9 Cr. L. J. 41; 19 M. L. J. 42.

(12) 31 M. 140; 7 Cr. L. J. 54; 3 M. L. T. 79; 17 M. L. J. 584.

(13) 32 B. 184; 7 Cr. L. J. 35; 3 M. L. T. 116; 10 Bom. L. R. 28.

(14) 1 Ind. Cas. 306; 6 A. L. J. 392; 9 Cr. L. J. 279.

(15) 9 Ind. Cas. 497; 8 A. L. J. 240; 12 Cr. L. J. 93; 33 A. 396.

ing : in the latter, it returns the records generally without any note thereon, and no judicial proceeding takes place. In *Sangilia Pillai* v. *The District Magistrate of Trichinopoly* (16) the Court refused to decide whether an order passed after and as the result of an examination of records called up under section 435 aforesaid was a judicial proceeding. But in *In re Subbaraya Vathyar* (17) it was held that the calling up of records under section 435 was not a judicial proceeding from which jurisdiction to act under section 476 could be obtained, and in this view I concur.

But I go further in this case. Even if the act of the District Magistrate in sending for the record of Case No. 129 of 1912 aforesaid and perusing the same was a judicial proceeding, such perusal did not bring to his notice that the witnesses in the case had given false evidence. The whole of the case against the present accused rests on statements and circumstances entirely outside that record. Yet on perusing that record the District Magistrate proceeded to hold an inquiry under section 476. That was *ultra vires*. It is true that this inquiry was made judicially and disclosed evidence of the alleged offence : but a Court cannot take action under section 476, for the purpose of obtaining notice of the offence to be dealt with under that section. It must have such notice, before it can legally make any inquiry under that section.

For all these reasons it is manifest that the proceedings of the District Magistrate under section 476 of the Criminal Procedure Code were *ultra vires*, and the illegality cannot be cured by applying section 537 of that Code. It is to be regretted that a prosecution deemed advisable by the District authorities should be blocked in this way : but such obstruction is inevitable if the plain provisions of the law are not followed. The District Magistrate did not follow the simple provisions laid down in section 195 —he once ordered the filing of a complaint and subsequently a Police *challan* in the same case —and altogether the procedure has been confused and uncertain. Surely it was simple enough for some official—preferably not a Public Prosecutor—to draw up a complaint of the offence charged, with details as to time and place, and apply to the District Magistrate to sanction the presentation of the same, and having obtained it, to file the complaint before the proper Magistrate in the usual way. I do not undertake to advise the course which the District Magistrate should now follow. The law is clear and simple, and he has opportunity for obtaining legal advice thereon. The proceedings of the District Magistrate under section 476 of the Criminal Procedure Code, and all proceedings arising out of his order of the 8th April 1914, are hereby set aside as illegal, and the applicant is discharged from all liability to appear and answer to the case instituted under the order of the 8th April 1914. If further action against him in respect of the alleged offence is deemed advisable, it must be taken in accordance with law.

Revision allowed.

(16) 25 M. 659; 2 Weir 599.
(17) 15 M. L. J. 489; 3 Cr. L. J. 118.

BOMBAY HIGH COURT.

CRIMINAL REVISION PETITION No. 404 OF 1914.

February 10, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

ADURJI AND BROTHERS—ACCUSED

versus

EMPEROR—PROSECUTOR.

Bombay District Municipalities Act (Bom. Act III of 1901), s. 96 Using room built as shop for residential purposes—"Conversion of any building," meaning of.

The words "conversion of any building", in Explanation to section 96 of the District Municipalities Act, necessarily imply some change in the building itself and, therefore, they do not cover a case where the building remains absolutely unchanged and the only thing that is changed is the use or occupation to which the building is put. [p. 518, cols. 1 & 2.]

Criminal application for revision from an order passed by the first Class Magistrate of Karad, varying the conviction but confirming the sentence passed by the second Class Magistrate of Medha.

Mr. *Coyaji* (with him Messrs. *Ratanlal Ranchhoddas* and *K. H. Kelkar*), for the **Applicants.**

Mr. *Strangman*, Advocate-General, (with him Mr. *S. S. Patkar*), Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—This case has been very carefully argued and appears to be regarded as one of some importance. What happened was that the applicant obtained leave to build a shop in Mahableshwar in the year 1903. He built what he obtained permission to build, but he used it as a dwelling-house, and not as a shop, up to November 1911. Thereafter he used the principal room, the biggest room I gather, as a shop, and continued so to do until October 1913. Then he let the whole building to a tenant and the whole of it was used by that tenant as a dwelling-house. He has been convicted on these facts of what may be very correctly described as the conversion of a shop into a dwelling-house without permission. If such a conversion comes within the terms of section 96 of the District Municipalities Act, then the conviction is correct. That section was held to apply both by the trying Magistrate and by the Sub-Divisional Magistrate who heard the case in appeal.

The question is whether the conversion of a shop into a dwelling-house is such a conversion as is contemplated by the section. There is no doubt that in general the section deals with alterations, actual structural alterations, to buildings. But by an Explanation at the end of the section we find that to erect a buliding (and to erect a building is a phrase used in the section) includes, amongst many other things, the conversion into a place for human habitation of any building not originally constructed for human habitation. We have here a building which, we may take it, was originally constructed for a shop and I will take it for the purpose of argument that it was not therefore originally constructed for human habitation. We have a building, therefore, of the kind contemplated by this particular portion of the Explanation. Nevertheless, it seems to me that the words "conversion of any building", I mean the plain English of the words without going into technicalities or refinements or anything of that kind, necessarily imply some change in the building itself and, therefore, they do not seem to me to cover a case where the building remains absolutely unchanged and the only thing that is changed is the use or occupation to which the building is put. This view is strengthened by an analysis of section 96 as a whole. I do not think either, as contended by the Advocate-General contrary to the opinion of the Sub-Divisional Magistrate, that an offence is made out under section 155 of the District Municipalities Act by reason of a disobedience such as is contemplated by clause 2 of section 96. The particular part of that clause which, it is sought to use, deals with conditions in writing imposed with reference to a building. In this case certain conditions in writing were imposed, but not one of those conditions has been broken. At any rate, it is not shown that it is so. And I cannot find in this case that the writing implied any condition which has been broken, so that neither directly nor by implication do I think that an offence under section 155 is made out. Therefore, I think that the conviction must be set aside and the fine, if paid, refunded.

SHAH, J.—I agree.

Conviction and sentence set aside.

MADRAS HIGH COURT.

CRIMINAL APPEAL NO. 641 OF 1914.

February 11, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

ANNAVI MUTHIRIYAN—PRISONER—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss 33, 58—Court, duty of, while admitting statement of absent witness—Irregularity Consent of accused or his Counsel as to admission of certain evidence, effect of—Criminal Procedure Code (Act V of 1898), s 517—Trial by Jury—Charge to Jury—Misdirection, effect of.

Under section 33 of the Evidence Act the Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable, before he admits a statement made by the absent witness in a previous judicial proceeding. It is not enough to have the statement of the Public Prosecutor to that effect but there must be independent evidence before him before he can exercise the powers given to him under the Evidence Act. [p. 520, col 1.]

Therefore, where a Judge acts upon the statement of the Public Prosecutor his procedure is irregular. [p 520, col 2.]

The English decisions relating to evidence can be

ANNAVI MUTHIRIYAN *v.* EMPEROR.

relied upon in India. [p. 520, col. 2.]

Prima facie the consent of the accused or his Counsel is the presumptive evidence of the absence of prejudice. [p. 521, col. 2.]

Empress of India v. *Mulu*, 2 A. 646; *In the matter of the petition of Rimi Reddi*, 3 M. 48; 2 Weir 756; *Emperor* v. *Kangal Mali*, 26 Ind Cas. 161; 15 Cr. L. J. 713; 41 C. 601; *Noshai Mistri* v. *Emperor*, 5 C. 958; 6 C. L. R. 353; *Queen* v. *Lukhun Santhal*, 21 W. R. 56 Cr., followed.

The rules of evidence are subject to the general principles of jurisprudence and it is the duty of the prosecution to establish the case against the accused, and they should not rely upon admissions made by him in the course of his trial for convicting him. [p. 521, col .]

Imperatrix v. *Pitambar Jina*, 2 B. 61; *Collector of Gorakhpur* v. *Palakdhari Singh*, 12 A. 1; *Rey* v. *Bertand*, 4 Moore P. C. (N. S.) 46); 36 L. J. P. C 51; 1 P. C. 520; 16 L. T 752; 6 W. R. 9; 10 Cox. C. C. 618; 16 E. R. 391; *Queen* v. *Bholanath Sen*, 25 W. R. 57 Cr.; 2 C. 23; *Queen* v. *Bishonath Pal*, 12 W. R. 3 Cr.; 3 B. L. R. 20 Cr.; 1 Ind,Jur. 238; *Queen* v. *Raghoonath Doss*, 23 W. R. 59 Cr.; *Ringaswami* v. *Emperor*, 18 M. L. J. 330; 3 M. L T. 407; 8 Cr. L. J. 152; *Subba* v. *Queen-Empress*, 9 M. 83; 2 Weir 356; *Emperor* v. *Sikhram Pandurang*, 26 B. 59; 3 Bom. L. R. 558; *Parmessur Singh* v. *Sor op Adhikaree*, 13 W. R. 40 Cr.; *In the matter of the petition of Jhubboo Mahaton*, 8 C. 739; 10 C. L. R. 233; 6 Ind. Jur. 639; *Emperor* v. *Waman Shiram Damle*, 27 B. 626; 5 Bom. L. R. 590, followed

In a trial by jury, reception of inadmissible evidence by the Judge and his failure to warn the jury against considering such evidence amounts to misdirection, which vitiates the whole proceeding. [p. 5 0, col. 1; p. 521, col. 2.]

Appeal against an order of the Court of Session of the South Arcot Division, in Case No. 29 of the Calendar for 1913.

Mr. T. Arumainatham Pillai, for the Appellant.

Mr. *Nugent Grant*, for the Government.

JUDGMENT.

SPENCER, J.—Apart from the question of the improper admission at the trial of the evidence of Akilanda Soma Naick given before the committing Magistrate without proof that it was impossible to procure his attendance before the Sessions Court with which my learned brother has fully dealt, I think that the accused is likely to have been further prejudiced in his trial by the misreception of hearsay evidence and that on this account also the appeal must succeed. The only evidence to connect the accused with this dacoity is the statement of two witnesses, *viz.*, Akilanda Soma Naick examined in the Committing Magistrate's Court and P. W. No. 2 examined in the Sessions Court. Both of these persons, on their own admission, are men employed by the Police to do private detection work in Kallar villages on behalf of the Police, and in my opinion the Jury should have been cautioned against acting too readily upon such evidence. Both of these witnesses have given a detailed statement as to the inquiries made by them to obtain a clue to the dacoity, in the course of which they employed one Chinnapayal as an agent. The statements of Chinnapayal, who has not been examined as a witness in the trail of the accused, are not admissible in evidence, but in the depositions of both of these witnesses, the statements as to what Chinnapayal said have been recorded as though it was direct evidence. One of the statements made by Chinnapayal as given by P. W. No. 2 is that four persons named by him had taken part in this dacoity and some others whose names he did not remember: one of those names was that of the accused under trial.

What Chinnapayal said was not evidence and should not have been admitted by the Sessions Judge, and it is likely to have prejudiced the Jury in deciding whether the accused was guilty or not. There are other statements in these depositions referring to other offences which were irrelevant for the purposes of this trial. If the Sessions Judge found it necessary to admit such evidence for other purposes, he should have cautioned the Jury as to its relevancy against the present accused. For these reasons, I agree that the conviction must be set aside and that the accused should be re-tried.

SESHAGIRI AIYAR, J.—The Jury brought in a verdict of 'guilty' against the accused in this case and the Sessions Judge convicted them of the offence of dacoity.

It is argued in appeal that there have been misdirections by the Judge and improper admission of evidence, which have prejudiced the accused and the verdict of the Jury. I do not think it has been proved that there has been any positive misdirection to the Jury, except it be the failure of the Sessions Judge to draw pointed attention to the fact that they have to rely upon the testimony of an absent witness in the case. He refers in paragraph 7 of his summing up to the fact that the Jury are not dependent on the evidence of Akilanda Soma Naick alone. That cannot be regarded as a

direction to disregard the evidence of this absent witness. Other points relating to misdirection were mentioned, but they all, affect the appreciation of the evidence and do not point to any failure on the part of the Sessions Judge to direct the Jury aright.

But on the question of the improper admission of evidence, I am of opinion that the conviction should be set aside. In the course of the examination of the 2nd witness for the prosecution reference was made to the accused having taken part in another dacoity; this evidence ought not to have been allowed to go in. The nature of the evidence is such that it would have prejudiced the Jury against the accused. But the more serious objection relates to the admission of the evidence of one Akilanda Soma Naick who was examined before the trying Magistrate. The Sessions Judge says: "This man has not put in an appearance in this Court and it does not appear why he has not come." Further on he says that "the Public Prosecutor asked that his deposition in the lower Court might be filed as evidence here, as it seemed that it would be causing unnecessary delay in the disposal of the case if it had to be adjourned for securing his attendance." Again he says that the accused's Pleader does not object to the evidence given before the Magistrate being admitted under section 33 of the Evidence Act. Under the Evidence Act the Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect. There must be independent evidence before him before he can exercise the powers given to him under the Evidence Act. Further, the Appellate Court may not be prepared to act upon representations which have satisfied the Trial Judge. It is, therefore, incumbent on the lower Court to have on record some legal evidence on which he could act. It was held in *Empress of India* v. *Mulu* (1) that it is the duty of the Court acting under section 33 to have reliable evidence regarding the impracticability of procuring the attendance of a witness. *In the matter of the petition of Rami Reddi* (2) this conclusion seems to have found favour with the learned Judges of this High Court. In a recent case in Calcatta in *Emperor* v. *Kangal Mali* (3) under similar circumstances the learned Judges pointed out the danger of allowing statements made in the Court below to be used as evidence without having taken the necessary steps to ensure the attendance of the witness in the Court. The same view was taken in *Noshai Mistri* v. *Empress* (4) and in the *Queen* v. *Lukhun Santhal* (5). I am, therefore, of opinion that the procedure of the Sessions Judge in acting upon the statement of the Public Prosecutor was irregular.

Does the fact that the accused's Pleader consented to the course make any difference in the matter? This question is not altogether free from difficulty. It is true, as pointed out in *Imperatrix* v. *Pitambar Jina* (6), that the provisions of the Evidence Act relating to the admissibility of evidence are as applicable to criminal trials as to civil trials. There can be no doubt upon this matter, as section 1 of the Evidence Act says that "the Act extends to all judicial proceedings in or before any Court including Courts-martial." Therefore, section 167 of the Evidence Act governs trials before the Sessions Court. The question remains whether the provisions of the Act are exhaustive of the rules of evidence and whether he can invoke the aid of the principles of jurisprudence or of English Law as supplementing and explaining the rules of evidence given in the Act. The high authority of Edge, C. J., in the *Collector of Gorakhpur* v. *Palakdhari Singh* (7) can be cited for the position that English decisions relating to evidence can be relied upon in India. I cannot agree with the learned Public Prosecutor that we are not entitled to refer to English decisions as the Act is self-contained. Such a practice has the authority of very eminent Judges in India and I am not prepared to depart from it. Section 58 of the Evidence Act lays down that no fact need be proved in any

(1) 2 A. 646.
(2) 3 M. 48; 2 Weir 756.
(3) 26 Ind. Cas. 161; 41 C. 601, 15 Cr. L. J. 713.
(4) 5 C. 958; 6 C. L. R. 353.
(5) 21 W. R. 56 Cr.
(6) 2 B. 61.
(7) 12 A. 1.

proceeding which the parties thereto or their agent agreed to admit at the hearing. The learned Public Prosecutor argues from this that as the Pleader for the accused dispensed with the personal appearance of Akalandasoma Naick in the Sessions Court, the accused is bound by such an admission. The rules of evidence are subject to the general principles of jurisprudence that it is the duty of the prosecution to establish the case against the accused, and that they should not rely upon admissions made by him in the course of the trial for convicting him. In *Reg.* v. *Bertrand* (8) the Judicial Committee of the Privy Council in a very elaborate judgment point out the inadvisability of basing a conviction upon evidence which but for the consent of the accused's Counsel should not have been admitted. This decision was followed in *Queen* v. *Bholanath Sen* (9), where the learned Judges pointed out that no conviction should be based against the accused upon anything that he said or consented in the course of the trial. *Queen* v. *Bishonath Pal* (10), *Jungi Khan* v. *Hur Chunder Rai* (11) and *Queen* v. *Rughoonath Dass* (12) are to the same effect. I may cite *Rangaswami* v. *Emperor* (13), a decision of the learned Chief Justice, in favour of the same position. It may be argued that in most of these cases the consent of the accused or of his Counsel was given for an infraction of the rules of procedure contained in the Code of Criminal Procedure. I do not think any difference can be made between the violation of a rule of procedure and the violation of a rule of evidence. The decision in *Emperor* v. *Sakharam Pandurang* (14) is strongly in favour of the contention of the Vakil for the appellant. In *Subba* v. *Queen-Empress* (15), the learned Judge of this Court, while holding that the improper admission of evidence was illegal, came to the conclusion that the accused was not prejudiced by such evidence being admitted and that, therefore, it was not necessary to order a trial. The same view has been taken in *Purmessur Singh* v. *Soroop Audhikaree* (16) and in *in the matter of the petition of Jhubboo Mahton* (17). I understand these judgments to lay down that *prima facie* the consent of the accused or of his Counsel is presumptive evidence of the absence of prejudice. I do not take these rulings to lay down anything more than that. I do not think it was intended to rule that, because an irregular procedure or improper admission of evidence has been consented to by the accused, it precludes the Judges hearing the case from deciding whether, notwithstanding the consent of the accused, his case has been prejudiced by the irregularity. In the present case the Sessions Judge pointed out distinctly "that unless you believe the story told by the 1st prosecution witness and Akilanda Soma Naick, there is no case against the accused." If I am right in my conclusion that the evidence of Akilanda Soma Naick should not have been admitted in evidence, it is impossible to argue that the Jury were not prejudiced by its inclusion, seeing that there was only one other witness on whose testimony they had to rely for basing the conviction against the accused. I have already drawn attention to the reception of another piece of evidence which ought not to have been allowed to be given in the case. As was pointed out in *Emperor* v. *Waman Shivram Damle* (18) such a course amounts to misdirection. In my opinion the verdict of the Jury and the conviction by the Sessions Judge should be set aside.

Conviction set aside.

(8) 4 Moore, P. C. (N. S.) 460; 36 L. J. P. C. 51; 1 P. C. 520; 16 L. T. 752; 16 W. R. 9; 10 Cox. C. C. 618; 16 E. R. 391.
(9) 2 C. 23; 25 W. R. 57 Cr.
(10) 12 W. R. 3 Cr.; 3 B. L. R. 20 Cr.
(11) 16 W. R. 69 Cr.
(12) 23 W. R. 59 Cr.
(13) 18 M. L. J. 330; 3 M. L. T. 407; 8 Cr. L. J. 152.
(14) 26 B. 50; 3 Bom. L. R. 558.
(15) 9 M. 83; 2 Weir 356.
(16) 13 W. R. 40 Cr.
(17) 8 C. 739; 1 C. L. R. 233; 6 Ind. Jur. 639. 626; 5 Bom. L. R. 599.

In re MALA MEKALAKATI SUBBADU.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 774 OF 1914.
CRIMINAL REVISION PETITION No. 646 OF 1914.
CRIMINAL REVISION CASE No. 72 OF 1915
(TAKEN UP No. 9 OF 1915.)
February 1, 1915.

Present: Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

In re MALA MEKALAKATI SUBBADU—PETITIONER ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 233, 239, 537—Misjoinder of charges—Joint trial—Offences in different villages on different nights—One accused charged with offences under ss. 457 and 380, Penal Code, and other with offences under ss. 457 and 380 or 411, Penal Code—'Same transaction'—Irregularity or illegality, whether curable.

Section 239, Criminal Procedure Code, does not permit the joint trial of accused for different offences committed in the course of different transactions. [p. 523, col. 2.]

Where, in respect of offences of house-breaking and theft committed in two different villages on two distinct nights, the 1st accused was charged with the offences under sections 457 and 380, Indian Penal Code, and the second accused with those under sections 457 and 380 or 411, Indian Penal Code, and both the accused were tried at one trial in respect of the above charges:

Held, that the trial was bad. [p. 523, col. 2 and p. 524, col 1.]

Budhai Sheikh v. *Emperor*, 10 C. W. N. 32; 33 C. 292; 3 Cr. L. J 126 and *Emperor* v. *Jethalal Harlochand*, 7 Bom. L R. 527; 29 B. 449; 2 Cr. L. J. 480, followed.

Held, further, that the charge was bad for vagueness, as it did not specify the articles stolen or the name of the person whose house was broken into and the place of offence was given only as one village whereas the trial was for offences committed at that village as well as another. [p. 523, col. 2.]

Per *Seshagiri Aiyar, J.*—Disregard of a plain duty cast by law on a Magistrate cannot be condoned with reference to section 537, Criminal Procedure Code. [p. 524, col. 1.]

Section 233, Criminal Procedure Code, must be strictly applied save where the Code itself provides exceptions. [p. 524, col. 1.]

Subrahmania Ayyar v. *King-Emperor*, 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C W. N. 866; 28 I. A 257; 25 M 61; 2 Weir 271; *Raman Behary Das* v. *Emperor*, 22 Ind. Cas. 729; 18 C. W. N. 1152; 15 Cr. L. J. 153; 41 C. 722, *Emperor* v. *Mata Prasad*, A. W. N. (1904) 52; 5 A. L. J. 459; 30 A. 351, 8 Cr. L. J. 4; *Gobind Kooi* v. *Emperor*, 6 C. W. N. 468; 29 C. 385 and *Musti Singh* v. *Emperor*, 22 Ind. Cas. 1008; 18 C. W. N. 183; 15 Cr. L. J. 224; 41 C. 63, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1893, praying the High Court to revise the order of the Court of the Deputy Magistrate of Cuddapah, in Criminal Appeal No. 32 of 1914, preferred against that of the Stationary Second Class Magistrate of Cuddapah, in Calendar Cases Nos. 311 and 312 of 1914 and case taken up by the Court *suo motu* in respect of the 2nd accused.

FACTS.—There was a house-breaking and theft committed on a certain night in the village of Tadigotla, and on the next night a similar offence was committed in the village of Nallapu Reddi Palli, about four miles distant from the former. The stolen property was recovered two days after the second theft. The accused (the 2nd being the concubine of the first) were charged before the Stationary 2nd Class Magistrate of Cuddapah, the first with offences under sections 457 and 380, Indian Penal Code, and the second with offences under sections 457 and 380 or 411, Indian Penal Code. The charge did not specify either the articles stolen or the owner of the houses broken into and the name of only one village was mentioned in the charge, while the trial was for offences committed in two villages. The Sub-Magistrate convicted the accused of the offences charged. On appeal the Deputy Magistrate of Cuddapah confirmed the conviction, holding that though the joint trial and joint charge were bad, that was only an irregularity which was cured by section 537, Criminal Procedure Code, as the same was not shown to have prejudiced the accused in any way. The 1st accused thereupon preferred this criminal revision petition to the High Court, which took up *suo motu* the case of the 2nd accused.

Mr. *Koti Reddi*, for Mr. *K. Subba Reddi*, for the Petitioner:—The trial is vitiated by misjoinder of charges. The offences took place in different villages and on different nights. They ought not to have been tried at one trial: *Budhai Sheikh* v. *Emperor* (1) and *Emperor* v. *Jethalal Harlochand* (2). *Raman Behary Das* v. *Emperor* (3) lays down that, in the absence of exceptions provided in the Code, section 233, Criminal Procedure Code, must be strictly applied. This is not an irregularity

(1) 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126.
(2) 29 B. 449; 7 Bom. L. R. 527; 2 Cr. L. J. 480.
(3) 22 Ind. Cas. 729; 41 C. 722; 18 C. W. N. 1152; 15 Cr. L. J. 153.

but an illegality and as such is incurable: *Subrahmania Ayyar* v. *King-Emperor* (4), *Emperor* v. *Mata Prasad* (5) and *Gobind Koeri* v. *Emperor* (6). Offences of theft and receiving stolen property are not triable at one trial. Further the charge is vague and indefinite.

Mr. *P. R. Grant*, for the Public Prosecutor, on behalf Government, argued *contra* and contended that the offences arose out of the same transaction and so the joint trial was perfectly legal and that at the most it was only a curable irregularity as the accused were not shown to have been prejudiced thereby.

ORDER.

SPENCER, J.—It is contended that in this case there has been a misjoinder of charges and I find the contention to be sound.

It appears that house-breaking and theft occurred in two villages four miles apart on two successive nights. The 1st accused was charged with house-breaking and theft and the 2nd accused, his concubine, was charged with house-breaking by night and theft or in the alternative, with receiving stolen property.

Seeing that no witnesses came forward to say that they had seen the thieves in the act of committing the offences of house-breaking and theft, it is not clear why the male prisoner was not also charged in the alternative under sections 457 and 380 or section 411 of the Indian Penal Code, but perhaps the Magistrate may have considered that the female prisoner was less likely to have taken an active part in the theft and house-breaking.

Be this as it may, there is nothing to suggest that the house-breaking and theft at Nallapu Reddi Palli was part of the same transaction as the house-breaking and theft at Tadigotla, and we must, therefore, take it that they were two separate transactions.

Now as pointed out in *Budhai Sheikh* v. *Emperor* (1), which had been followed by decisions of this Court, section 239, Criminal Procedure Code, is the section of the Code which deals with the trial of more persons than one and it permits them to be tried jointly for the same offence or for different offences committed in the course of the same transaction, but not for different offences committed in the course of different transactions.

In the present case prosecution witnesses Nos. 1 and 2 identified a cloth (material object No. 1) as one that had been stolen from the house of prosecution witness No. 1 at Tadigotla and prosecution witness No. 3 identified a jewel (material object No. 2) as one that had been stolen from his house at Nallapu Reddi Palli. The two accused were tried for different offences in respect of these two articles stolen on different occasions, a procedure which tended to cause complication, besides being unwarranted by law.

The charge is also bad for vagueness, as it does not specify the articles stolen or the name of the person whose house was broken into, and the place of offence is given only as Tadigotla, whereas the trial was for offences committed both at Tadigotla and at Nallapu Reddi Palli.

We accordingly set aside the convictions and sentences and direct that the accused be re-tried on charges properly framed by such Magistrate as the District Magistrate of Cuddapah may direct, other than the Magistrate who has already tried the case.

SESHAGIRI AIYAR, J.—I entirely agree. The alleged thefts were on two different dates in two different villages. The stolen property was recovered two days after the second theft. The Public Prosecutor has not argued that these three incidents relate to the same transaction. Under section 233, there should be separate charges and separate trials, unless any of the exceptions contained in sections 234 to 239 apply. The Appellate Magistrate, while conceding that the joint trial and joint charge were irregular, has held that as the irregularity has not been shown to have prejudiced the accused, the proceedings need not be set aside. It was pointed out in *Subrahmania Ayyar* v. *King-Emperor* (4) that "disobdience an express provision as to a mode of trial" was not a mere irregularity. Following this dictum, the learned Judge of the Calcutta High Court in *Raman Behary Das* v. *Emperor* (3)

(4) 25 M. 61; 11 M.L.J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257; 2 Weir 271.

(5) 30 A. 351; A. W. N. (1908) 152; 5 A. L. J. 450; 8 Cr. L. J. 4.

(6) 29 C. 385; 6 C. W. N. 468.

held that section 233 must be strictly applied save where the Code itself provides exceptions. The language of the section is imperative, and I am unable to agree with the Court below that the disregard of a plain duty cast by law on the Magistrate can be condoned with reference to section 537. See *Emperor* v. *Mata Prasad* (5) and *Gobind Koeri* v. *Emperor* (6).

I have already stated that the joinder of the charge of theft with that of receiving stolen property, not in the alternative, but cumulatively is not countenanced by the Code. It may be argued on the analogy of the decision in *Musai Singh* v. *Emperor* (7) that this defect can be cured as the irregularity related only to the failure to frame distinct charges. It is also doubtful whether the two offences may not be said to arise out of the same transaction. See, however, *Mohendra Nath Das Gupta* v. *Emperor* (8). But there can be no doubt that the trial of the 1st accused with the second accused, who was only charged with an offence under section 411 of the Penal Code, is illegal. Section 239, which permits of a joint trial of more than one accused, does not cover this case. See *Emperor* v. *Jethalal Harlochand* (2).

I argree in the order proposed by my learned colleague.

Conviction set aside; Re-trial ordered.

(7) 22 Ind. Cas. 1008; 41 C. 66; 18 C. W. N. 183; 15 Cr. L. J. 224.

(8) 29 C. 387; 6 C. W. N. 550.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 498 OF 1914.

December 15, 1914.

Present:—Mr. Justice Shah Din.

HIDAYATA AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 401—Belonging to a gang of thieves—Convictions prior to formation of gang and orders under s. 110 of Criminal Procedure Code, admissibility of evidence as to—Limitation Act IX of 1908), s. 12—Application for copy of judgment mislaid—Limitation.

In a trial under section 401 of the Penal Code evidence of the previous convictions of some of the accused for offences of theft, house-breaking and receiving or concealing stolen property both prior and subsequent to the year when the nucleus of the gang was for the first time formed, is admissible as proving habit. [p. 526, col. 2.]

Empress v. *Nabar Kumar Patnaik*, 1 C. W. N. 146, followed.

Orders passed from time to time against the accused under section 110 of the Criminal Procedure Code demanding from them security for good behaviour are also relevant evidence against them for the purpose of proving association and intention to habitually commit theft within the meaning of section 401 of the Penal Code. [p. 526, col. 2, p. 527, col. 1.

Bhoma v. *Emperor*, 9 Ind. Cas. 555; 38 C. 408; 15 C. W. N. 461; 12 Cr. L. J. 97 and *Emperor* v. *Tukaram Malhari*, 15 Ind. Cas. 811; 14 Bom. L. R. 373; 13 Cr. L. J. 539, referred to.

Beja v. *Emperor*, 26 Ind. Cas. 625; 13 P. R. 1914 Cr.; 16 Cr. L. J. 33, explained.

Where in an appeal filed through the jail authorities it appeared that the application for a copy of the judgment of the Magistrate was made within the period of limitation but was somehow mislaid and a second application had to be sent after the period presented for the appeal had expired.

Held, that the appeal must be treated as filed within time. [p. 525, col. 1.]

Appeal from an order of the Magistrate, first Class, exercising enhanced powers under section 30 of the Criminal Procedure Code, Jhang, dated the 20th April 1914, convicting the appellants.

Messrs. *Morton* and *Fazal-i-Husain*, for the Appellants.

Pandit *Jawala Parshad* (for the Government Advocate), for the Respondent.

JUDGMENT.—This appeal and Criminal Appeals Nos. 550 and 912 of 1914 are connected and they will be disposed of in one judgment.

The fourteen appellants, who have preferred these three appeals and whose names are mentioned in the subjoined statement, which also contains the caste, age and residence of each appellant, have been convicted by the Magistrate, Sheikh Siraj-ud-Din, of the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, and they have all been convicted under section 401, Indian Penal Code, and sentenced each to rigorous imprisonment for seven years, including three months' solitary confinement, save and except Samaila, appellant in Appeal No. 912, who in consideration of his youth has been sentenced to two years' rigorous imprisonment.

* * * *

The Magistrate commenced the trial on

the 17th March; 104 witnesses were examined for the prosecution; and charges were framed against the accused persons under section 401, Indian Penal Code, on the 24th March, on which date the statements of the accused were also taken down. The prosecution witnesses were further cross-examined on behalf of the accused between the 24th and the 30th March and on the latter date supplementary statements of the accused persons were recorded. One hundred and twelve witnesses for the defence were examined from the 1st April to the 6th April, and the arguments were heard on the 8th April. The Magistrate delivered judgment on the 20th April, the result being that he convicted and sentenced all the accused persons under section 401, Indian Penal Code.

Hidayat and 10 others (Nos. 1 to 11 in the statement given above) have appealed to this Court through Messrs. Morton and Fazal-i-Husain (Appeal No. 498 of 1914); while Piru and Budhu, who are brothers, (Nos. 12 and 13 in the above statement) have filed their appeal through Mehta Bahadur Chand (Appeal No. 550 of 1914), Samaila, appellant, has preferred an appeal through the jail authorities (No. 912 of 1914) which, though *prima facie* barred by limitation, I have decided to deal with on the merits, inasmuch as there is reason to believe that Samaila applied for a copy of the judgment of the Magistrate within the period of limitation but his application was somehow mislaid and a second application had to be sent for a copy of the judgment after the period of limitation prescribed for the appeal had expired. In these circumstances, I have treated Samaila's appeal as filed within time.

The Magistrate appears to me to have taken great pains with this case, though I must say that I am not very much impressed with the manner in which he has dealt with the evidence for the prosecution with special reference to the 38 cases of theft and burglary in which, according to the prosecution, various groups of appellants have participated since the year 1910. The prosecution evidence has been discussed by the Magistrate under five main heads:

(1) The existence of the gang;

(2) cases of theft and burglary since 1910 in which one individual member or more members of the gang has or have been proved to have taken part;

(3) the evidence relating to each individual cases o theft or burglary;

(4) the evidence of the approver with special reference to the thefts and burglaries in which he took part along with one or more of the other members of the gang, and the evidence of other witnesses for the prosecution which required special notice; and

(5) documentary evidence which goes to prove that some of the appellants are habitual thieves.

A discussion of the evidence for the defence occupies the concluding portion of his judgment, and the general conclusion of the Magistrate is that this evidence is wholly unworthy of credit and is insufficient to rebut the case for the prosecution.

As regards the alleged existence of the gang to which the appellants have been held to have belonged, the Magistrate refers to the evidence of ten Sub-Inspectors of Police, P. Ws. Nos. 5, 6, 7, 8, 9, 10, 14, 43, 44 and 45, and to the evidence of seventeen *lambardars*, *zaildars* and others, P. Ws. Nos. 11, 12, 13, 21, 23, 24, 28, 37, 38, 39, 49, 60, 61, 69, 73, 91 and 93 who state that they saw the appellants associating with one another in groups of various sizes on different occasions and at different places, the principal places at which some of them used to come together being Wahwala Well in Kot Sahai Singh, which is the residence of Hidayat and his brothers, and Muhammadwala Well in *Chak* No. 266, where two notorious women of ill-fame named, *Musammat* Saban and *Musammat* Panan, reside. The greater part of the evidence given by the prosecution regarding the alleged association of the appellants for the purpose of habitually committing thefts is hearsay and too indefinite to be of any value; and the majority of the Sub-Inspectors of Police, and of the *lambardars* and *zaildars*, on whose evidence the Magistrate has placed reliance in holding the existence of the gang proved, of which the appellants are stated to have been the members, simply content themselves with *giving their own opinions* as to the existence of a gang of habitual thieves since 1910, based in some instances upon entries in history sheets kept in Police stations and in other cases upon

evidence of repute, which is not based upon tangible facts that can be substantiated by legal evidence in a Court of Law. The learned Pleader who appeared for the Crown frankly conceded that evidence of this description, whenever given by the prosecution witnesses, should be excluded from consideration. There, then, remains a small residue of admissible evidence regarding the association of the appellants for the purpose specified in section 401, to which I shall refer later on while discussing the case of each appellant.

* * * * *

The evidence of the approver Pahllu has been discussed by the Magistrate at page 42 of his judgment. After a tender of pardon had been made to him, his statement was taken down on the 23rd January 1914 by Khan Muzaffar Khan, Magistrate, first Class; and I agree with the Magistrate in believing the evidence which he has given in this case. The grounds adduced on behalf of Hidayat and his brothers why the approver's testimony against them should not be believed have been noticed by the Magistrate, and it seems to me that in view of the fact that Hidayat and the approver committed burglary No. 38 together, as has been held in the judgment of this Court in Criminal Appeal No. 220 of 1914, the Magistrate was right in holding that any ill-feeling that at one time might have existed between Pahllu and Hidayat had disappeared, and that Pahllu had not named Hidayat and his brothers as his associates in crime to satisfy his personal grudge. It seems to me, however, that so far Muradi Nanga is concerned the approver's evidence against him should be received with caution, inasmuch as admittedly Muradi Nanga abducted *Musammat* Saban, who is Pahllu's first cousin, and thereby incurred the displeasure of Pahllu's family. In my opinion the evidence of the approver, with the reservation just mentioned, must be accepted as reliable against such of the appellants as have been proved by independent evidence to have taken part in the thefts and burglaries in which the approver was concerned. That part of the approver's evidence which relates to the existence of a gang of persons associated for the purpose of habitually committing theft has been corroborated by the evidence of Jahana *zaildar* (P. W. No. 21), Muhammad Bakhsh *lambardar* (P. W. No. 25), Allah Ditta teacher (P. W. No. 37), Sahhon *lambardar*, Kot Sahai Singh (P. W. No. 39), Muhabbat Khan *lambardar* (P. W. No. 69) and Ahmad Bakhsh *lambardar* of Maghiana (P. W. No. 73). Further, his evidence as regards the commission of thefts or burglaris referred to above as Nos. 26, 30, 37 and 38 has, as I have shown above, been corroborated in material particulars by independent testimony of a reliable character.

In considering the question of the guilt of the appellants under section 401, Indian Penal Code, the Magistrate has also received in evidence and relied upon the previous convictions of some of the appellants for offences of theft, house-breaking and receiving or concealing stolen property both prior and subsequent to the year 1910 when, according to the Magistrate, the nucleus of the gang of which all the appellants became members was for the first time formed. For the appellants it has not been disputed that the previous convictions of individual appellants for the offences specified above are relevant against them in this case, but it has been contended that only convictions subsequent to the year 1910 are so relevant and not those which are prior in date to that year. I cannot accept this contention. Previous convictions of the appellants for offences against property of the nature above referred to are admissible as evidence of habit [*Empress* v. *Naba Kumar Patnaik* (1)], and in considering the question whether such of the appellants as have been previously convicted did or did not belong in the years 1910-1913 to a gang of persons associated for the purpose of habitually committing theft, evidence as to their being addicted to theft before the years 1910 as shown by their convictions prior to that year is certainly admissible. Next, the Magistrate has also relied upon orders passed from time to time against some of the appellants under section 110, Criminal Procedure Code, demanding from them security for good behaviour because they were held to be habitual thieves; and on the authority of *Bhona* v. *Emperor* (2)

(1) 1 C. W. N. 146.

(2) 9 Ind. Cas. 555; 38 C. 408; 15 C. W. N. 461; 12 Cr. L. J. 97.

and the case of *Emperor* v. *Tukaram Malhari* (3) I hold that such orders as aforesaid are relevant evidence against the appellants affected by these orders for the purpose of proving association and intention to habitually commit theft within the meaning of section 401, Indian Penal Code. The ruling of this Court in *Beja* v. *Emperor* (4) to the effect that evidence of bad character or of general repute such as would be sufficient in connection with proceedings under section 110, Criminal Procedure Code, is inadmissible against persons who are tried under section 401, Indian Penal Code, applies to evidence of bad character or of general repute adduced in the course of the trial under section 401, Indian Penal Code, but does not apply to previous orders passed against a person under section 110, Criminal Procedure Code, binding him over to be of good behaviour on the ground of his being an habitual thief. For these reasons, I hold that the Magistrate has rightly admitted in evidence against some of the appellants their previous convictions for offences of theft and house-breaking and orders passed against them under section 110, Criminal Procedure Code. The details of these convictions and orders as given by the Magistrate at page 48 of the judgment are admitted to be correct.

Upon careful consideration of the prosecution evidence in this case, I have come to the conclusion that the nucleus of a gang of thieves was formed first in the year 1911 about the time when a burglary was committed in the house of Wilayat (P. W. No. 18) and that the members of the gang then were Malla, Hidayat, Manku and Sardara Danka. The gang became more active in the year 1913 and between the months of February and October of that year other persons joined the gang and were responsible for thefts Nos. 26, 29, 30, 37 and 38. There is satisfactory evidence to show that in the year 1913 the gang consisted of Hidayat, Manku, Surkhru, Murad, Sardara Naul, Khan, Alia, Walia, Sardara Danka and Samaila, and I hold that all these persons were associated for the purpose of habitually committing theft.

The evidence adduced by each appellant in his defence has been referred to by the Magistrate, but it has not been relied upon by the appellants' learned Counsel before me, and all that I need say in this place is that, so far as the appellants above named are concerned, the case for the prosecution stands unrebutted and their guilt under section 401, Indian Penal Code, is fully proved. It has not been contended before me that, assuming the guilt of the appellants proved, the sentences passed upon them are excessive; and I certainly think myself that, having regard to the nature of the offence of which they have been convicted, the sentences passed by the Magistrate are not too severe.

The result is that I accept the appeal of Machhia Nanga, Muradi Nanga, Piru and Budhu and setting aside their convictions and sentences acquit them. As regards the remaining appellants their convictions and sentences are maintained and their appeals are dismissed.

Appeals partly accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 336 OF 1914.

February 10, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

ADUR DESIKACHARI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Letters Patent (Mad.), s. 15—Criminal Procedure Code (Act V of 1898), ss. 117, 118, orders under, nature of—Criminal trial—Revisional order of single Judge, appeal from, maintainability of—Right of appeal, how conferred.

Proceedings taken for binding over persons to keep the peace under Chapter VIII of the Criminal Procedure Code are criminal trials within the meaning of section 15 of the Madras Letters Patent and no appeal lies under the Letters Patent from an order of a single Judge dealing with a revision petition. [p. 528, col. 1.]

Wazed Ali Khan v. *Emperor*, 22 Ind. Cas. 747; 18 C. W. N. 274; 15 Cr. L. J. 171; 41 C. 719, followed.

Rights of appeal do not exist unless specially conferred by Statute. [p. 528, col. 2.]

The portion of the Letters Patent commencing with section 22 dealing with criminal jurisdiction gives

(3) 15 Ind. Cas. 811; 14 Bom. L. R. 373; 13 Cr. L. J. 539.

(4) 26 Ind. Cas. 625; 13 P. R. 1914 Cr.; 16 Cr. L. J. 33.

ADUR DESIKACHARI v. EMPEROR.

no right of appeal against the order of a single Judge acting as a Court of Revision. [p. 528, col. 2.] *Srinivasa Aiyangar* v. *Queen-Empress*, 17 M. 105; 1 Weir 786, followed.

Appeal, under section 15 of the Letters Patent, against the order, dated 23rd September 1914, in Criminal Revision Case No. 502 of 1914, preferred to the High Court against the order of the District Magistrate of South Arcot, in Criminal Revision Case No. 4 of 1914, preferred against that of the Sub-Divisional Magistrate of Cuddalore, in Miscellaneous Case No. 32 of 1913.

Messrs. *T. V. Venkataramier*, *T. Narasimma Iyengar* and *K. S. Krishnasamy Iyengar*, for the Appellants.

Mr. *C. Sidney Smith*, for the Government.

ORDER.—A preliminary objection has been taken that no appeal lies in this case. In our opinion proceedings taken for binding over persons to keep the peace under Chapter VIII are criminal trials within the meaning of section 15 of the Letters Patent, and if this is so, the section provides no appeal from the judgment of a single Judge dealing with a revision petition presented against the order of a Magistrate under section 118 of the Code of Criminal Procedure.

In re Ramasamy Chetty (1) this was the view taken by the officiating Chief Justice who gave several reasons for his opinion.

The learned Chief Justice was apparently mistaken in saying that an appeal was allowed against an order to give security for keeping the peace.

Section 406 of the Code of Criminal Procedure provides only for appeals from orders to give security for good behaviour.

But the procedure prescribed by section 117 of the Code of Criminal Procedure for conducting inquiries under Chapter VIII is that for conducting trials, and persons ordered to give security may under section 123 of the Code of Criminal Procedure be committed to jail, the imprisonment for failure to give security for keeping the peace being simple and for failure to give security for good behaviour being rigorous. Imprisonment is a kind of punishment (*vide* section 23 of the Indian Penal Code).

An order passed under section 106 (3) by an Appellate Court that persons convicted of offences involving a breach of the peace should execute bonds to keep the peace is treated in section 423 (1) (*b*) (3) as an enhancement of sentence. At the end of the inquiry if it is found unnecessary to bind over the person proceeded against he is to be released, or discharged, according as he happens to be in custody or not at the time. We have no doubt, therefore, that proceedings under this chapter are of a criminal nature. The next question is whether they constitute a trial. It may be that if the definition, in section 4 (4) of the Code of Criminal Procedure of 'inquiry' be used as a test, such proceedings might fall within the scope of an inquiry rather than of a trial. But it is not to be supposed that when the Letters Patent were enacted in 1865 the definition afterwards embodied in the Criminal Procedure Code of 1882 was in the mind of the Legislature. In the Code of 1861 the word 'inquiry' was used only to denote proceedings preliminary to trial.

There can be no doubt that proceedings under Chapter VIII are criminal cases and can be transferred from one Magistrate's file to another's: vide *Wazed Ali Khan* v. *Emperor* (2).

For these reasons we consider that *In re Ramasamy Chetty* (1) was rightly decided.

Mr. Sidney Smith for the Public Prosecutor has also suggested another reason for holding that no appeal lies. Section 15 of the Madras Letters Patent falls within that part which begins at section 11 dealing with Civil jurisdiction. It cannot be understood by implication that an appeal lies in every case in which the right of appeal is not denied by this section. We must take it that rights of appeal do not exist unless expressly conferred by the Legislature. The portion of the Act which commences at section 22 and deals with criminal jurisdiction gives no right of appeal against the order of a single Judge acting as a Court of Revision.

This was the view taken in *Srinivasa Aiyangar* v. *Queen-Empress* (3) with which we agree.

We, therefore, dismiss this petition.

Petition dismissed.

(1) 27 M. 510; 1 Cr. L. J. 1087; 1 Weir 787.

(2) 22 Ind. Cas. 747; 41 C. 719; 18 C. W. N. 274; 15 Cr. L. J. 171.

(3) 17 M. 105; 1 Weir 786.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 116 OF 1911.

April 9, 1914.

Present:—Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

AGARSINGJI RAISINGJI—PLAINTIFF—APPELLANT

versus

BAI NANIBA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Thakorate of Gamph—*Succession—Primogeniture—Maintenance to junior members—Estate held by junior members, nature of—Death of maintenance-holder without male issue, effect of—Reversion* Chudasama Girasias—*Females, right of, to succeed—Adoption by widow of last holder, effect of—Mortgagee from maintenance-holder, right of—Construction of deed—Compromise—Absolute estate, creation of—Ahmedabad Taluqdars Act (Bom. Act VI of* 1862), *s.* 12—*Alienation, effect on.*

The Thakorate of Gamph is governed by the rule of primogeniture. There is a custom of giving away for maintenance villages to junior members of the family. The estate is not governed by the ordinary law of co-parcenary and is not partible. The villages given to the junior members of the family are given for maintenance upon terms that upon the failure of male issue they will revert to the holder of the "*gadi*." [p. 532, col. 2.]

Such a reversion is not impeded by the existence of a female. [p. 534, col. 2.]

Where the widow of a last maintenance-holder adopts a son, the adopted son does not divest or defer the vesting of the estate which reverts by the custom of reversion. [p. 536, col. 1.]

Among Chudasama Girasias there is a custom that wives and daughters do not succeed as heirs. [p. 531, col. 1.]

The Thakor of Gamph granted a village for maintenance to one of his junior sons. There was a litigation between the successor of the Thakor and the sons of the grantee, which resulted in a settlement under which the greater part of the village was given to the sons of the grantee and their descendants and heirs as *maliks, mukhtiars* and *dhanies*. All the sons died without any male issue. The plaintiff, Thakor, claimed the village by right of reversion. At this time the whole of the estate of the Thakor was under the management of the Taluqdari Settlement Officer. The widow of the last maintenance-holder who had adopted a son objected:

Held, that the compromise deed did not confer an absolute estate upon the grantee's sons and heirs; [p. 532, col. 1.]

that the alienation under the compromise deed was invalid under section 12 of the Taluqdars Act of 1862, and the adoption had no effect on the reversion; [p. 532, col. 1.]

A mortgagee from a maintenance-holder or an assignee of the mortgagee has no right whatever in the estate when the estate reverts to the grantor on the death of the maintenance-holder. [p. 536, col. 2.]

First appeal from the decision of the First Class Subordinate Judge at Ahmedabad, in Civil Suit No. 405 of 1907.

Mr. *Desai* (with him Mr. *N. K. Mehta*), for the Appellant.

Messrs. *Raikes* and *Jayakar*, (with them Mr. *R. W. Desai*), for the Respondents.

JUDGMENT.—This suit was filed by the present Thakor of Gamph, Agarsingji Raisingji, to recover the village of Piperia in so far as it was not already in his possession from the three original defendants, namely, Bai Devba, widow of Kaliansingji Rupsingji, Pertapsing Shivsing, otherwise called Vijaysing, who was alleged to have been adopted by Devba, and Bai Shri Bairajba, who was alleged to be a mortgagee of the village of Piperia. The village of Piperia was one of the nine villages which at the beginning of the last century belonged to the Thakor of Gamph, a Thakor of the Chudasama Rajput clan whose home was in Kathiawar and adjacent to the Ahmedabad territory.

The evidence shows that the Chudasama Rajputs many years ago migrated from Junagadh into what is now the Dhandhuka Taluka of Ahmedabad, and there occupied all or most of the villages in that Taluka. In course of time, the estate which had been undivided became split up into different Talukdari estates by the process of allotment of villages for Jivai or maintenance to younger male members of the family of the chief. The history and constitution of these Talukdari families and estates was the subject of very prolonged and searching investigation prior to and subsequent to the passing of the Ahmedabad Talukdars Act of 1862, and one of the officers chiefly concerned in the investigation was Mr., afterwards Sir James, Peile, a Talukdari Settlement Officer. In 1863, in making a report of his survey operations to the Revenue Commissioner under date the 15th September, he stated: "The way in which these Talukdars are formed by partition from a sovereignty or chieftainship is very clearly shown in the appended pedigree of the Gamph Thakors to whom all Dhandhuka at one time belonged. The allotment in each generation of one or two villages a piece to the one or more younger brothers of the Thakor of the day has, in the lapse of years, left the mutilated trunk of the chieftainship with only eight villages and halves of two others." The pedigree

referred to in that report shows that Melaji, the son of Raisingji, had two uncles, who as junior members of the family each received a village. His uncle Kakabhai received Ankewalia and his uncle Babhoji Piperia. But before his death Ankewalia and Piperia had reverted to the ruling branch, to the branch of the chief, and, accordingly, Melaji was able to assign Ankewalia to Arjansingji and Piperia to Rupsingji. Rupsingji had two sons, or his widows claimed that he had two sons, Keshrisingji, and Kaliansingji, and in the year 1870, there was litigation between the established successor of Melaji, namely, Raisingji, and the two sons of Rupsingji with reference to the village of Piperia. Raisingji contended that Keshrising and Kaliansing were both supposititious children, not the real sons of Rupsingji, and that Rupsingji having died without male issue, the village of Piperia reverted, as it had previously reverted in Melaji's time, to the Thakor of Gamph. The litigation between Raisingji and the two alleged children of Rupsingji resulted in a settlement in the year 1871 under which 41 acres of the village of Piperia were admitted to be the absolute property of the Thakor of Gamph, while the rest of the village, except a four-annas share which belonged to certain Mahomedans, was confirmed to Keshrising and Kaliansing, and, as a result of that settlement, Keshrising and Kaliansing until their deaths enjoyed the greater part of the village of Piperia. Keshrising predeceased Kaliansing and Kaliansing died in October 1903, leaving widow Bai Devba, the original first defendant in this suit. According to the contention of the plaintiff, Kaliansing and Keshrising having neither of them left male issue there was reversion of the whole of the village, which remained with them in their life-time, to the Thakor of Gamph. The widow of Kaliansing, however, after her husband's death, namely, in March 1904, adopted the 2nd defendant as the son of her deceased husband. The 3rd defendant claims as a mortgagee of the village of Piperia. She obtained an assignment on the 13th of April 1906 of the mortgage rights of Lerabhai Malichand, who had obtained the mortgage with possession of the village of Piperia from Kaliansing on the 13th of October 1883. Devba died after the institution of the suit and before the decree of the lower Court.

The main questions in the case are:—(1) whether upon the death of Kaliansing without male issue the village of Piperia as held by him reverted to the Thakor of Gamph; or whether his adopted son, the 2nd defendant, has a right to remain in possession and ownership of the village as against the Thakor of Gamph who claims the right of resumption; and (2) whether the mortgagee who represents the interest under the mortgage created by Kaliansing has any title which he can assert successfully against the Thakor of Gamph since the death of Kaliansing.

The first question which was argued in this appeal on behalf of the respondents, namely, the 2nd and 3rd defendants, the adopted son and the mortgagee, was whether, having regard to the documents executed at the time of the Settlement in 1871, the suit could possibly succeed even assuming the right of reversion alleged to exist in the Thakor of Gamph under ordinary circumstances. The contention for the respondents was that by these documents an absolute estate was conferred by the Thakor and that any right of reversion was in terms released.

Now the right of reversion, as we have stated, is said to arise upon the failure of male issue in the Jivaidar, the younger member who obtains the grant of the village for maintenance. The Settlement of 1871 resulted in the execution of two documents by the contending parties. One was Exhibit 114 executed by Keshrising, dated the 6th of September 1871, and the other Exhibit 360 executed by the Thakor Raisingji father of the present plaintiff, on the same date. The document executed by Keshrising recites:

"That the Suit No. 1918 of 1870 was instituted against the Thakor Raisingji to recover the rupees of the income of the grass raised on the pasture of the village of Piperia, which grass the Thakor had got attached by the Talukdari Settlement Officer; that the question in that suit, together with dispute that existed between the Thakor and the son of Rupsing with regard to the village of Piperia, were referred to arbitration;

that an award was made which was accepted by the parties, and in pursuance of that award the sons of Rupsing gave up 41 acres 12 *gunthas* out of two fields, which had been seized by the Thakor and admitted that he was the sole owner and master of it. They agreed to pay permanently for the rest of the village, which was left in their possession, Rs. 200 a year for land revenue, which figure was fixed in lump for all their descendants, that their descendants should pay and that the Thakor's descendants should receive it, and if there should be any increase in the land revenue of the Taluka by the Government or in any other way, the Thakor should be responsible. Rupsing's descendants were only to pay always Rs. 200 clear. and the Thakor, except as to land measuring 41 acres and 12 *gunthas*, had no right or title on the village of Piperia or any land within its boundaries, Rupsing's sons being the sole owners and masters."

The document executed by the Thakor contains as its first clause the passage upon which chief reliance is placed on behalf of the respondents. This clause is as follows:—"The land 41 acres and 12 *gunthas* of the description undermentioned in the second clause of this document situated within the boundaries of the above said village Piperia has been taken out by us and we have kept our independent ownership over the same. With the exception of the same you and your descendants and heirs are *maliks*, *mukhtyars*, *dhanies* of this Piperia village site-land and border-land as per orignal limits. We have no right or claim to it." The words translated "descendants and heirs" are * * * ((Vansa Varas). There is not 'and', and if that expression is taken literally it means "your descendants who are heirs."

Now, so far as we have any knowledge of the custom of inheritance among Chudasama Girasias daughters are not recognised as heirs. That was the conclusion arrived at in another Chudasama case which went through three Courts terminating in the Privy Council, and there is evidence on record in this case of witnesses who are acquainted with Chudasama customs that wives and daughters do not succeed as heirs. Therefore, "descendants who are heirs" would be confined to male descendants. Here then is an acknowledgment that, except for the 41 acres and 12 *gunthas* of the village, Kaliansing and Keshrising and their male descendants are *maliks*, *mukhtyars*, *dhanies*. It does not appear to us that that in terms enlarges the estate which, according to the plaintiff's contention, would appertain to a Jivaidar in the Chudasama clan in Dhandhuka, for he would hold his Jivai village for himself and his issue so long as there were any male descendants to them.

It was suggested in argument that one of the questions which was agitating the parties at the time of this settlement in 1871 was the question whether Melaji had not given to Rupsingji the village of Piperia as a gift, not by way of Jivai, but absolutely. Now it is suggested that there is some indication of that in one or possibly more of the documents upon the record which have emanated from the Government Officers in connection with this estate. We do not think that there is any substantial reason for thinking that that was the question which either of the parties was agitating. We think that the great weight of the evidence indicates that Melaji gave the village of Piperia to Rupsingji as Jivai upon the usual terms, and the only question which was raised between the parties besides that of the seizure of the grass by the Thakor was whether Keshrising and Kaliansing were entitled to be recognised as legitimate and genuine sons of the deceased Jivaidar, Rupsingji. That question was conceded in their favour by Raisingji in return perhaps for a concession of 41 acres 12 *gunthas* out of the village. Upon the documents, therefore, we do not think that the objection which has been raised by way of demurrer can prevail.

Moreover, the release must be construed in the light of the position which the parties occupied towards each other at the time the document was executed and in reference to the dispute which was then pending between them. In *London and South Western Railway* v. *Blackmore* (1), Lord Westbury said: "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But

(1) (1870) 4 H. L. 610 at p. 623; 39 L.J. Ch. 713; 23 L. T. 504; 19 W. R. 305.

a dispute that had not emerged, or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release." Here if reference be made to the original pleadings (Exhibits 197 and 222) in the Suit of 1870—we say the originals, because the official translations are admittedly faulty—it will be recognised that the only dispute which had then emerged was whether Keshrisin and Kaliansing were spurious sons or genuine: and the most that could have been decided against the Thakor was that the young men were genuine sons, and, therefore, entitled to possession, but entitled only as Jivaidars. No question was then raised as to any claim on their part to hold absolutely against the Thakor. And indeed so late as 1887 we find Kaliansing in his written statement in Suit No. 335 of 1887 (Exhibit 202) professing in the plainest language to be in possession of Piperia by virtue only of the grant from the Thakor in Jivai or Giras, *i. e.*, maintenance. We are satisfied, therefore, that despite the apparent terms of Exhibits 114 and 360, there is no substance in the argument that they conferred an absolute estate, releasing the Thakor's right of reversion.

There is, however, another and independent objection to the respondents' contention upon this point. It is this, that assuming the reversion, upon the failure of male issue of the Jivaidar subsists in the holder of the Thakorate of Gamph, that is a part of the estate and a part of the estate which may at any time become of great value. Now, at the time of this settlement in 1871 the whole of the landed estate of the Thakor was under the management of the Talukdari Settlement Officer for the purpose of settling the debts of himself and his predecessor, and under section 12 of the Ahmedabad Talukdars Act of 1862 any alienation of the estates which came within the purview of that Act during the time that they were under management is null and void. The Thakor had a vested reversionary interest in the village of Piperia which, upon the deaths of Keshrising and Kaliansing, would revert to the main line and the whole of that village would become available to the creditors of the Thakor or Thakors. Having regard to the scope and intention of that Act, we think that any such alienation, as is said to have been made by this document (Exhibit 360), would be void as offending against the provisions of section 12. So much for the preliminary objection.

The next question that we have to consider is whether the plaintiff has made out that the parties are bound by the customary law, which, as he asserts, entitles him to claim reversion upon the death of Kaliansing. Upon that question the evidence upon the record appears to us to be overwhelming in favour of the plaintiff's contention. It is established by the report of Government Officers that the Thakorate of Gamph was governed by the rule of primogeniture. It is established that there was a custom of giving away for maintenance villages to junior members of the family. Therefore, the estate was not governed by the ordinary law of co-parcenary and was not partible. Various instances have been proved in the past of Jivai villages which had been given to junior members reverting to the main line upon the death of the Jivaidar without male issue. We have already referred to the case of Ankewalia and Piperia, which occurred in the beginning of last century upon the deaths of Kakabhai and Babhoji. But much older instances can be found in the book kept by the Barot, which is handed down from generation to generation, from Barot to Barot. We have there instances of falling into the main line of the village of Chokdi upon the death of Kushiaji at the end of the 17th century, and the village of Ankewalia appears to have reverted to the main line upon the death of Fatesingji, who does not appear in the pedigree but belonged to the generation preceding Kushiaji, being a brother of Devaji. The learned Judge has no reason to distrust the evidence of the Barot who proved entries in this (Vaivancha) book. And such records by the Barots are described by Forbes in the 'Ras Mala' as being recognised for their accuracy and truthfulness among the Rajput clans of Kathiawar.

We think that on the evidence the case of the plaintiff is made out that the villages given to junior members of the family were given for maintenance, upon the terms that upon the failure of male issue they reverted to the holder of what is called the '*gadi*'. A very noteworthy piece of oral testimony to

that effect is to be found in the evidence of Akhuba, who was one of the descendants of Melaji, and who holds the village of Ankewalia upon these terms. It is not a case where he could admit, out of friendliness for the Thakor, that there is a right of reversion upon failure of the grantee's male line, for he himself has no sons and one of his brothers is of unsound mind. Therefore, the reversion in his case is not likely, so far as we can see, to be long deferred. Another notable witness is Exhibit 333, Dadabha Bhavansing, the *Talukdar* of the village of Cher belonging to this clan. He says: "Narsing was my uncle two degrees removed. And old Talukdar, Vakhatsing, told me that Chokdi, Ankewalia and Piperia had reverted to Gamph Darbar. He said that the villages were given seventy-five years ago." In all twenty-nine Chudasama witnesses had been called on the part of the plaintiff who are holders of Talukdari villages in the Dhandhuka Division, and they all, without exception, testify to the existence of the custom alleged by the plaintiff.

Having regard to this evidence, we think there is no room for doubt that the custom of reversion is established in the plaintiff's favour. It is true that the learned Judge below has thrown doubt on the credibility of the plaintiff's oral witnesses on this point; but we are not able to share this doubt, for which, we observe, no particular reason is assigned. A long series of witnesses deposing to one special custom of this kind must of necessity use much the same language, and it may be that it was the uniformity of the story which excited the Judge's suspicions. In any event no other or more valid ground for suspicion has been mentioned before us, and this ground appears to us untenable. It is further worthy of remark that the evidence of these witnesses, who admit the custom of reversion, is evidence against their own interests, and this consideration is by no means displaced by the remark that, in the majority of cases, the likelihood of their interests being in fact prejudiced is so remote that the point should not be held to have weighed with them. As to this it must be observed that the nearness or remoteness of a possible prejudice of this sort is very much a matter of individual opinion, and, whether it be near or remote, we know that the tenacity with which Rajput Girasias hold to their land must operate against the making of any admissions which, in any conceivable circumstances, might tend to deprive them or their successors of their existing estates.

This evidence is, we think, in conformity with the official reports both as to the original status of the Jivaidar and as to the regular practice which has been followed. In Sir James Peile's report of 6th June 1866 (excerpts from which are Exhibit 580 on this record) it is, no doubt, stated that "a village given from a *gadi* to a younger son reverts to the *gadi* if the younger son dies childless;" but this, we think, is manifestly a slip, the condition intended being the extinction of the grantee's line by default of male heirs. Certainly it was nobody's case before us that the reversion falls in if the original grantee leaves male heirs, and both the other evidence on the record and the history of the parties' dealings are, we think, conclusive to show that the Thakor's right to the reversion does not accrue so long as there are male heirs capable of taking in succession to the original grantee; indeed more than this has never been claimed by the Thakor, nor was it contended for the respondents that the right of reversion lapses in all cases except where the original grantee dies without issue. That this was the meaning intended by Sir James Peile appears from his report of 30th January 1860, where he says: "I believe I am correct in stating that patrimonies carved out of the main estate for the scions of the house were enjoyed under no other limitation whatever except that, should the grantee's family become extinct, their estate should revert to the head of the clan." This passage occurs in a letter the object of which was to ascertain various details of Girasia custom from the then Political Agent in Kathiawar. At that time this officer was Captain Barr, and in his reply to Sir James, dated 7th March 1861, he writes, "patrimonies carved out of the main estate for scions of the house are enjoyed as you understand." This view of the matter is confirmed by numerous instances to which plaintiff's Counsel has called our attention and in which the dispositions of the estates followed the rule for which the plaintiff contends. The reply to this evidence made on behalf of the

respondents was that such dispositions were made by order of Political Officers and for reasons of state. But a reference to the record shows that that is not so; on the contrary, the various orders were made as being calculated to carry out the established Girasia custom and tradition, and were made by officers most familiar with that custom.

Then it is contended that assuming that there is such a custom, nevertheless the reversion does not take place immediately upon the death of the last sonless Jivaidar but his widow succeeds to his estate. A good deal of evidence was referred to by the respondents' Counsel in support of that contention. All of it is of the same nature. It is an assertion that in the case of separated Girasias the widow inherits her husband's estate. Now a case of separated Girasias occurs, as is shown very clearly in certain judgments of the Ahmedabad Courts, Exhibits 248, 250, 253 and 438, where a village has been granted in Jivai and the Jivaidar has various sons who for convenience enjoy portions of the village separately, and that is what is meant, so far as the record shows, by "separated Girasias," and where you have several brothers enjoying portions of the village separately, and one of these brothers dies without leaving children, it often happens that the widow succeeds to his share for her life. We say it often happens, because the evidence does not establish that it is invariable. Counsel for the respondents has been able to point out a number of cases in which a widow of a separated Girasia who dies sonless has succeeded to his share. But the discussion of the question in the judgments to which we have referred, several of which judgments refer particularly to the evidence given by the then Thakor of Gamph as being specially valuable and reliable, shows that there is no fixed rule in the matter—sometimes widows succeed and sometimes they do not succeed—; but that question really has no bearing upon the question now before us, which is: Whether the existence of a widow of a sonless Jivaidar, the only survivor of the Jivaidar family, can prevent the operation of the custom of reversion as soon as her husband dies? The evidence as to what is done in such cases as that is to this effect, that if the Jivai grant is of small value, the Darbar allows the widow to continue because she must have maintenance. If it is of large value, then only a reasonable allowance is given to her for maintenance. Certain instances were relied upon by the plaintiff to prove that the widows did not interfere with the right of reversion immediately upon the death of their husbands, and so far as they go, they do seem to establish that proposition. But it appears to us that if it is accepted that there is a right of reversion upon failure of the male line, it follows almost as a logical consequence that the reversion will not be impeded by the existence of a female.

And the evidence shows that no such impediment has ever in fact been recognised. Apart from the large mass of apparently respectable oral evidence to this effect, we have numerous actual instances in the plaintiff's favour. Thus in Exhibit 521 we have the Political Agent's order in the case of the villages Memka and Vaghela under Wadhan which had been granted in Jivai to Keshrising, who had died leaving only a widow and two daughters. The orders are that "according to usage," an important phrase as showing the ground upon which the Political Officers were proceeding, "the two villages will revert to the state, and the state in its turn will incur the responsibility of making suitable provision for the widow and two daughters." Witness, Junaji Motibhai, Exhibit 339, deposes to the due execution of these orders. So in the case of Bagwan under Gangad: the village was granted in Jivai to the cadet, Ratansing, and after his death without male issue, his widow Jethiba in her plaint, Exhibit 601, acknowledges that, in accordance with the custom, the village had reverted to the Thakor and, in lieu thereof, certain lands had been assigned to her for maintenance. Witness Hamirji Abhesing, Exhibit 337, gives similar testimony as to the disposal of Dared under Vala, though in that case the grant was continued to the widow, presumably because the village was a small one and was considered necessary for her maintenance. In the case of Ayraderiwala under Sayla it is proved by the Bhayati Judge, Exhibit

646, that when the grantee died without sons, the village reverted to the state, and the grantee's widows were allowed a monthly maintenance of Rs. 50. Then we have Exhibits 513, 514. 517 and 541 which show that the Jivai village of Panchasia under Vankaner was similarly dealt with upon the failure of male heirs in the grantee's line, and in Exhibit 513 the widow herself could put her claim no higher than that "the Vankaner Darbar has no right whatever to resume the *giras* as long as there is male issue in the line of the grantees." Exhibit 515 is the petition of the two widows of Narsing Jalamsing, to whose father the villages of Kerala and Rajavadla were granted in Jivai by the Thakor of Vankaner. They contended, in their long and argumentative petition, that the "Darbar is estopped from saying that the widow of a deceased Bhayat is entitled to a Jivai only." But the orders of the Political Officers (Exhibit 516) were against the widows, whose claim to anything more than maintenance was rejected on the ground that it was contrary to the custom enforced by the Agency. These orders, which were confirmed by the local Government, were ultimately taken on appeal to the Secretary of State, who, however, declined to interfere (Exhibit 518). In the Kotda Sangani State we have the similar instance of the village Bagadya, the witness being Mr. Abhechand Jethabhai, the Manager of the state (Exhibit 640). We see no reason to doubt, and every reason to believe, that the customs prevailing in such matters in the Rajput Girasia states above-mentioned are of general validity among Rajput Girasias, whether they belong to the Jhala or the Gohel or the Chudasama sub-division of the clan. These nominal sub-divisions are, as the witnesses prove, closely inter-connected, and the matters now under discussion concern the general interests and traditions of the clan, not the particular usages of any sub-division of it. To the argument that no actual case is proved where an adoption was defeated by the reversionary right, the answer is that we have no known case where the two rights came into competition; and the explanation of this fact is, as the learned Judge below observes, that these Rajput Thakors occupying a *gadi* are not in the habit of adopting, but rather in the habit of putting forward supposititious sons. This circumstance itself suggests how conscious they are of the difference between such claims as spring from the ordinary Hindu Law of adoption and such a claim as can alone entitle an aspirant to the possession of the *gadi* or to any interest therein.

The next question, then, which we have to consider is the position of the adopted son, the 2nd defendant. He is found to have been in fact adopted. But the fact of his adoption by no means concludes the case in his favour. The remarks of Sir Charles Farran, in what is known as the case of *Amarsangji* v. *Dipasangji* (2), are very appropriate in this connection. He says: "Under these circumstances we must hold that plaintiff has not proved his right to succeed to the village of Kadwal. We hold the factum of adoption proved; and for spiritual purposes and for inheritance of any private property which Jodhsing may have left, as distinguished from the village of Kadwal, the adoption would be good. But as regards the village of Kadwal, we think that the facts and circumstances are such as to have shifted the burden from defendant on to plaintiff, so that the latter is bound to show that Jodhsing or Jodhsing's widows had the right to adopt a son and thus prevent the lapse of Kadwal village to the Limdi Taluka." The reason why the respondents tried so hard to establish that widows succeeded to the estates of Talukdars was that the existence of a widow would defeat the reversioner, and the adoption of a son to the Jivaidar by the widow would have the effect of divesting an estate which had already vested in the reversioner upon the death of the Jivaidar. But if the alleged custom that the widow succeeds, and thus keeps out the reversioner, is not established, it appears to follow that the adopted son can only succeed if he can show that by his adoption he will divest an estate already vested, according to custom, in the Thakor. No instance has been adduced to show that that is the result of such an adoption, and it appears to us that this series of events should have no such effect upon premises which we have arrived at with regard to the existing customs.

(2) (1898) Un. P. J. 60 at p. 66.

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It has been suggested that an adoption, if good at all, must be altogether good and effective according to Hindu Law. The answer to that is that we are not here dealing with the ordinary Hindu Law. We are dealing with the custom of a Rajput clan, and we see no reason why the conclusion arrived at by Sir Charles Farran in the *Amarsangji's* case (2) should not be equally applicable to the present case. For the rule of Hindu Law as to the effect of an adoption is not affected: that rule contemplates and allows the adopted son's title only to the partible property of the co-parcenary, while the property which we are dealing with here falls outside that category. We, therefore, think that the adopted son does not divest or defer the vesting of the estate which was given to the Thakor of Gamph by the custom of reversion.

The only other question remaining is as to the mortgagee. The original mortgage obtained is a mortgage in October 1883 in consideration of an advance of a sum approaching Rs. 5,000, the greater part of which was applied to discharge a debt due to the Thakor and to free the village of Piperia from the possession of the Thakor, who apparently held it under a lien for advance for maintenance and assessment. There is no doubt that the mortgagee acquired by his mortgage as much as the mortgagor Kaliansing was able to give him, and what he acquired was not merely the interest of Kaliansing, but the interest of Keshrising who had previously died, and whose interest under the document of 1811 had ostensibly been transferred—for what purpose is not clear—to the Thakor of Gamph. The mortgagee got that interest also because the evidence shows that at the time of mortgage the document transferring the moiety of the village of Piperia was handed by the Gamph Darbar to the mortgagee. It does not appear to us, however, that the fact that the mortgage money was advanced in order to satisfy the claim of the Thakor of Gamph is any reason, now that the reversion has occurred, for treating the mortgagee as entitled to anything more than the mortgagor was able to give in 1883. The position is similar to that of the assignee of the Jivaidar in *Beni Pershad Koeri* v. *Dudhnath Roy* (3), who was held not to take anything more than his grantor was able to give him, having regard to the estate which he had received for maintenance. So far as the English analogies are of any value in a case of this kind, the position of the mortgagee, as pointed out by Mr. Desai, is very similar to the position of the mortgagee in the case of *Hankey* v. *Martin* (4), where the plaintiff mortgagee was entitled under his security to a base fee to continue so long as there should be issue of the mortgagor who would have succeeded under the entail, but he was not entitled to a mortgage of an absolute interest as against the remainder-man.

We reverse the decree of the lower Court and pass a decree for the plaintiff declaring that the defendant No. 2 has no right whatever to the village of Mouje Piperia, and that the defendant No. 3, as assignee of the mortgage of the 13th of October 1883, has also no right whatever in the said village. We pass a decree for possession of the village of Mouje Piperia as prayed in the plaint, with mesne profits for three years prior to suit. Mesne profits to be calculated in execution. Decree to be reduced by such maintenance as was given to the widow of Kaliansing during her life-time after the death of her husband. Costs on the respondents throughout.

Appeal allowed.

(3) 27 C. 156; 26 I. A. 216; 4 C. W. N. 274 (P. C.).
(4) (1883) 49 L. T. (N. S.) 560.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 296 AND 297 OF 1914.

February 5, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

VENKATARAMA AIYAR—PLAINTIFF—APPELLANT

versus

NARAYANA AIYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Claim petition not pressed—Agreement to get petition dismissed without costs, whether void—Contract Act (IX of 1872), s. 78.

An estoppel arises only when a man is not allowed

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to deny the truth of some matter which he has made another to believe to be true. [p. 537, col. 1.]

Where it was agreed between the parties that the claim petition of the defendant should be allowed but without costs and that the plaintiff should apparently in consideration of the defendant giving up his costs refrain from instituting a suit:

Held, that section 115 of the Evidence Act did not apply and there was no estoppel. [p. 537, col. 1.]

Quære.—Whether such an agreement would be void on the principle contained in section 28 of the Contract Act? [p. 537, col. 2.]

In a suit instituted under Order XXI, rule 63, of the Civil Procedure Code, there is no question of setting aside the consent order because if a party does not object to an order being passed against him it cannot be inferred that the order passed is not against him. [p. 537, col. 2.]

Second appeals against the decrees of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suits Nos. 72 and 73 of 1913, preferred against those of the District Munsif of Srirangam, in Original Suits Nos. 322 and 323 of 1911.

Mr. *T. V. Muthukrishna Aiyer*, for the Appellant.

Messrs. *N. Rajagopalachariar* and *T. Arumainatham Pillai* for Mr. *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

IN S. A. NO. 296 OF 1914.

The learned Subordinate Judge has held that the plaintiff is estopped from maintaining the suit out of which the appeal arises. Before us, the argument in support of the judgment under appeal has been that there was an agreement between the parties that the claim petition of the 1st defendant should be allowed, but without costs, and that the plaintiff should (apparently in consideration of the 1st defendant giving up his costs), refrain from instituting such a suit as the present. This is alleged to give rise to an estoppel. Section 115 of the Indian Evidence Act shows that on the facts as alleged, there would not have been any estoppel. An estoppel arises when a person is not allowed to deny the truth of some matter which he has made another to believe to be true. In the present case the plaintiff did not make the defendant believe in the truth of anything; all that is alleged is that in consideration of the plaintiff's express or implied undertaking not to institute a suit the defendant waived his costs. There can, therefore, arise no question of any estoppel, though there might have been an agreement barring the suit. Nor is the agreement that is now alleged and relied upon proved. Had it been proved, the question might have arisen whether such an agreement would have been void on the principle contained in section 28 of the Indian Contract Act. That question has, however, not been argued before us and we express no opinion on it, as no such agreement has been proved in the present case. The indications are to the contrary—that the claim petition was allowed to succeed on the understanding that the plaintiff was to institute the present suit.

The Subordinate Judge has also based his judgment on the ground that there was a consent order and that the Court cannot set aside a consent order except on a ground which would invalidate an agreement between the parties. But here there is no question of setting aside any consent order. The plaintiff is suing under Order XXI, rule 63, of the Code of Civil Procedure. A suit under this rule is no doubt for the purpose of getting rid of the effect of an adverse decision in a claim petition. But it is not an appeal from that decision and in this respect, it certainly stands on a very different footing. The decision that is relied upon, *Nilakant Banerji* v. *Suresh Chandra Mullick*(1), is clearly distinguishable. There the decision was held to be binding on the respondents' predecessor-in-title, one Khogendro Nath Mullick, and that in effect made the matter *res judicata* against the respondent. In the present case, it is because the order on the claim petition is binding on the plaintiff that he can institute a suit to get rid of the effects of the order. (Order XXI, rule 63, of the Code of Civil Procedure). This is also an answer to the objection that there was no order against the plaintiff, an objection which we have some difficulty in understanding. It is quite clear that when it was decided that the plaintiff was not entitled to attach the property which he had purported to attach, there was an order against him. The fallacy of the argument is caused by assuming that because a party does not object to an order being passed against him, therefore, the order that is passed is not against him.

(1) 12 C. 414 at p. 423; 12 I. A. 171; 9 Ind. Jur. 439; 4 Sar. P. C. J. 685.

The appeal will be allowed and remanded to the lower Appellate Court for disposal on the merits. The costs will abide the result.

IN S. A. No. 297 OF 1914.

This case follows the above decision in Second Appeal No. 296 of 1914, and for the like reasons as are recorded in our judgment therein this appeal will also be allowed and remanded to the lower Appellate Court for disposal on the merits.

The costs will abide the result.

Appeals allowed;
Cases remanded.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 899 OF 1912.

November 26, 1914.

Present:—Mr. Justice Beaman.

JOHARMAL LADHOORAM—PLAINTIFFS

versus

CHETRAM HARISING AND OTHERS—DEFENDANTS.

Hindu Law—Joint family firm, whether family asset—Managing member, powers of, to enter into contracts—Liability of other members—Estoppel—Defence—Denial of contract and at the same time pleading contract as of wager, whether permissible.

A joint Hindu family firm must be regarded like any other joint family asset. [p. 539, col. 1.]

In a case where a business is carried on by the members of a joint Hindu family for the benefit of the entire family, there may be many persons who do not actively participate in the conduct of the business, there may be many members who are minors, and it is only by a confusion of ideas that these can be associated with those who are actively carrying on business as partners in the ordinary commercial sense. But where it is found as a fact that such a business was being carried on by any one or more members of a joint Hindu family for the benefit of the other members, particularly if such business had been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable to the notion of managership by one or more members for the benefit of the rest. [p. 539, col. 1.]

Where one or more members of a joint Hindu family start a business of their own, not at the expense of the joint family, nor with the intention of sharing its profits and losses with the other members, their position and their liabilities to the other members have to be regulated with reference to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self-acquisition. [p. 539, col. 1.]

It hardly lies in the mouth of a person to say in one and the same breath: "I did not make a contract, but if I did make a contract, I am sure it was a wager." [p. 543, col. 1.]

Mr. *R. D. N. Wadia*, (with him Mr. *Talyarkhan*), for the Plaintiffs.

Messrs. *Mirza* and *Ghaswalla*, for Defendant No. 1.

JUDGMENT.—The plaintiffs sue the five defendants as members of a joint Hindu family, trading for the purposes of these contracts in the name of Harising Chetram, for a sum of Rs. 6,625-9-6, the differences due to the plaintiffs for sales of linseed. The contracts sued upon were entered into by the 4th defendant, Hakamchand, on account, as contended by the plaintiffs, of the other defendants in the month of September 1911 for the September settlement. Defendants Nos. 1 and 2, Chetram Harising and Beniram Harising, resist the plaintiffs' claim on the ground that the family was divided shortly before these contracts were made in September 1911 and that they, the said defendants Nos. 1 and 2, are the only partners in the firm of Harising Chetram. They deny that the defendant No. 4, Hakamchand, had any authority to enter into contracts on their behalf or that they are bound by any contracts so entered into by the said Hakamchand. They further deny liability on the ground of their constituting a joint Hindu family with the other two defendants, Khubchand and Hakamchand, although they admit that the 5th defendant, Kapurchand, is the son of the first defendant Chetram and a partner in the firm of Harising Chetram. It is further admitted that Chetram, Beniram and Kapurchand now constitute a joint Hindu family as they re-united after the partition of 1911. The defendants further contend that Hakamchand was a minor at the date these contracts were made with the plaintiffs and as such he was not competent to represent the joint family even assuming that it had then been a joint undivided Hindu family, nor had he received any express authorisation from the managing members of the firm of Harising Chetram & Co. to act as their agent in Bombay. Lastly, the defendants contend that the contracts sued upon are wagering contracts unenforceable at law.

It is not altogether easy perhaps to define with precision what is usually meant in these Courts by a joint Hindu family firm. It appears to me that a firm must be regarded like any other joint family asset if it, in fact, belongs to the joint family; and nothing is really gained by insisting upon the peculiar character of the property and then introducing many legal notions which are appropriate rather to partnerships in the common sense than to the special concept of the joint Hindu family. It may be, and very often is, the case that a business is carried on by the members of a joint Hindu family for the benefit of the entire family. In such cases there may be many members who do not actively participate in the conduct of the business; there may be many members who are minors; and it is only by a confusion of ideas that these can be associated with those who are actively carrying on business as partners in the ordinary commercial sense. Nevertheless, if it be found, as a fact, that such a business was being carried on by any one or more members of a joint Hindu family for the benefit of the other members, particularly if such business had been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable, I think, to the notion of managership by one or more members for the benefit of the rest in the usual sense in which the relations of the manager and other members of the family have often been accepted and defined in all the Courts. Again, it may be, and often is, the case that one or more members of a joint Hindu family start a business of their own, not at the expense of the joint Hindu family, nor with the intention of sharing its profits and losses with the other members. Here it becomes clear at once that the position of the members so carrying on a joint family business and their liabilities to the other members have to be regulated with reference to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self-acquisition. Great difficulties would likely be here introduced by the nucleus doctrine, but with those I am not now concerned. Assuming that a joint Hindu family carries on a business by one or more of its members for the benefit of the rest of the family, which is the common case, then the liability of the other members not actively concerned in the conduct of the business would, I take it, be referrable, as I have just said, to the theory of managership and would probably be restricted to the share of each such member in the joint Hindu family property. It might be doubted whether any personal liability beyond that can be attached to members of the family not actively carrying on the business, not in the commercial sense partners and, therefore, not parties to any contracts made with the firm as a firm. That is one point in which a distinction might well be drawn between what is commonly called a joint Hindu family firm and a firm in the true commercial sense. The difficulty in all cases of the kind, with which I am now dealing, arises where firms so-called are started by members of a numerous joint Hindu family, many of whom afterwards repudiate liability, although if the concern turns out successful they would probably be willing enough to share in the profits. In all such cases it becomes difficult to define with precision the limits of liability attaching to members of a joint Hindu family who may not themselves have had any connection with the business carried on by the other members in other parts of the country in a name which is afterwards assigned by creditors to a joint family firm. And there is this distinction too, no donbt, that these family firms are very often handed down, as long as they continue to be profitable, from father to son and are really regarded in much the same light as any other joint family ancestral property.

In the present case it is not denied that the firm was established, say, 30 years ago or thereabouts, and was carried on as a joint family concern up to the year 1911. Whether every member of the family, then alive, was actively associated with the conduct of the business, might be difficult to prove; and assuming that some were not, then the question would arise whether they were personally liable as partners in the ordinary sense, or whether taking them to be members of the family represented in the conduct of the business by the managers, they would

not at least be bound by the acts of such managers to the extent of their share of this and all other joint family property in which as co-parceners they had a share. I do not think that it is necessary in the present case to pursue this process of analysis further, because there does not appear to me to be any practical difficulty to be surmounted. There can be no question but that defendants Nos. 1 and 2 used at any rate to manage the business while it was admittedly a joint ancestral family business and are still carrying it on and managing it as a firm in the same name. If, then, it can be shown that the defendant No. 4, Hakamchand, represented them in Bombay for the purposes of making these contracts with the plaintiff firm, it would necessarily follow, waiving for a moment the question of Hakamchand's minority, that they would be answerable to the plaintiffs for the moneys now claimed. I understand that the first defendant is really the only substantial member of the family. Therefore, if his liability were made out, it would not matter much, I apprehend, to the plaintiffs whether or not Khubchand or Hakamchand were also made liable. Nor does the question raised of the fourth defendant's minority affect the case, viewed in this light, in the slightest degree; for, assuming that he was a minor in September 1911, yet, if he were authorised by the firm of Harising Chetram to act for them in Bombay as their agent for the purpose of making these contracts and did so act, they would be equally bound and the minority of their agent would be immaterial. It is only on the assumption that Hakamchand was not authorised by and on behalf of defendants Nos. 1 and 2, and that his acts were not afterwards ratified by them, that, on the footing of being a member of the joint Hindu family to which this firm belonged, it might be material to determine whether he was a minor or not at the time he made the contracts which are now sought to be enforced against all his co-parceners on the ground of their collective responsibility for the acts of any member of the joint family assuming to act in that capacity. It would, then, doubtless have to be shown that the acts were done for the benefit of the family as a whole and that Hakamchand, in so acting, had legally assumed a character of manager with authority to bind all his co-parceners. Notwithstanding a passage in Trevelyan on Minors at page 18, I confess I should feel some doubt in holding that a minor member of a joint Hindu family could possibly act as manager for adult members or that contracts entered into by him in that capacity for the benefit of the family as a whole would necessarily be binding upon all the other members. If, again, it were the case of a joint Hindu family, all the members of whom were minors, then it would be less difficult to hold that the oldest minor was managing for the rest; still, it appears to me, his minority would remain an insuperable difficulty in the way of holding that he was either competent to contract for himself or for other minors, as incompetent in their turn to enter into contracts. If, however, there be no joint family existing in the present case, and if the 4th defendant, Hakamchand, be held not to have been acting as the agent of defendants Nos. 1 and 2's firm, his minority would have little bearing upon the liability of these defendants one way or the other. It might, no doubt, serve to protect him, but beyond that I do not think that the question would have any material bearing upon what is substantially in controversy in this case. All this, however, may be very briefly dismissed upon a simple finding of fact, for I have not the very least doubt but that in September 1911, the defendant No. 4, Hakamchand, was not a minor. The evidence taken on commission is, speaking generally, of little value, but I cannot neglect the deposition of the School Master, Ramchand Rao Balaji, who was a master at the school at which Hakamchand, defendant No. 4, received his education. That witness swears that he was a Master from 1886 to 1899 and that the defendant No. 4, Hakamchand, came to school, as shown by the school register, in the year 1897. Now, I cannot bring myself to believe that Hakamchand could have gone to school before he was at the very least five years of age. Nor can I entertain any serious doubt, notwithstanding the many defects appearing on these registers, that the entry, showing that Hakamchand was admitted into the school in 1897, is entirely trustworthy. If, in that year, Hakamchand was five years, it is clear that he would be nineteen when these contracts were made. I think it much more probable that he was two or three years older and that the plaintiffs are right in saying that he was at least twenty-one

when he made these contracts ostensibly on behalf of the firm of Harising Chetram.

There is next to be answered the question whether or not this firm of Harising Chetram was a part of the joint family property when the contracts were entered into, and whether, if so, those responsible for the conduct of the business were managers in the sense that their act would bind all the other co-parceners. The defendants have set up a partition alleged to have been effected shortly before the contracts now sued upon were entered into. The evidence taken on commission is largely directed to proving this allegation. It is, in my opinion, altogether untrustworthy and deserves no credit. In the first place, all the witnesses speak to the partition or rather to the terms of the partition having been embodied in a writing. This writing was made in one of the books belongiug to the firm of Harising Chetram. It is not forthcoming, and although I accepted the evidence of defendant No. 1 for the purpose of letting in secondary evidence, I do not really, now that all the remaining evidence in the case has been taken, believe a word of it. I do not believe that any partition of the kind alleged was made: still less do I believe that the terms were written out in a book, belonging to the firm of Harising Chetram, which has since mysteriously disappeared. Indeed, this defence is one of those characteristically dishonest defences with which every Judge sitting on this side of the Court and having experience of *Marwari* suits must be only too familiar. These *Marwari* firms, whether taking the form of commercial partnerships or admittedly joint family businesses, almost invariably have recourse to repudiating liability, when their ventures turn out unfavourable, on the ground that this or that member or group of members did not belong to the firm, or that the transactions were unauthorizedly entered into by one single member of the firm; or if the transactions were entered into on the footing of the concern being a joint Hindu family property, that a partition had been effected and that they, the defendants, were in no way liable. This is the kind of defence which is constantly set up in these Courts in suits of this kind; and the present appears to me to be a very typical case. The defendants Nos. 1 and 2 doubtless thought that their best chance would be to deny what they knew to be a fact, that this business was really a part of the joint family property and had been managed up to and including the time when these contracts were entered into by most, if not all, the surviving members of the joint family. So we have this entirely incredible story of a partition opportunely effected just before the contracts were entered into, which have turned out to be unfavourable to the firm of Harising Chetram. It is to be observed that every member of the family, that is to say, all the five defendants were adults, and that the evidence leaves little real room for doubt but that they were all actively concerned in the conduct of the business of the firm of Harising Chetram. The 5th defendant, Kapurchand, son of first defendant, Chetram, is himself twenty-five years of age; and I have not the least doubt but that Hakamchand, the 4th defendant, was also an adult, and an active participant in the business of Harising Chetram in the year 1911. Now, if that were so, there would be no difficulty in making all these members of a joint Hindu family liable for the losses of the business, not only to the extent of their share in the joint family property but personally as well. This is what I believe to have been the true state of affairs when the contracts were entered into.

But, assuming again for the sake of argument, that the firm of Harising Chetram was being carried on independently by the two elder brothers, Chetram and Beniram, with whom was associated the 5th defendant, Kapurchand, in the year 1911, and they were carrying it on on the legal footing of self-acquisition, still it appears to me that they would be undoubtedly bound by the acts of Hakamchand and would be liable to the plaintiffs. The evidence is, and it is very good evidence, on behalf of the plaintiffs that Jethmal, the *munim* of the plaintiff firm, first became acquainted with Chetram, defendant No. 1, before these transactions had ever been entered into, in Jubbulpore. Jethmal says he goes to Jubbulpore every year to collect outstandings and he there met Chetram, the 1st defendant, and that he met also Hakamchand, the 4th defendant, who was with his brother, Chetram, and apparently took part in such business talk as followed. It was there, according to

this witness, and I really see no reason to doubt him, that proposals were first made by Chetram on behalf of the firm of Harising Chetram to enter into business relations with the plaintiffs in Bombay. Naturally, seeing Hakamchand and Chetram together, the plaintiffs were the readier to entertain the proposals made in September to do business in forward linseed contracts by Hakamchand on behalf of the firm Harising Chetram. Now, the evidence given by the plaintiff, Joharmal Ladhooram, on this point also appears to me to be entirely trustworthy. I see no reason to doubt the word of the two witnesses Joharmal and Jethmull when they say that Hakamchand came to them in September 1911, representing himself to be a member or agent of the firm of Harising Chetram and inviting business. The evidence is that in doing so, Hakamchand said that he would obtain ratification of the contracts from the headquarters of the firm at Bareilly; and this ratification was presently received by the plaintiffs in two post cards, Exhibits D and E, dated the 6th and 10th September, respectively. These post cards purport to be written by the firm of Harising Chetram and signed for that firm. They recognize the contracts entered into by Hakamchand on behalf of the firm and ratify them. The evidence of Jethmal is to the effect that the plaintiffs' procedure was, after making the contracts with Hakamchand on behalf of the firm of Harising Chetram, to send a memorandum of the contracts to that firm's head offices. That may very well have been done and is quite consistent with the despatch of the two post cards of the 6th and 10th of September. In these the writer is made to say that he has been apprised of these contracts, that he has noted them in his own books, and that he confirms them. The defendant No. 1 now stoutly contends that both these post cards are forgeries. He even goes the length of saying that he never posted any post card or any other communication at Jubbulpore in the course of his life. This is apparently a falsehood. He had considerable business at Jubbulpore, as he admits he negotiated *hundis* there for transmission to merchants with whom he admittedly had dealings in Bombay. And although he says that all this business was always done in the quarter of the city called Lath Ganj where there is a Post Office, whereas these post cards bear the postal mark of despatch from Shroff or Saraf Bazaar, it is quite plain, I think, that the only Postal District recognized there is that of Saraf Bazar and not Lath Ganj, and I have not the slightest doubt but that defendant No. 1, Chetram, did despatch these post cards from Jubbulpore to the plaintiffs in Bombay. The only alternative hypothesis is that Hakamchand procured the despatch of these post cards by some friend of his own in order to enable him to enter into gambling transactions with the plaintiffs' firm by deluding them into the belief that he had the firm of Harising Chetram at his back, while, in fact, that firm knew nothing of his proceedings. It cannot be supposed, and it is not contended on behalf of the defendants, that these post cards have been forged by the plaintiffs or that the plaintiffs have procured the forgery of them. Then, it appears to me, in the highest degree improbable that Hakamchand should have gone the length of committing forgery or inducing his friends to commit forgery at Jubbulpore merely to induce the plaintiff firm to give him contracts, which they would not have otherwise given him, in the hope of making gambling profits upon them. It is true that the evidence for the plaintiffs of identification of handwriting is really worthless. Nor do I believe Chetram's denial of his own handwriting. But I think, looking to the surrounding circumstances and probabilities, that I am quite safe in concluding that these post cards were really written by Chetram.

Now, if that be so, they amount to a complete ratification and fix the defendants' firm, that is to say, admittedly defendants Nos. 1 and 2, with the liability they have so strenuously sought to evade.

Even apart from these post cards, I should have felt no doubt whatever but that Hakamchand was acting for, and was authorized to act for, the firm of Harising Chetram. It is proved up to the hilt that he has acted as their representative in dealings with the two other large and respectable firms of Gokaldas and Haridas Premji at or about the same time, and if he was so acting on behalf of the firm of Harising Chetram in 1910 and 1911 with other firms, the already strong probabilities are converted into practical certainty that he was acting in the like character in these dealings with the plaintiffs,

There is the last point to be considerd, but I can dispose of it in a very few words. The defendants have contended that even assuming the contracts were entered into by the defendant No. 4 on behalf of the firm of Harising Chetram, and that, therefore, all the five defendants, or at any rate the members of that firm, would be liable for them, yet in the present case the contracts being wagers are unenforceable at law. The only defendants who contest the claim here are the defendants Nos. 1 and 2. As they both deny that they ever made these contracts or authorized the defendant No. 4 to make them, I confess, I do not see how they can possibly be in a position to contest the character of the contracts. It hardly lies in the mouth of a person to say in one and the same breath: "I did not make a contract, but if I did make a contract I am sure it was a wager." That is in effect the form the defence has taken here. But waiving that logical difficulty, I may say that there is no evidence worth the name led by the defendants to prove that the contracts sued upon were wagers. I hold that the contracts were not wagers.

I, therefore, entertain no doubt whatever but that the firm of Harising Chetram is answerable to the plaintiffs for the amount claimed. And I further hold that when that firm became so liable, every-one of the five defendants was a member of the joint family of which that firm was an asset and was taking an active part in the business of the firm. I, therefore, hold that all the defendants are liable to the extent of their shares in the joint family property and also liable personally.

The plaintiffs' suit must be decreed in full against all the five defendants with all costs throughout, including all costs reserved.

Suit decreed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 348 OF 1914.

December 22, 1914.

Present:—Mr. Justice Hannay.

MAMMAREDDI SATTIRAZU—RESPONDENT—PETITIONER

versus

MAMMAREDDI AMMAYI *alias* AKKAMMA—PETITIONER—RESPONDENT.

Hindu Law--Joint family—Preliminary decree for partition, whether effects severance of co-parcenary—Holder of preliminary decree for partition, death of—Widow, whether proper legal representative.

A preliminary decree for partition effects the severance of the members of a joint Hindu family, and if a plaintiff in a partition suit dies issueless after the passing of a preliminary decree, his proper legal representative is his widow. [p. 544, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the judgment and order of the Court of the Temporary Subordinate Judge of Rajahmundry at Cocanada, in Civil Miscellaneous Petition No. 243 of 1913, in Original Suit No. 4 of 1911.

FACTS.—After the passing of a preliminary decree in a suit for partition instituted by a Hindu against the other members of the undivided family the plaintiff died. His widow then applied to be brought on record as the legal representative of the deceased plaintiff and was accordingly added by the Subordinate Judge. Against that order, the defendant preferred this civil revision petition.

Mr. K. S. Ganesa Iyer, for the Petitioner:—So long as the shares of the parties were not specifically ascertained and partition effected by metes and bounds and a final decree embodying the said arrangements passed, the undivided status of the family continued and the right of survivorship was not lost by the other members of the undivided family. The widow had, therefore, no *locus standi* to come in.

Mr. *V. Ramadoss*, for the Respondent:—The preliminary decree for partition put an end to the co-parcenary and from the date of passing of such a decree the family became divided. *Thandayuthapani Kangiar* v. *Ragunatha Kangiar* (1). The widow was, therefore, the only person who could legally represent the deceased.

JUDGMENT.—The case of *Thandayuthapani Kangiar* v. *Ragunatha Kangiar* (1) is

(1) 10 Ind. Cas. 660; 9 M. L. T. 421; (1912) M. W. N. 223; 35 M. 239; 21 M. L. J. 240.

authority for the view of the lower Court that the preliminary decree for partition effected a severance of the family, and in this view the order bringing on record the widow of the deceased plaintiff, who had obtained the preliminary decree, as legal representative of the deceased plaintiff, is correct.

The petition is dismissed with costs.

Petition dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 397 OF 1914.

December 10, 1914.

Present:—Mr. Justice Beaman.

GANGABAI—PLAINTIFF

versus

SONABAI—DEFENDANT.

Contract—Person having two estates larger and smaller conveying entire property without limitation—Inference—Principle—Exception.

Where a person has two estates, one larger and the other smaller, and purports to convey the entire property without any words of limitation, he must always be taken to be conveying the highest estate he has: that is to say, if an executor having a one-third personal beneficial interest in the estate purports to convey the whole of it without qualification or limitation, he must be taken to be conveying in his character as executor and not in that of one having a beneficial interest only in a fraction of the whole estate purported to be conveyed. [p. 544, col. 2.]

Upon this general principle, exceptions may be grafted with reference to the particular facts of particular cases. [p. 544, col. 2.]

Messrs. *Inverarity, Jinnah* and *R. D. N. Wadia*, for the Plaintiff.

Mr. *Moos* (with him Mr. *Weldon*), for Defendant No. 1.

Messrs. *Taraporevala* and *Dadachanji*, for Defendant No. 2.

JUDGMENT.—The plaintiff in this suit seeks specific performance of an agreement to sell a certain property in Sheikh Memon Street, alleged to have been entered into on the 18th of January 1914, between the said plaintiff and the defendant, Sonabai, administratrix of the estate of her deceased father. The plaintiff also asks for the rectification of the agreement, if necessary, by the insertion of words not therein to be found at present, making it clear that the contract was entered into by Sonabai as administratrix. Before the case was opened, the learned Counsel for the plaintiff asked leave to raise an additional issue which implies, as I understand it, the abandonment of this supplementary prayer for rectification. No evidence has been led in the course of this trial to prove any mutual mistake in the actual wording of the agreement, Exhibit E; but in its final form the plaintiff's case amounts to this, that inasmuch as Sonabai was the administratrix and purported to convey the whole of the property in suit without any qualification or words of limitation, she must be presumed in law to have agreed to convey the highest estate she was capable of conveying, and that too without the need of any designatory words such as administratrix. I have been referred to certain cases upon this subject, and notably the case of *Bijraj Nopani* v. *Pura Sundary Dassee* (1) and the very informing case of *In re Venn & Furze's Contract* (2). Ever since the trial commenced, I have bestowed my best attention upon this interesting point, and although it was only in Counsel's concluding arguments that the case of *In re Venn & Furze's Contract* (2) was brought to my notice, I had independently arrived at the principle to which, I think, Stirling, J.'s judgment in that case gives very clear expression. It appears to me, as a general principle, that where a person has two estates, one larger and the other smaller, and purports to convey the entire property without any words of limitation, he must always be taken to be conveying the highest estate he has: that is to say, if an executor having a one-third personal beneficial interest in the estate purports to convey the whole of it without qualification or limitation, he must be taken to be conveying in his character as executor, and not in that of one having a beneficial interest only in a fraction of the whole estate purported to be conveyed. Upon this general principle, which I believe to be universally valid and applicable, exceptions may be grafted with

(1) 24 Ind. Cas. 296; 16 Bom. L.R. 796; 27 M. L. J. 93; 1 L. W. 555; 18 C. W. N. 1313; (1914) M. W. N. 679; 16 M. L. T. 338; 12 A. L. J. 1185; 20 C. L. J. 368; 42 C. 56.

(2) (1894) 2 Ch. 101; 63 L. J. Ch. 303; 8 R. 220; 70 L. T. 312; 42 W. R. 440.

reference to the particular facts of particular cases. Thus where, upon the facts found, the Court is satisfied that both the parties must have been aware that the intention of the vendor was to restrict what was being sold to his personal lesser interest and where the Court also finds that that was the intention of the vendor, then, no doubt, the conveyance would only be effectual to that extent. But that is really no exception at all to the general rule I have stated. It appears to me to make not the slightest difference whether, in such circumstances, the vendor is expressly designated as executor or administrator if, in fact and to the knowledge of the purchaser, he be an executor or administrator and purports to convey without limitation the whole estate. Nor do I think any distinction can be maintained in principle between actual conveyances and agreements to convey for the purposes of applying this general rule. If I am right so far, it is obvious that there is no case for rectification here because there is no need for it. If the agreement of the 18th of January 1914 was really the agreement of the administratrix, then, in my opinion, it would be as much an act of Sonabai in that capacity whether or not she be described on the paper as administratrix. So far upon the question of pure law.

Next arises the question whether the facts proved in this case would bring it within the class of exceptions I have indicated, that is to say, whether there is anything in the form of the document or the relations of the parties or their conduct in this agreement, which would warrant the Court in holding that it was the intention of Sonabai to agree to convey no more than any beneficial interest she herself might have in the property agreed to be conveyed, and that that intention was known to and accepted by the plaintiff, Gangabai. Except for the constant association of Cooverbai, the defendant, Sonabai's sister, with Sonabai in all the stages of this transaction, I fail to discover any such facts. The agreement itself purports to be drawn as between Sonabai alone of the one part, and the plaintiff, Gangabai of the other; and Sonabai, who was admittedly well-known to Gangabai to be the administratrix of her late father's estate, agreed to sell not her own interest, whatever that might be in the suit property, but the entire property. Bearing in mind that Cooverbai was herself present when the agreement was entered into and signed by the plaintiff and the defendant, and that no attempt was made on either side to obtain her signature or have the agreement drawn in the joint names of herself and Sonabai, it appears to me beyond reason to contend that in this matter Sonabai was not putting herself forward as competent to deal with the property, not as one having merely a limited interest therein, but with all the powers of administratrix. I think too that Cooverbai must have been present with the object of confirming the act of Sonabai as administratrix, while keeping an eye, perhaps, on her own interest. But I can hardly believe that if it had really been the intention of Sonabai merely to sell her own right, title and interest in the property, or to sell that along with the right, title and interest of Cooverbai, the Attorney, under whose control the whole proceeding was conducted, would have allowed the agreement to be executed in its present form. Still less do I think that if that had been the intention and the plaintiff had been aware of it, she would have consented to the agreement binding her to pay so high a price as Rs. 33,750 for an unascertained share of a property which, at the highest, would hardly be worth more than Rs. 43,000.

It remains, then, to be considered whether, approaching the case in this light, the agreement of the 18th of January 1914 is one which ought to be specifically enforced. The defendant's contention is that she was duped into signing the agreement by the treachery probably of Mathuradas and that had she been aware of the figure he intended to fix, she would never have consented to sell the property. In effect, this amounts to such a plea as might very properly be entertained under section 22 of the Specific Relief Act, and it then would be merely a question of fact whether or not the defendant has satisfied the Court that she had not entered into the agreement with the full knowledge of the facts or under a mistaken impression, or had in any other way through misrepresentation been induced to part with the

property on terms which, with fuller knowledge, she would not have accepted. In such cases it is not necessary that the facts should go the length of establishing actual fraud. What the Court is to look to is, whether in the exercise of its discretion the agreement is one which ought to be specifically enforced particularly having regard to this, whether enforcing it would not inflict more injury upon the defendant than confer benefit on the plaintiff. In every suit for specific performance, Courts of Equity have a free discretion limited only by those general principles which require all Courts of Justice to act in accordance with sound judicial principles and not upon mere caprice and sentiment.

Now, this case has occupied some time and a considerable amount of evidence has been led before the Court on both sides with the object, *first*, of proving that the transaction throughout was perfectly straightforward and that no imposition of any sort was practised upon the defendant; *next*, of proving that she acted upon a supposed assurance given by Mathuradas that he would never value this particular property at less than Rs. 1,000 per square yard. It is indubitably certain, I think, that the defendant, a Parsi woman, had not received any professional advice at all in the matter, probably because she did not ask for any. But after having listened to the evidence, while it was being given, with the closest attention, after having heard it criticised by learned Counsel on both sides, and having again reconsidered it from first to last, I feel very little doubt in my own mind as to the real truth of the matter. In the first place, I do not throw any doubt upon the evidence of Mathuradas. He is a gentleman of wealth and position, and I am sure that his evidence here was substantially true in every particular. This indeed has not been seriously questioned by learned Counsel for the defendant. The defendant's case is in effect that Chhotalal, the broker, was at the bottom of the whole arrangement, and that it was through his misrepresentations to the defendant, Sonabai, on the one hand, and Mathuradas on the other, that the defendant was duped into making this very unfavourable agreement. The undoubted facts which I collect from the evidence, in my opinion, are that the broker was negotiating the sale of this property on behalf of the defendant, Sonabai. The first bidder appears to have been Haribhai, formerly a servant in the shop of the plaintiff, Gangabai, and afterwards a rival trader in the same line. Haribhai is a witness of very poor class, upon whose word I can place but little reliance. It is very clear, however, from his evidence taken along with that of others that he was very anxious to establish himself in the place of his former mistress, Gangabai, and if he did not actually offer to buy the premises now in suit, he did admittedly take them upon a much enhanced rent actuated no doubt, as I have said, by his desire to establish himself in place of Gangabai. It is the allegation of Chhotalal that Haribhai further offered to buy the premises for a sum varying between Rs. 28,000 and Rs. 30,000. Thereupon, Maganlal, the maternal uncle of the plaintiff, who is a very young woman, appears to have been apprised by Chhotalal of what was going on and in the interest of his niece offered to raise any bid that Haridas might make by Rs. 2,000 or Rs. 3,000. Thereon, there appear to have followed negotiations conducted by the broker, Chhotalal, between Sonabai and the plaintiff, Gangabai; and I believe the truth to be here, as stated by the plaintiff's witnesses, that while Gangabai would offer no more than Rs. 30,000, Sonabai refused to sell for anything less than Rs. 35,000. In estimating the probabilities of what followed, it is necessary to remember that Sonabai had mortgaged this property to one Canjid Sunderji for a sum of Rs. 18,500 in all; and it appears that Mathuradas, who is a member of the well-known firm of Vassanji and Co., was acting after the death of Canji Sunderji on behalf of his estate. Sonabai admits that Canji Sunderji had always treated her with the utmost kindness and consideration and stood to her, as she put it, almost in the relation of her father. Further, she had much confidence in Mathuradas, and after Canji Sunderji died, she says she used to turn to him for advice in all her business dealings. These being the close relations existing between Sonabai and Mathuradas, it is, in my opinion, extremely probable that Sonabai should have mentioned, as she swears she did, to Mathuradas in one of her conversations about

her affairs that she believed that the property in suit was worth Rs. 1,000 per square yard, and that Mathuradas may have said in general terms: "Well, if you can get that for it, by all means sell it." I do not believe that it is true, as now alleged by the defendant, that Mathuradus, acting in the interests of Gangabai, brought pressure to bear upon Sonabai to sell this property by threatening her with the foreclosure of Canji Sunderji's mortgage. But I do believe that it is quite possible that Sonabai, as a result of some such conversation, as I have just related, got it into her head that Mathuradas had accepted her valuation and confirmed her belief that her property was worth the very high figure of Rs. 1,000 per square yard. With that idea in her mind, gradually converted possibly into an enlarged belief that Mathuradas had actually assured her that he would find a purchaser, if necessary, for her at that figure or a higher one, it was extremely natural that, on this difference arising between Sonabai and Gangabai as to the value of the property, Sonabai should have been only too willing to leave the price to be fixed by Mathuradas. Gangabai had equal reasons to repose confidence in this gentleman so that she would have been, as indeed she proved to be, quite ready to accept his valuation. At the same time after the dispute had actually arisen between Sonabai and Gangabai, the evidence does not satisfy me that Sonabai had any further personal communications with Mathuradas on this subject. I come now to that part of the case which relates to the written submissions to Mathuradas. That these were procured by Chhotalal, there can be no doubt whatever. The plaintiff's version, as supported by her principal witnesses, is that the only point in difference between her and Sonabai was, whether the price to be paid for the property should be Rs. 30,000 or Rs. 35,000. Chhotalal, thereupon, said to Sonabai: "If you go on haggling like this, the bargain will never be completed, so the best thing you can do is to leave the figure to be settled by some one in whom you have confidence." To this Sonabai gladly agreed, doubtless having in her mind the belief I have mentioned that if she could obtain the arbitration of Mathuradas, he would fix the price at at least Rs. 43,000. But the plaintiff's story is that nothing of that kind was really left to the arbitration of Mathuradas. All that he was asked to decide was some figure between Rs. 30,000 and Rs. 35,000, which might seem to him to be fair; and this undoubtedly was what was conveyed to Mathuradas orally by Chhotalal. But it may well be doubted whether anything of the kind was conveyed by Chhotalal to the defendant. Sonabai. At this point it is well to bear in mind what the knowledge of the principal parties was at this stage, if I am so far right. Gangabai and Chhotalal knew perfectly well what the actual submission about to be made to Mathuradas was. Sonabai did not. Mathuradas himself was duly informed that he would be requested to fix some figure between Rs. 30,000 and Rs. 35,000. He says that he understood that to be the limit of his authority, and that too without any respect to the actual value of the property. He says that, so far as he understood the submission to himself, he would have fixed the figure between Rs. 30,000 and Rs. 35,000, whether the property had been worth a lakh or whether it had been worth Rs. 10,000. At this point, then, Mathuradas, after having been informed by Chhotalal of what the plaintiff and the defendant desired of him, refused to act without a written authorisation from both of them. Accordingly, Chhotalal drafted the terms of submission for Sonabai, which, with unimportant alterations, she copied at the dictation of her sister, Cooverbai, and posted on the 12th of January to Mathuradas. Apparently, that letter was not delivered as quickly as was expected, and Chhotalal, who was exceedingly anxious to get this authorisation from Sonabai, came to her and informed her that Mathuradas had not received her letter. She, accordingly, re-wrote it on the 14th and took it to the Office of Messrs. Vasanji & Co., where she handed it to Chhotalal, who, in turn, gave it to Mathuradas. The other letter, posted on the 12th, likewise came to his hand with little delay. On the 15th, a similar letter of authority was obtained from Gangabai. Now, it is to be noted that Sonabai's letters, which, for the purposes of this discussion, are alone important, are couched in general terms and contain no reference at all to restricting Mathuradas to some figure between Rs. 30,000 and Rs. 35,000. It is quite clear

that, if I am right in believing that Sonabai hoped that Mathuradas would fix the figure not lower than at the rate of Rs. 1,000 a square yard, her letter of authorisation would have taken precisely the form which, in fact, it has done. On the other hand, if Chhotalal had verbally informed Mathuradas that his arbitration was only invited subject to this restriction, it is equally clear that he would not have inserted it in the draft he gave to Sonabai, if Sonabai was really, as she alleges, being kept in the dark upon this most material point. Now, observe what follows. Prior to the meeting of the 18th of January 1914, Chhotalal had been very busy apparently drafting the agreement to sell this property. He had taken this agreement to the firm of Bhaislankar, Kanga, Girdharlal & Co., some four days before it was actually executed, and submitted it to Girdharlal for his correction and approval. Girdharlal says that in this matter he was acting, if for anybody, for Chhotalal. At least he is driven to say that he made these corrections for Chhotalal's sake. However, that may be, I think very little turns upon the actual form of the agreement. There is nothing the least objectionable in it, and the defendant herself admits, as does her sister, Cooverbai, that had the price come up to their expectations, they would have cheerfully accepted it and would have put the sale through. I merely mention these preparations by Chhotalal as showing his personal interest and activity in the conduct of the whole proceedings. The draft thus corrected, or rather fair copies of it, were given to Maganlal, and Maganlal in turn gave one of them to his attorney, Chandulal. Chandulal struck out one clause; but I think it is proved that out of deference to the wishes of Sonabai that clause was allowed to stand in the final agreement, Exhibit E. The only point then is that, if this be true, it contradicts part at least of Sonabai's evidence in which she stoutly denies that she knew anything at all of any draft agreement before she was called upon to sign the agreement, Exhibit E, at the house of Girdharlal on the 18th of January. Having got all these agreements, however, in due order, it appears that by the 15th of January, as I have said, Mathuradas had obtained written authorisations from the plaintiff and defendant to fix a price, as we now know, between Rs. 30,000 and Rs. 35,000. There only remained to appoint the time and place for the parties to meet and complete the transaction. This was accordingly done by Chhotalal, and 2 P. M. of the 18th was finally settled and the place was to be Girdharlal's private residence. I attach very little importance to the small matter of the alteration of the time of the meeting, of which Sonabai was informed on the 17th. On the 18th, Sonabai and her sister, Cooverbai, went first to Chhotalal's house and with him to the appointed rendezvous, where the plaintiff and her uncle, Maganlal, were also present with Mathuradas, the whole proceedings being conducted by Girdharlal, the Attorney. Now, we come to a very singular circumstance, which, in my opinion, leaves little doubt as to the true state of Sonabai's mind and intention in this matter. For it is common ground that the plaintiff and the defendant signed the agreement, Exhibit E, in blank. They were asked by Girdharlal whether they would like to have the figure first settled by Mathuradas duly filled in or whether they would prefer to sign the agreement and then leave the figure to be filled in. I have no doubt whatever that this is exactly what did occur and neither have I any doubt as to the reason why. As I have said, Gangabai, the plaintiff, knew quite well that Mathuradas would fix some figure between Rs. 30,000 and Rs. 35,000 and she was quite willing to accept whatever figure he thus gave. But Sonabai, cherishing a belief that Mathuradas would never allow the property to be sold for less than Rs. 1,000 per square yard, thought she would steal a march on Gangabai and spring a surprise upon her in the announcement by Mathuradas of some figure not less than Rs. 43,000. Sonabai must have known perfectly well that Gangabai, at the worst, contemplated paying no more than Rs. 35,000. Remembering, however, the terms of her letter of authorisation to Mathuradas and totally ignorant of what had been communicated to him by Chhotalal, she was in the reasonable expectation of securing a very much higher price than any in the contemplation hitherto of the intending purchaser, Gangabai. This appears to me to account for the readiness with which

both the parties agreed to sign Exhibit E in blank: Gangabai because she was really indifferent and ready to accept whatever figure Mathuradas might fill in; Sonabai, because she fully expected that Mathuradas would fill in a figure which she new very well Gangabai would never accept. That I take to be the explanation of what is otherwise inexplicable, that is to say, the manner in which this transaction was put through at Girdharlal's house. Bearing in mind the almost immediate resentment expressed by Sonabai, if she had really known that Mr. Mathuradas did not believe himself authorised to fix a higher figure than Rs. 35,000, it is difficult to understand why she was so indignant (as she swears she was) and why in so short a time she took steps to repudiate the transaction. Now, this does not put Sonabai's conduct in a very favourable light or entitle her to much consideration at the hands of a Court of Equity. Still there is nothing on her part actually dishonest, though I feel very little doubt that, in securing Mathuradas as final arbiter, she believed that she stole a march on Gangabai. After all, her submission contained no reference whatever to any figure, and as, according to evidence, it does not appear that she had ever seen Mathuradas since the negotiations began, there is no reason why she should have believed herself obliged to tie him down in the manner suggested by Chhotalal. That I believe to be the true explanation of what passed at Girdharlal's house and faithfully to reflect the intention and the state of mind of Sonabai. It is true that the evidence shows that when the figure was announced (whether orally by Mathuradas, or, after it had been written by him on a piece of paper and handed over to Girdharlal, by Girdharlal, matters nothing), Sonabai did not protest. Neither did Cooverbai According to these women, they were so staggered at the lowness of the figure and at what Sonabai conceived to be Mathuradas' treachery to her, that they stared aghast. Chhotalal asked them to go downstairs and said he would explain everything to them. That ends the story of the actual making of agreement. And after a full consideration of all that is contained in it, I entertain very little doubt that Sonabai was taken by surprise and had she known of the true nature of the submission which alone Mathuradas believed himself to have received from these two women, she would not have consented to his arbitration on those terms, much less would she have signed the agreement in blank, before the price had been announced. As I have said, in this matter she received no independent advice from her Attorneys or, as far as I can see, from anybody. She probably thought that she was conducting her own business very cleverly; and in so endeavouring to outwit the plaintiff, Gangabai, she might have hesitated about the advisability of taking any Attorney or any other adviser into her confidence. It, however, does not alter the fact that she probably was under a very serious mistake and delusion. That may have been entirely her own fault, but in the circumstances disclosed in her evidence (and so much of it I believe), it was not unnatural and it was not really in any sense dishonest. Looking to the other side of the question, I find nothing whatever blameworthy on the part of the plaintiff. She also is a young woman, who has not appeared in person in this case and presumably knows nothing at first hand of what went on. Chhotalal, the broker, is the only man who had the first hand communication with the three principal persons concerned, Sonabai, Gangabai and Mathuradas; and Chhotalal was a witness who certainly did not impress me very favourably. He has a very lively and substantial interest in getting this transaction completed. If, therefore, the plaintiff were likely to suffer materially by the failure to complete this contract, it might be a very nice and difficult question for the Court to answer upon the ground of fairness to both the parties whether it should be specifically enforced or not. The evidence, however, here (and it is the plaintiff's own evidence) is all one way. I cannot see how she will be benefited by the specific performance of this contract. It is indeed incredible, except upon the supposition that her Attorneys have driven her into this suit, why she has taken this step at all. She has agreed to pay more than the property is worth. She could carry on her business just as well in any other premises. On the other hand, the defendant appears to me extremely reluctant to part with the property at the price stated in the agreement. She has really only a half in-

terest therein, the other half belonging to her sister Cooverbai. There appears to be absolutely no need to sell the property for the payment of the deceased's debts. In the discharge of her duty as administratrix, the defendant would be under no urgent need of selling the property. And I can only suppose that she consented to sell, and that her sister, Cooverbai, supported her in that decision, on the understanding that the sale would be an extremely profitable one for both of them.

In view of these considerations, it appears to me that this is a case in which the Court ought not to grant specific performance. I think that, in the circumstances, the proper decree would be that the prayer for specific performance, and the supplementary prayer for rectification, should both be refused, and the plaintiff's suit so far dismissed. But having regard to the state of the evidence and what I believe to be the underlying truth of the whole matter, I do not think that the plaintiff ought to be made to bear the defendant's costs of this litigation. There remains the counter-claim, which, again, is not entitled, I think, to very much sympathy at the hands of the Court. The most that can be said in this behalf is that the plaintiff is bound to pay the rent for the time she has remained in occupation of the premises; but in view of the peculiar circumstances of the case, I do not think that she ought to pay the enhanced rent the defendant is seeking to obtain from her. In my opinion, what the general justice of the case requires is, that the earnest-money should be refunded to the plaintiff with interest at 6 per cent. per annum up to the date on which the defendant offered to return it; next, that the plaintiff should pay to the defendant rent of the premises at the rate of Rs. 190 a month until she gives vacant possession; and that in all other respects the suit and the counter-claim should be dismissed, each party bearing her own costs.

The plaintiff should deliver up possession by the 1st of February 1915.

Suit and Counter-claim dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 177 OF 1912.

October 14, 1914.

Present: —Mr. Justice Chevis.

MURAD ALI AND OTHERS—DEFENDANTS—PETITIONERS

versus

CHIRAGH DIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pleadings—Appeal—Ground not taken before first Court—Compromise of criminal case—Consideration.

An Appellate Court is not competent to decide a case in favour of a person on a plea not raised by him before the first Court. [p. 550, col, 2.]

Surrendering a disputed title is a good consideration for a compromise of a criminal case. [p. 550, col. 2.]

Basheshar Nath v. *D. Devi Pershad*, 19 Ind. Cas. 411; 20 P. R. 1913; 10 P. W. R. 1913 followed.

Petition for revision, under section 70 (1) (*a*) and (*b*) of Act XXV of 1899, as amended by Act IV of 1912, of the decree of the Divisional Judge, Amritsar Division, dated the 15th October 1911, reversing that of the Munsif, second Class, Batala, District Gurdaspur, dated 15th May 1911, dismissing the claim.

Mr. *Fazl-i-Hussain*, for the Petitioners.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The facts are given in the judgments of the lower Courts. In the first Court the plaintiffs urged that the deed of relinquishment, which he now seeks to have cancelled, was executed under fraud and undue influence and so was without consideration. The first Court overruled these pleas, and dismissed the suit. The learned Divisional Judge has reversed this decision, on the ground that the criminal case the compounding of which was the consideration for executing the deed, was non-compoundable and so the consideration was unlawful under section 23 of the Contract Act. It seem to me that no such plea was ever raised in the first Court (see the pleadings) and I do not think plaintiffs should be allowed to attack on fresh grounds in the Appellate Court. Moreover I note that the criminal case was compoundable so far as the charge of assault was concerned, and it was to plaintiff's advantage to get even part of the case dropped. Further, if new points are to be admitted, it is doubtful if any considertaion was necessary, the case being one of plaintiffs surrendering a disputed title —vide *Basheshar Nath* v. *Devi Pershad* (1)

(1) 19 Ind. Cas. 411; 20 P.R. 1913; 101 P.W.R. 1913; 185 P. L. R. 1913.

But I decide the case on the ground that plaintiffs should not have been allowed to succeed in the Appellate Court on a ground advanced in the first Court.

This application is allowed and the suit dismissed with costs throughout. Counsel's fee Rs. 20.

Petition allowed.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 70 TO 73 OF 1913.

January 7, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

GANSHAM DOSS SIROMANI DOSS AND OTHERS—PETITIONERS—APPELLANTS

versus

UMDE RAJAH RAJE DAMARA KUMARA THIMMA NAYANIM BAHADUR VARU, RAJAH OF KALAHASTI AND OTHERS—RESPONDENTS.

Execution—Receiver, appointment of—Property sold—Receiver, right of—Suit between decree-holder and auction-purchaser, separate, maintainability of.

A Receiver appointed in the course of an application for execution of a decree becomes *functus officio* immediately the properties attached are sold in execution, as the judgment-debtor's interest in them ceases on such sale. [p. 552, col. 1.]

Kutti Chettiar v *Subramania Chettiar*, 4 Ind. Cas. 1077; 19 M. L. J. 728; 32 M. 485, followed.

To such an application for execution, the auction-purchasers are not necessary parties, and the right between them and the decree-holder should be determined by a separate suit and not in the execution proceedings. [p. 552, col. 2.]

Appeals against the orders of the District Court of North Arcot, in Civil Miscellaneous Petitions Nos. 385 to 387 and 118 of 1912, in Execution Petition No. 24 of 1908, in Original Suit No. 33 of 1895, dated the 23rd September 1912 and 7th October 1912, respectively.

FACTS.—In 1896 one Chennappa Nayani Varu obtained a compromise decree for maintenance against the then Raja of Kalahasti whereby the maintenance of Rs. 650, which was agreed to be paid to the plaintiff and his male descendants, was charged on the whole of the Kalahasti Estate. The appellants obtained a transfer of the said decree, and in execution certain villages were attached and placed in possession of a Receiver, who had been appointed therefor. Some of these villages were subsequently sold in execution of certain decrees on mortgages executed by the Raja of Kalahasti prior to the attachment referred to above but after the passing of the said decree, and were purchased by the respondents who were put in possession of the same by order of Court, the Receiver being removed so far as those villages were concerned.

The appellants then put in petitions (1) for the Receiver being allowed to continue in possession of the villages until their decree amount is discharged; (2) for allowing the appellants to continue the execution proceedings against the respondents, who were alleged to be the representatives of the judgment-debtor; (3) for restraining the respondents, auction-purchasers, from interfering with the possession of the Receiver; and (4) for the issue of a proclamation of sale.

The District Judge of North Arcot, before whom the petitions came on for hearing, dismissed the petitions holding that the respondents were not the representatives of the judgment-debtor. Against those orders the appellants preferred these appeals.

Mr. *C. V. Anantakrishna Iyer*, for the Appellants:— The mortgages in favour of the decree-holders in execution of whose decrees the respondents purchased the properties are all subsequent to the decree in favour of the appellants, which gives not merely a charge but allows the same to be executed as a mortgage decree. Further the purchase by the respondents was subject to the right of the appellants and the appellants are, therefore, entitled to proceed against the respondents. The Receiver appointed in execution of the decree in favour of the appellants (subject to which alone the respondent can claim rights in the property purchased by them), ought not to have been removed.

Mr. *K. Srinivasa Iyengar*, for the Respondents:—The decree in favour of the appellants is only a simple money decree, even though it gives them a charge. It is not a mortgage decree, nor has it been executed as such, but only as a money decree. The Receiver was appointed for properties attached in execution of the money decree and as a sale of the property by the Court puts

an end to the attachement, the receivership goes with it: Appeal against Order No. 27 of 1913. The appellants' right, if any, is only against the sale proceeds. Even in the case of successive mortgagee decree-holders, when once the properties have been sold in execution of one mortgage decree, the right of the other mortgage decree-holders as against the purchaser should be determined in a separate suit, and not in execution of their own decrees [*Kutti Chettiar* v. *Subramania Chettiar* (1)].

Mr. *C. N. Anantakrishna Iyer* briefly replied.

JUDGMENT.—The petitioner in all these cases has a *razinama* decree for maintenance, which he claims to have been made a charge on the Kalahasti Estate. He seeks to proceed in execution against property in the hands of persons who have purchased portions of the estate in sales under mortgage decrees.

So far as the execution petitioner's applications are for the continuance of the Receiver appointed in execution of the petitioner's applications to execute his *razinama* decree as a money decree, it is clear that the respondents being in possession by virtue of their purchases, the Receiver cannot continue in possession after the properties have been sold under those decrees. For all the interest of the judgment-debtor has passed under the prior sales, and no saleable interest remains to be sold again [Vide *Kutti Chettiar* v. *Subramania Chettiar* (1)].

The other prayers in these petitions, which were to make the purchasers parties to the execution proceedings and to restrain them from interfering with the possession of the Receiver, are for these reasons equally inadmissible.

In Miscellaneous Petition No. 118 of 1912, which is connected with Civil Miscellaneous Appeal No. 73 of 1913, the petitioner asked for the sale in execution of certain villages which he had attached. The connected execution petition has not been printed and so it does not appear whether he applied to sell the properties in execution of his decree, as properties attached under a money decree, or as if they were mortgaged under a mortgage decree. In the other execution applications there is no request to execute these decrees as mortgage decrees.

In any case, we have no hesitation in following the decision in appeal against Order No. 27 of 1913, which related to this same estate, and in holding that the petitioner cannot be allowed to bring the property to sale in execution of his decree without a fresh suit. The persons who are now in possession were not parties to his decree and, therefore, it is necessary that the petitioner should file a suit in which the rights of the parties to these appeals may be adjusted. Otherwise, he cannot execute the decree by attachment of portions of the estate in which the original judgment-debtor has no longer any subsisting interest. These petitions were, therefore, rightly dismissed by the learned District Judge and we dismiss these Civil Miscellaneous Appeals with costs (one set). This order will not prejudice the petitioner from applying for any moneys which may have been collected by the Receiver prior to the sales to the respondents.

Appeals dismissed.

(1) 4 Ind. Cas. 1077; 19 M. L. J. 728; 32 M. 485.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 102 OF 1914.

February 8, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

SHER KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEBI PRASAD—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 167—Suit for declaration that a perpetual lease is not binding—Jurisdiction of Civil or Revenue Court.

A decree was obtained on foot of a mortgage-deed for sale of a *zemindari* property. Before the property was sold the mortgagor executed a perpetual lease in respect of certain lands appertaining to the share in question. The *zemindari* was then put to auction and sold. The purchaser brought a suit in the Civil Court for a declaration that the perpetual lease was not binding on him:

Held, that the suit was not cognizable by the Civil Court by reason of the provisions of section 167 of the Tenancy Act. [p. 554, cols. 1 and 2.]

Ram Singh v. *Rao Girraj Singh*, 26 Ind. Cas. 731; 37 A. 41; 12 A. L. J. 1252, referred to.

First appeal from an order of the District Judge of Aligarh, dated the 4th May 1914.

The Hon'ble Mr. *Abdul Raof*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—This is an appeal by the defendants against an order of the learned District Judge of Aligarh passed under Order XLI, rule 23, remanding to the Court of the Subordinate Judge of Aligarh for decision on the merits a suit which had been dismissed by that Court. The learned Subordinate Judge had held that, on the facts stated in the plaint, the suit was not cognizable by him, being barred by section 167 of the Agra Tenancy Act (Local Act II of 1901). This is the finding which the learned District Judge has reversed on appeal and his decision is now challenged before us. There was a mortgage of some *zemindari* property on which a suit was brought and a decree for sale was made; after the mortgage, but before the decree for sale, the mortgagors executed a perpetual lease in respect of certain lands appertaining to the share in question. In execution of the decree for sale the *zemindari* property was put to sale and was purchased by the present plaintiff. He brought this suit in order to get rid of the perpetual lease. As originally drafted, the relief claimed in the plaint was recovery of possession over the land in question as against the defendants-lessees. In reply the defendants-lessees claimed the benefit of section 202 of the Tenancy Act, and were accordingly directed to institute a suit in the Revenue Court for the determination of the question whether or not they held the land in suit as tenants of the plaintiff. They instituted a suit accordingly; but when that suit came up for trial the present plaintiff, who was defendant in the Revenue Court, admitted the existence of a tenancy. He pleaded that the precise nature of that tenancy, and in particular the validity of the perpetual lease under which the present defendants claimed to hold, was not a matter for determination in that suit. On this understanding a decree was passed to the effect that the plaintiffs in the Revenue Court, who are appellants before this Court, held the land in suit as tenants of the present plaintiff-respondent. After the proceedings in the Revenue Court had thus terminated the respondent obtained leave to amend his plaint, by asking for a simple declaration that the perpetual lease in question was not binding upon him. It was the plaint as thus amended which the learned Subordinate Judge has held not to be cognizable by the Civil Court. The provisions of section 167 of the Agra Tenancy Act have been discussed in a number of rulings, the most recent of which is that reported in *Ram Singh* v. *Rao Girraj Singh* (1). As will be apparent from that report, I am myself deeply committed to the view that the provisions of section 167 of the Tenancy Act do bar a suit like the present. The plaintiff in this case, having obtained possession of the *zemindari* share on his auction purchase, found in existence a perpetual lease of a portion of the property which he regarded as interfering with his full enjoyment of the property acquired by him. His natural remedy, if as a matter of fact the lease was executed under such circumstances as not to be binding upon him, was by way of a suit for ejectment under section 58 of the Tenancy Act. Such a suit would fall within the provisions of serial number 29 of group (*c*) of the fourth Schedule to the Act in question and would be cognizable only by the Revenue Courts. The plaintiff in such a case would seek for ejectment of the defendants-lessees on the ground that they hold only as tenants from year to year. In reply the perpetual lease in favour of the said defendants would be set up, and in order to the determination of the question thus raised the Revenue Court would have to decide whether the said lease was valid and binding on the plaintiff. The question is whether the plaintiff can be allowed to oust the jurisdiction of the Revenue Court, and bring his

(1) 26 Ind. Cas. 731; 12 A. L. J. 1252; 37 A. 41.

suit before a different *forum* by seeking for a mere declaration. In the judgment which was before the Bench of this Court which decided the case of *Ram Singh* v. *Rao Girraj Singh* (1), I have discussed this question at some length, and so far as I am concerned I have nothing to add to the reasons which I gave in my judgment in that case, for holding that the second part of section 167 of the Tenancy Act must be construed as barring a suit like the present. It may be said that the final decision of the Bench of this Court does not proceed precisely on the lines taken by me. Even, however, confining my decision to the grounds taken by the learned Judges who decided the case of *Ram Singh* v. *Rao Girraj Singh* (1) on appeal under section 10 of the Letters Patent, I would say that, if we disregard the form of the present suit, the real substance is clearly one which could have been decided in the Revenue Court. The object of the plaintiff is to get rid of the defendants who claim to hold the land in suit under a perpetual lease. This he can undoubtedly do by a suit in ejectment in the Revenue Court of the nature already explained. I do not think he is entitled to come to the Civil Court for a mere declaration, the only object of which would be to enable him to take further proceedings in ejectment before the Revenue Courts. It seems to me that unless this view is maintained, a conflict of jurisdiction between the Civil and the Revenue Courts in matters of this sort will sooner or later be inevitable. Section 11 of the Code of Civil Procedure could not be applied strictly on its terms so as to make the decision of a Civil Court in a declaratory suit binding on the Revenue Court in a suit for ejectment, for it could be pleaded that the Civil Court had no jurisdiction to try the suit for ejectment. I would accordingly set aside the order of the lower Appellate Court and restore that of the Court of first instance.

CHAMIER, J.—The facts of this case have been stated by my learned colleague and I will not repeat them. In the Courts below it was contended on behalf of the defendants that the jurisdiction of the Civil Court was barred by the provisions of section 167 read with section 95 of the Agra Tenancy Act. The Subordinate Judge accepted this contention and dismissed the suit. On appeal the district Judge held that section 95 of the Act did not apply to the case at all, because the plaintiff could not have brought a suit under section 95 for a declaration as to the validity of the perpetual lease set up by the defendants or to have it declared that the defendants were not the holders of a perpetual lease. Having regard to the definition of the word *class* contained in the Act, it appears to me that a suit for such a declaration would not be a suit for a declaration as to the class to which a tenant belongs, nor do I think that such a suit would be one for a declaration as to the name and description of a tenant within the meaning of clause (*a*) of section 95, though it was vigorously contended by Mr. Abdul Raoof that the word 'description' covered such a case. In this Court it is contended that even if section 95 does not apply to the case, yet the jurisdiction of the Civil Court to entertain this suit is barred, because at the date of the suit the plaintiff might have brought a suit for the ejectment of the defendants under sections 58 and 63 of the Tenancy Act. It has been held, I think rightly, in several cases by this Court that in a suit for the ejectment of a tenant, if the tenant pleads that he holds under a perpetual lease under which he is not liable to be ejected, it is for the Revenue Court to decide whether the plea is correct or not, but at least three Judges of the Court are further committed to the view that a suit like the one now before us cannot be maintained, because the plaintiff might have instituted a suit in the Revenue Court for the ejectment of the defendants in which the validity of the lease set up by the defendants might have been determined. The case is really covered by the principle of the decision of Richards, C. J., and Banerji, J., in *Ram Singh* v. *Rao Girraj Singh* (1), in which they approved of the view taken by my learned colleague. On the authorities I feel bound to hold that the question whether the defendants are entitled to hold the land under the perpetual lease set up by them is a "matter in respect of which" a suit might have been brought in the Revenue

Court within the meaning of section 167 of the Tenancy Act, although the plaintiff could not in the Revenue Court have claimed any declaration regarding the lease. It may be doubted whether the authors of the section intended that it should be construed in such a comprehensive manner but a *cursus curiæ* has been established from which I am not prepared to dissent. I agree that this appeal should be allowed and the decision of the first Court restored.

By the Court.—The appeal is allowed. The decree of the lower Appellate Court is set aside and the decree of the first Court is restored with costs here and in the lower Appellate Court. The costs in this Court will include fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

Second Civil Appeal No. 1831 of 1914.

February 18, 1915.

Present:—Justice Sir Donald Johnstone, Kt.

KHUBI and others—Plaintiffs—Appellants

versus

CHOTTU—Defendant—Respondent.

Appeal, second—Finding of fact without any evidence—Consideration.

A finding of fact based on no evidence or against express *prima facie* reliable evidence is liable to be set aside in second appeal. [p. 555, col. 2.]

The reversioner of *C* sued for possession of his holding on the ground that he had become a *faqir*. The suit was compromised and the land was left with *C for his life only*. Thereafter *C* sold his ancestral house to *T* for Rs. 300. The reversioners again sued to set aside the sale. This case was also settled. The plaintiffs allowed *T* to keep the house on the condition of their getting Rs. 130 out of Rs. 300 and the land in possession of *C*.

Held, that the retaining by *C* of the sum of Rs. 170 was a good consideration for giving up the land. [p. 556, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Hissar Division, at Karnal, dated the 4th March 1914, reversing that of the Munsif, first class, Jhajjar, District Rohtak, dated the 4th August 1913, decreeing the claim.

Mr. *Muhammad Saleem*, for the Appellant.

Mr. *N. C. Mehra*, for the Respondent.

JUDGMENT.—The sole question for decision at this stage of the case is whether there was an adequate consideration for this compromise. Secondly, whether the Additional Divisional Judge in finding that Chottu did not agree to the compromise has not wholly ignored obvious evidence on the record. To take the second question first. It is clear that this is a matter for second appeal. The lower Appellate Court without any evidence whatever has held that Chottu was not present at the time when the Munsif sanctioned the compromise.

There is no evidence whatever in support of this proposition; on the contrary it is contradicted by the record, in which it is plainly written that the parties were present, and in which a certain *lambardar* is expressly stated to have identified the parties in open Court. This mistake vitiates the Additional Divisional Judge's judgment. It must be held that Chottu was present and though there is no express statement by him that he agrees to the compromise, there can be no possible reason for doubting that he really did agree.

To turn to the first question, I cannot understand how it can possibly be said that there was no consideration for what Chottu gave up. In 1896 the plaintiffs had sued Chottu for 53 *bighas* of land on the ground that he had become a *faqir*. That case was compromised and the land was left with Chottu *for his life only*. Thereafter Chottu sold the house to Tula Ram, and the plaintiffs sued them both in order to have the sale set aside, on the ground that Chottu was a *faqir* and that he had no "necessity" to sell. Chottu had received Rs. 300 in cash from Tula Ram as the price of the house. He must have wanted money and he knew that after what had happened in 1896 the plaintiffs were pretty certain to succeed in their suit against him. That being so, he made an arrangement with the plaintiffs and Tula Ram, according to which Tula Ram was to keep the house, Chottu was to give Rs. 130 out of the purchase-money to the plaintiffs and was also to give up to plaintiffs the land which in any case would come to them upon his death. It is not absolutely clear why he was willing to give up the land, but, considering the persistent efforts of the plaintiffs to get the land after Chottu had

renounced the world, it is quite easy to conjecture that he found the land somewhat troublesome. In short, the whole compromise seems to me quite natural and reasonable. It is incorrect to say that there was no consideratson for the surrender of the land. The plaintiffs in their recent suit, assuming that it would have been successful, would have had the sale of the house set aside, in which case Chottu would have had to surrender the whole of the Rs. 300, and as it was no doubt very inconvenient for him to do so he agreed to give up the land and keep Rs. 170. The lower Appellate Court takes too narrow a view when it says why should Chottu in a suit about a house be willing to give up his land.

For these reasons I accept the appeal and give plaintiffs a decree in full with costs throughout.

Appeal accepted

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 589 OF 1912.

February 2, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

T. K. TIRUMALAIYAPPA PILLAI AND OTHERS—DEFENDANTS Nos. 1 TO 3 AND 8—APPELLANTS

versus

S. VENGU AIYAR AND OTHERS—PLAINTIFF—DEFENDANTS Nos. 4 TO 7—RESPONDENTS.

Religious Endowments Act (XX of 1863), s. 3—Temple committee, power of, to appoint additional trustees—Power, when liable to be questioned.

A temple committee appointed under Act XX of 1863 has a discretionary power to appoint additional trustees to a temple under its superintendence, and such appointments can only be questioned on the ground that the power was not exercised reasonably and in good faith.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Appeal Suit No. 45 of 1910, preferred against that of the Additional District Munsif of Tinnevelly, in Original Suit No. 334 of 1907.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellants.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.—As regards the objection raised to the maintainability of the suit, it is sufficient to state that the first Court found the plaintiff to be in possession of the suit temple and properties: and the Subordinate Judge notes that this finding was not contested before him.

It is next contended that the Subordinate Judge has applied a wrong test in deciding the vital question of the legality of the order of appointment of the additional trustees, the defendants Nos. 8 and 9. Reliance is placed on a recent decision of this Court in *Thiruvangadatha Aiyangar* v. *R. Ponmappaiyangar* (1), in which it was held that a temple committee under Act XX of 1863 has a discretionary power to appoint additional trustees to a temple under its superintendence and that such appointments can only be questioned on the ground that the power was not exercised reasonably and in good faith. We are quite in accord with the decision quoted, but in the present case as pointed out by Mr. T. Rangachariar, the facts found by the Subordinate Judge fully satisfy the test laid down and show that the appointment of the additional trustees was made reasonably and in good faith. It is sufficient to refer to paragraphs 31 and 70 of the Subordinate Judge's judgment.

It is not contended that the dismissal of the plaintiff can be justified if the appointment of the defendants Nos. 8 and 9 was illegal

The last contention is that the injunction as it stands in the decree is too widely worded. It is certainly open to be read as prohibiting any interference by the temple committee even in exercise of the undoubted powers of superintendence vested in them by Act XX of 1863. We accordingly direct it to be amended by inserting the words "on the strength of the proceedings" after the words "interfering in any way whatsoever."

With this modification the decree of the Subordinate Judges is confirmed. Appellants will bear respondents' costs in this Court.

Decree modified.

(1) 25 Ind. Cas. 905; 28 M. L. J. 209.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 464 OF 1911.

June 8, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT. and Mr. Justice Beachcroft.

SOUDAMINI GHOSE—OPPOSITE PARTY—APPELLANT

versus

GOPAL CHANDRA GHOSE—RESPONDENT.

Arbitration, without intervention of Court—Civil Procedure Code (Act V of 1908), s. 104 sub-s. (1) cl. (f), Sch II, Para. 21 (1)—Order filing award—Appeal, right of—Submission to arbitration, capacity to make—Parties, capacity of, to contract—Reference to arbitration by executor or administrator—Power to modify provisions of Will—Pure questions of law, whether to be referred to arbitration—Questions, what, to be referred—Submission, whether affects legality of award.

In an arbitration without the intervention of the Court the fact, that a decree is drawn up on the basis of the judgment which follows the order filing an award cannot take away the right of appeal of the party aggrieved by the order. [p. 557, col. 2.]

Where such an appeal is allowed, the decree will become infructuous, the whole foundation of the decree will disappear, and it will be competent to the Appellate Court to declare that the decree had been vacated, because the order, on which it was based, had been cancelled. [p. 558, col. 1.]

Under clause (*f*) of sub-section (1) of section 104 of the Civil Procedure Code, an appeal lies from an order filing or refusing to file an award in an arbitration without the intervention of the Court. [p. 557, col. 2.]

Sabitree v. *Promoda Prosad*, 19 Ind. Cas. 941; 21 C. L. J. 248 and *Khetter Nath* v. *Ushabala Dasi*, 22 Ind. Cas. 39 ; 18 C. W. N. 38 , followed.

Capacity to make a submission to arbitration is co-extensive with capacity to contract; every person capable of entering into a contract may be a party to a submission; conversely, he who cannot contract, cannot make a submission; and as a necessary corollary, in the case of persons whose capacity to contract is restricted, the power of making a submission is, in the same manner and to the same extent, limited. Consequently, if parties enter into a submission concerning a subject-matter over which one of them has no authority or only a restricted power of disposition, an award ordering such party to do that which he cannot lawfully do, will be of no legal effect whatever. [p. 559, col. 1.]

Wyatt v. *Benson*, 23 Barb (N. Y.) 327, referred to.

An executor or administrator is competent under certain circumstances to make a reference to arbitration; such right cannot be disputed when exercised within the limits of his authority. [p. 559, col. 2.]

Bean v. *Farman*, (1828) 6 Pickering (Mass.) 269, referred to.

But an executor cannot make a reference to arbitration with the avowed purpose that the terms of a Will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator. [p. 559, col. 2.]

Pure questions of law may be referred to the decision of an arbitrator. [p. 559, col. 2]

Stiff v. *Andrews*, (1816) 2 Madd. 6; 56 E. R. 237; *Ching* v. *Ching*, (1801) 6 Ves. 281; 31 E. R. 052; *Young* v. *Walter*, (1804) 9 Ves. 364; 7 R. R. 224; 32 E. R. 642; *Mathew* v. *Davis*, (1842) 1 Dowling (N.S.) 679 and *Ghulam Khan* v. *Muhammad Hassan*, 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 25 P. R. 1902; 12 M. L. J. 77; 4 Bom. L. R. 161, referred to.

As a submission only refers to the arbitrator questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void [p. 560, col. 1.]

Turner v. *Swainson*, (1836) 1 M. and W. 572; 46 R. R. 402; 2 Gale 133; 5 L. J. Ex. (N. S.) 266; Tyr. & Gr. 933; *Alder* v. *Savill*, (1814) 5 Taunton 454; 5 R. R. 551; 128 E. R. 766 and *Lewis* v. *Rossiter*, (1875) 44 L. J. Ex. 136; 33 L. T. 260; 23 W. R. 832, referred to.

Submission to an arbitration does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter. [p 560, col. 2.]

Steers v. *Lashley*, (1794) 6 T. R. 60; 101 E. R. 435, referred to.

Appeal against an order of the Subordinate Judge of Jessore, dated the 30th June 1912.

Babu *Dwarka Nath Chuckerbutty* and Dr. *Sarat Chandra Bysak*, for the Appellant.

Dr. *Dwarka Nath Mitter*, Babus *Lalit Mohan Banerjee*, *Harendra Nath Mookerjee* and *Smritis Chandra Ghose*, for the Respondent.

JUDGMENT

MOOKERJEE, J.—This appeal is directed against an order under clause (1) of paragraph 21 of the second Schedule of the Civil Procedure Code of 1908. The Court below has ordered that an award made by arbitrators without the intervention of the Court be filed. A preliminary objection has been taken to the competence of the appeal, on the ground that as a decree has already been drawn up in accordance with the judgment pronounced on the basis of the award and as such decree is not open to appeal under clause (2) of paragraph 21, the order must be deemed to have merged in the decree and to be no longer liable to be challenged by way of appeal. In our opinion, the preliminary objection must be overruled. It cannot be disputed that under clause (*f*) of sub-section (1) of section 104 of the Code, an appeal lies from an order filing or refusing to file an award in an arbitration without the intervention of the Court. Such appeal may be preferred at any time within the period prescribed therefor by the Indian Limitation Act. The fact that a decree is drawn up on the basis

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of the judgment which follows the order cannot take away the right of appeal of the party aggrieved by the order. No doubt, the decree cannot be assailed by way of appeal, except on the ground that it is in excess of or not in accordance with the award. But this does not justify the inference that as soon as the decree is drawn up, the order which is its foundation becomes merged therein and loses its character as an appealable order. It has been argued, however, that this view may lead to an anomalous result, namely, that if the appeal is entertained and ultimately allowed, the order will stand cancelled, while the decree based thereon will remain unaffected, because it has never been challenged by way of appeal, as the limited ground on which it can be attacked does not exists. This position has been soaght to be illustrated by a referrence to the concrete facts of the present case. The order under clause (1) of paragraph 21 was made by the Subordinate Judge on the 30th June 1911, and on that very day, he pronounced judgment according to the award. The decree on the basis of the judgment was drawn up on the 4th July 1911, but, as required by rule 7 of Order XX of the Code, bore the date of the judgment. The present appeal against the order was lodged on the 6th September 1911. No appeal has ever been preferred against the decree, as there is no reason to hold that the decree is in excess of or not in accordance with the award. Under these circumstances, it has been argued on behalf of the respondent that if the present appeal is entertained and allowed, the decree will still remain operative, and that consequently, it would be idle to hear this appeal on the merits. This argument is manifestly fallacious. If this appeal is allowed, the decree will become infructuous; the whole foundation of the decree will disappear; and it will be competent to this Court to declare that the decree had been vacated, because the order on which it was based had been cancelled. We hold, accordingly, that this appeal is competent, and this view is in accord with that adopted in *Sabitree v. Promoda Prosad* (1) and *Khetter Nath v. Ushabala Dasi* (2).

(1) 19 Ind. Cas. 941; 21 C. L. J. 248.
(2) 22 Ind. Cas. 391; 18 C. W. N. 381.

To appreciate the merits of the controversy between the parties, a brief outline of the facts is essential. One Umes Chandra Ghosh, husband of the appellant and father of the respondent, died in 1909. He had made a testamentary dispositions of his properties on the 3rd June 1906, by which he appointed his widow (the appellant) and his son by a predeceased wife (the respondant) as the executors of his estate. The widow and the son jointly applied for probate of this Will, which was granted to them by the District Judge on the 7th June 1910. Before the probate had been granted, however, on the 18th May 1910 the widow and the son executed an *ekrarnama* by which they referred to three arbitrators the disputes which had arisen between them as to the construction of the Will, as to their right to possess and enjoy the properties covered thereby and several other matters. The *ekrarnama* expressly states that, should the arbitrators deem any of the terms of the Will indefinite or illegal, they would be competent to alter such term and to make a definite and reasonable provision in place thereof agreeably to the intention of the testator. On the 20th July 1910, the arbitrators made their award. On the 26th September 1910, the son applied, under paragraph 20 of the second Schedule of the Code, for enforcement of the award. The widow resisted the application on the ground, amongst others, that the award was invalid because based on a submission which was illegal and beyond the competence of the parties. The Subordinate Judge has overruled all the objections taken by the widow, directed that the award be filed and made a decree in accordance therewith. In our opinion, the order of the Subordinate Judge cannot be supported.

The parties to the submission were executors to the Will of the testator; they had applied for probate of the Will which was shortly afterwards issued to them. They are bound by the terms of the Will and it is their duty to administer the estate in accordance therewith, subject to the control of the Probate Court. They proceeded, however, by means of a reference to arbitration, to arrange for the administration of the estate as if they were not joint executors, and for its possession and

enjoyment independently of the provisions of the Will. They expressly authorised the arbitrators to substitute for the provisions of the Will, which might seem to them indefinite or illegal, other provisons agreeably to what might be imagined to have been the intention of the testator; in other words, the executors, in their submission, authorised the arbitrators to make a new Will for the testator. The arbitrators have literally availed themselves of the authority thus conferred upon them, and a comparison of the provisions of the Will with the elaborate directions given by the arbitrators for the management and distribution of the estate will make manifest the extent to which they have departed from the provisions of the Will. The question, consequently, arises whether an award of this character, based on a submission which was clearly beyond the competence of the parties, should be enforced by the Court.

It is an elementary rule that as a submission to arbitration is a contract, the parties thereto must not only have a general legal capacity to contract, but they must also have such power in relation to the subject-matter of the submission as will enable them to carry into effect any order which could be legally and properly laid upon them by the award. To put the matter briefly, capacity to make a submission is co-extensive with capacity to contract; every person capable of entering into a contract may be a party to a submission; conversely, he who cannot contract, cannot make a submission; and, as a necessary corollary, in the case of persons whose capacity to contract is restricted, the power of making a submission is, in the same manner and to the same extent, limited. Consequently, if parties enter into a submission concerning a subject-matter over which one of them has no authority or only a restricted power of disposition, an award ordering such party to do that which he cannot lawfully do will be of no legal effect whatever. This is well illustrated by the case of *Wyatt* v. *Benson* (3). There a religious corporation, having no power to sell its real estate except with the consent of the Supreme Court, submitted to arbitration the question of sale of a particular property; the arbitrators ordered the sale to be made; it was ruled that their award had no force or effect whatever. On this principle, it has been held that if an arbitrator directs a party to do anything which he is not competent under the law to do, the direction is invalid. In Bacon's Abridgment, Tit. Arbitrament and Award, E. 4, it is stated that the award to be valid, must be of a thing lawful. Illustration of the application of this doctrine may be found in more than one case in the books. In *Wood* v. *Griffith* (4), Eldon, L. C., observed that neither the Court of Chancery nor any other Court will enforce an agreement, by which, if carried into execution, the parties will be compelled, under the process of a Court of Justice, to do that which in the view of justice is criminal. In *Turner* v. *Swainson* (5), Parke, B., accepted the contention that an arbitrator clearly could not direct one of the parties to do that which would make him liable to other persons as a trespasser. We must not be taken, however, to countenance the proposition that an executor or administrator is not competent under any circumstances to make a reference to arbitration; such right cannot be disputed when exercised within the limits of his authority. [*Bean* v. *Farman* (6), Halsbury's Laws of England, Volume I, Article 943.] But it is equally plain that an executor cannot make a reference to arbitration with the avowed purpose that the terms of the Will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator. The case before us is plainly not one of submission to arbitration by an executor for the settlement of any debt, account or claim in relation to the estate in his hands. The arbitrators are, no doubt, asked to construe the Will; and it need not be disputed that pure questions of law may be referred to the decision of an arbitrator: *Stiff* v. *Andrews*, (7), *Ching* v. *Ching* (8) *Young* v. *Walter* (9), *Mathew*

(3) (1857) 23 Barb. (N. Y.) 327.

(4) (1818) 1 Swanston 43; 18 R. R. 18; 1 Wilson 34; 36 E. R. 291.

(5) (1836) 1 M. and W. 572; 46 R. R. 402; 2 Gale 133; 5 L. J. Ex. (N. S.) 266; Tyr. & Gr. 933.

(6) (1828) 6 Pickering (Mass) 269.

(7) (1816) 2 Madd. 6; 56 E. R. 237.

(8) (1801) 6 Ves. 281; 31 E. R. 1052.

(9) (1804) 9 Ves. 364; 7 R. R. 224; 32 E. R 642.

v. *Davis* (10), *Ghulam Khan* v. *Muhammad Hassan* (11). But the arbitrators are here authorised to do something more than a construction of the Will which, as their Lordships of the Judicial Committee said in *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (12) does not mean an addition to the terms of the Will. They are empowered to alter the terms of the Will. This plainly was not within the competence of the executors.

There is a further difficulty in the way of the enforcement of this award. It cannot be disputed that as a submission only refers to the arbitrator questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void: *Turner* v. *Swainson* (5), *Alder* v. *Savill* (13), *Lewis* v. *Rossiter* (14). The principle is well-illustrated by the case of *Ingram* v. *Milners* (15). There, the arbitrator ordered some bankers, parties to the reference, to pay to the other party, the defendant, out of funds in their hands belonging to a firm of which the defendant was a member, a certain sum stated to be the amount of a debt due to the defendant from his partners, who were, however, not parties to the submission. It was ruled that the direction was void. In the case before us the plaintiff and the defendant are two of the legatees under the Will, and the daughters of the testator, who are not parties to the submission, have a substantial interest in the estate. They are entitled to succeed in the specified contingencies, and one of them was entitled to be married at the expense of the estate. They are in no way bound by this award. In these circumstances, it is impossible for the Court to enforce this award to the detriment of persons who are not parties thereto.

The question finally arises, whether it is competent to one of the parties to the submission to take exceptions to the legality of the award. Paragraph 21 of the second Schedule of the Code provides that the award is to be filed, only if no such ground as is mentioned in paragraph 14 is proved. The ground mentioned in clause (*c*) of paragraph 14 is an objection to the legality of the award apparent upon the face of it. Now, the award in this case mentions expressly the Will of the testator and also the deed of submission, and a perusal of the Will and the submission along with the award makes it manifest that the award is illegal and should not have been ordered to be filed. We may add that it is well settled that submission to an arbitration does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter: *Steers* v. *Lashley* (16).

The result is that this appeal is allowed, the order to file the award set aside, and the application under paragraph 20 of Schedule II of the Civil Procedure Code dismissed with costs in both Courts. The decree of the Subordinate Judge will also stand cancelled. We assess the hearing fee in this Court at five gold *mohurs*.

BEACHCROFT, J.—I agree.

Appeal allowed.

(10) (1842) 1 Dowling (N. S.) 679.

(11) 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 25 P. R. 1902; 12 M. L. J. 77; 4 Bom. L. R. 161.

(12) 23 Ind. Cas. 166; 19 C. L. J. 369; 37 M. 199; (1914) M. W. N. 299; 12 A. L. J. 315; 18 C. W. N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 16 Bom. L. R. 328.

(13) (1814) 5 Taunton 454; 15 R. R. 551; 128 E. R. 766.

(14) (1875) 44 L. J. Ex. 136; 33 L. T. 260; 23 W. R. 832.

(15) (1807) 8 East 445; 103 E. R. 414.

(16) (1794) 6 T. R. 60; 101 E. R. 435.

CALCUTTA HIGH COURT.

CIVIL RULE *Nisi* No. 679 OF 1914.

August 17, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Richardson.

PROSONNO KUMAR CHAKRAVARTI AND ANOTHER DEFENDANTS NOS. 1 AND 2—PETITIONERS

versus

PROKASH CHANDRA DUTTA—PLAINTIFF—OPPOSITE PARTY.

Surety—Bail, person giving—Contract with third person to be indemnified—Forfeiture—Contract, whether legal.

It is essential that the person giving bail should be interested in looking after and, if necessary, exercising the legal powers he has, to prevent the accused from disappearing. This is essential for the protection of the public and anything that tends to prevent or hinder his so doing is illegal. [p. 561, col. 1.]

HAR PRASAD *v.* SUKHDEVI KUNWAR.

Consolidated Exploration and Finance Company v. *Musgrave*, (1900) 1 Ch. 37; 81 L. T. 747; 48 W. R. 298; 69 L. J. Ch 11; 6 T L. R. 13, followed.

It is illegal for a surety to contract with a third person to be indemnified in case of forfeiture and he cannot, therefore, escape his liability. [p 561, col. 1.]

Dr. *Dwarka Nath Mitter* and Babu *Nirmal Chandra Chander*, for the Petitioners.

Babu *Karunamoye Bose*, for the Respondent.

JUDGMENT.—This Rule must be made absolute on the ground on which it was issued. The principle laid down by North, J., in the case of *Consolidated Exploration and Finance Company* v. *Musgrave* (1) has been applied in this country both by the Punjab and Allahabad Courts and obviously must apply in every country where English criminal justice is administered. The principle is that it is essential that the person giving bail should be interested in looking after and, if necessary, exercising the legal powers he has to prevent the accused from disappearing. This is essential for the protection of the public, and anything that tends to prevent or hinder his so doing is illegal. Why is it not equally illegal for the bail to be indemnified by a third person, it being admittedly illegal to be indemnified by the prisoner? The reason of the illegality is the same in each case. Therefore, the opposite party cannot escape by saying that he contracted with a third party.

The decree of the lower Court must be set aside and the plaintiff's suit dismissed without costs in any Court.

Rule made absolute.

(1) (1900) 1 Ch. 37; 81 L. T. 747; 48 W. R. 298; 69 L. J. Ch. 11; 16 T. L. R. 13.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 242 OF 1913.

February 2, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

HAR PRASAD—DEFENDANT—APPELLANT

versus

SUKHDEVI KUNWAR—PLAINTIFF—RESPONDENT.

Hindu Law—Will—Bequest in favour of two brothers "in equal shares"—Tenancy-in-common not joint tenancy.

Where a Hindu made a Will providing that in the absence of a begotten or adopted son to him and after the death of his widow, his two brothers would take his property "in equal shares:"

Held, that the two brothers got a tenancy-in-common and not a joint tenancy under the Will. [p. 564, col. 2.]

Gopi v. *Jaldhara*, 33 A. 41; 7 Ind. Cas. 697; 7 A. L. J. 941, followed.

Mankamna Kunwar v. *Balkishan Das*, 28 A. 38; A. W. N. (1905) 170, distinguished.

Jogeshwar Narain Deo v. *Ram Chandra Dutt*, 23 C. 670; 23 I. A. 37, referred to.

First appeal from the decision of the Additional Subordinate Judge of Mainpuri at Etawah, dated the 17th May 1913.

FACTS.—Har Pershad, Ganga Pershad and Gur Pershad were three brothers. Gur Pershad was adopted by Ramcharan Lal, an uncle of his. There was a partition between Gur Pershad and Ramcharan Lal and the former got half share of the property. On the 5th of May 1903, Gur Pershad made a Will, giving a life-interest in his estate to his wife with remainder over to his two natural brothers, Har Pershad and Ganga Pershad. Gur Pershad died and then his wife and the property went to Har Pershad and Ganga Pershad. Ganga Pershad died on 27th March 1911 and his widow sued for possession of his share. The Subordinate Judge decreed the suit. The defendant appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Gulzari Lal*), for the Appellant:—The devise contained in the Will is to the two brothers jointly. They took the estate jointly and their status was, therefore, that of joint tenants and not of tenants-in-common. The brothers were members of a joint family, they treated the property as joint family property and not as a separate acquisition, and the incidents of joint family property should apply to such property. There is no evidence to show that the devise was of a tenancy-in-common.

I rely on *Mankamna Kunwar* v. *Balkishan Das* (1), in which it was observed that under the English Law a conveyance of land to two or more persons without any words indicating an intention that they were to take as tenants-in-common constitutes a joint tenancy.

( ) 28 A. 38; A. W. N. (1905) 170,

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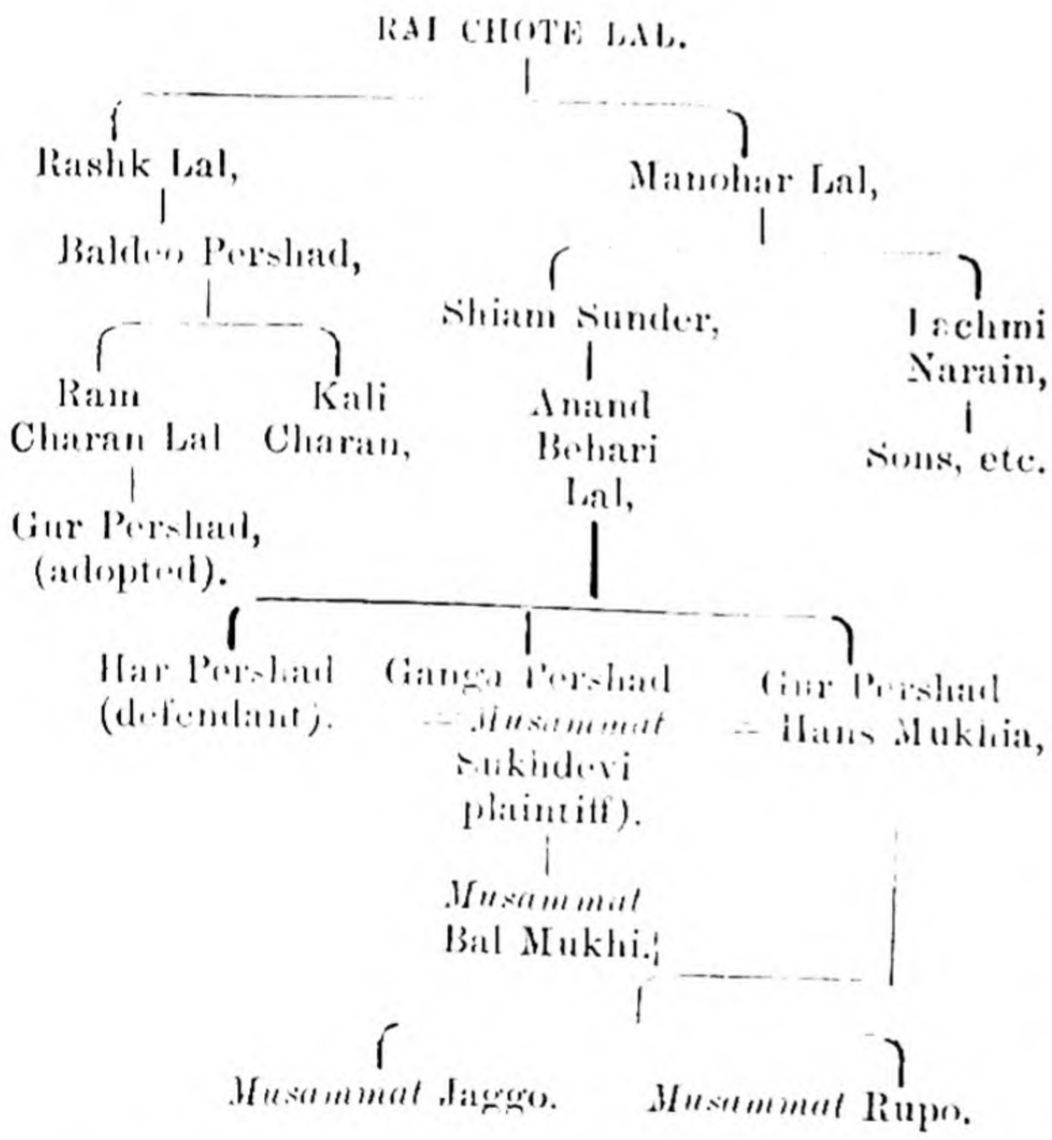
The mere fact that the words used in the Will are "in equal shares," does not show that a tenacy-in-common was created, unless it is supplemented by some clear evidence that it was intended to create a tenancy-in-common. Otherwise the natural and legal inference is that a joint tenancy was created.

The Hon'ble Dr. *Sunder Lal*, Messrs. *Girdhari Lal Agarwala* and *Lachman Rao Dube*, for the Respondents, were not called upon.

JUDGMENT.—This is a defendant's appeal arising out of a suit for possession brought by the widow of the defendant's deceased brother, Ganga Pershad, for recovery of her husband's separate estate, *plus* mesne profits. The Court below decreed the claim. The following genealogical tree will assist the understanding of the case. It is not a complete tree of the whole family of Rai Chote Lal, but is sufficient for the case:—



Ramcharan Lal adopted Gur Pershad, the son of Anand Behari Lal. The parties are *Kayasths* by caste.

It is common ground that a dispute having arisen between Ram Charan and his adopted son, there was a partition, and a half share of the former's property was handed over to Gur Pershad, and it is a half share in the estate thus acquired by Gur Pershad that is now in dispute.

Gur Pershad died on 21st May 1906. On 15th May 1903 he made a Will. He gave a life-interest in his estate to his wife with remainder over to his two natural brothers, Har Pershad and Ganga Pershad, "in equal shares" as stated in paragraph 5 of the Will.

The widow held the estate till her death on 28th May 1906 when the property went, under the Will, to Har Pershad and Ganga Pershad. It will be noticed that Gur Pershad disinherited his own two daughters, Jaggo and Rupo, though he gave them a maintenance allowance payable out of the income of the estate.

On 27th March 1911 Ganga Pershad died and Har Pershad is in possession of the whole estate.

The former's widow is the plaintiff and her case is as follows:—

(1) That the two brothers were separate;

(2) that the two brothers each took a separate share in the estate of Gur Pershad under the Will and that Ganga Pershad's share therein was his self-acquired property and separately enjoyed by him. The defence of Har Pershad was—

(1) That the devise to the two brothers was made to them jointly, so that on the death of one the other took the whole by survivorship.

(2) That even if this be not so, the two brothers threw the estate into the joint family estate and it was treated as joint family property and must now be held to be such, as the family has all along been joint.

(3) That in equity, if the plaintiff is legally entitled to the estate, she is bound to refund to him certain expenditure incurred by him.

The Court below has held, on a construction of the Will, that each of the brothers took a half share in the estate of Gur Pershad and that they did not take jointly;

(2) that though there had not at any time been any partition or separation in the family of Anand Behari Lal and his sons, still the shares taken by the two sons had been held and enjoyed separately and that the widow was entitled to her husband's separate acquisition.

(3) That the plaintiff was entitled to Rs.1,128 as mesne profits up to the date of suit after allowing defendant 10 per cent. for the costs of management, Rs. 1,200 allowances paid

to Gur Pershad's daughters, Rs. 74 for survey expenses and Rs. 200 paid for owner's rate. The defendant appeals and three points are pressed before us:—

(1) That on a proper construction of the Will the two brothers took the estate jointly and did not hold as tenants in-common.

(2) That even if they got separate shares under the Will, still they treated it as joint family property and not as separate acquisitions and it thus became joint family property.

(3) That the defendant is entitled to credit for certain items of expenditure disallowed by the Court below.

To properly estimate the value of the evidence on the record it is necessary to set out the circumstances of this family.

Shiam Sundar Lal has two sons, Anand Behari Lal and Makund Behari Lal. He, Shiam Sundar, is still alive. Anand Behari, who is the defendant's own witness, admits that Shiam Sundar had got rid of the whole of the ancestral property belonging to the family many years ago, excepting the house in which the family lives. He has told a story as to how his father finally separated from his two sons dividing the family house and the moveables into three lots. The lower Court has disbelieved this and we have no doubt that it is a pure myth.

Be that as it may, on May 28th 1906 when Gur Pershad's widow died, the only property possessed by Anand Behari and his sons was the family house and the moveables it contained.

Anand Behari's wife had inherited a small *zemindari* share in the village of Deora Satri from her own parents. She is still alive and still owns this property, which, however, is not the property of the joint family, though beyond doubt its income is expended on the support of the owner's household and its members.

Anand Behari started life in Government service on a salary of Rs. 10 a month in May 1880 and he is now at the end of 34 years' service only an *ahlmad* or clerk in the Collector's office with a salary of but Rs. 30 per mensem.

His father, Shiam Sundar Lal, is old and now paralyzed and earning nothing. His brother, Makund Lal, who is separate (as he says) from him, is *Kanungo* on a small salary in another district. The elder son, Har Pershad, defendant, began life as a Police clerk on Rs. 10 a month and had been in service about six or seven years when Gur Pershad's widow died. He was then a head constable, so that his income as such would have been at the utmost about Rs. 25 a month. His duties forced him to live away from home.

Ganga Pershad at the time of Gur Pershad's widow's death was a youth of some 16 or 17 years, studying or rather pretending to study. He is not shown as having ever been a source of income. It will thus be seen that in 1906, when the estate came to the two brothers under the Will, the family was far from wealthy. All the ancestral property had long since vanished. Anand Behari supported himself on his income as a clerk and Har Pershad was away from home a head constable in the Police. Ganga Pershad was only a youth. When the widow died, Har Pershad resigned his appointment in the Police and came home to manage the property newly acquired.

There, therefore, had been no cause for separation or partition in the family of Anand Behari and his sons. There was no property to divide beyond the ancestral home, part only of which belonged to them. The father and elder son were each earning a separate income. In a sense they formed a joint family, but without any joint family property of any import.

We now consider the terms of the Will. It is to be found translated at page 21A. We have examined the original, which is in Urdu. The testator left his estate to his widow for her life-time, in case the child which was about to be born to her should be a girl or being a boy should die at his birth. If the child should be a boy and he lived, the estate was to be his.

He also by a separate deed granted her authority to adopt and if she did adopt as directed, the adopted son was to take the estate. In the absence of a son, the widow was to hold the estate for life with certain limited powers of alienation. After his death, his daughters were not to inherit but were to receive Rs. 25 per mensem each from the estate as maintenance, which they were empowered to enforce in a certain manner.

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Then comes the fifth paragraph with which we are concerned:—

"I direct that after the death of my wife and in the absence of a son begotten or adopted, my own brothers, Babu Har Pershad and Babu Ganga Pershad, shall be the owners of the aforesaid property, together with all rights, 'in equal shares'. I do not think it proper to commit to writing the reason for my taking this course as it would bring disgrace on the family, etc., etc." The rest of the document does not affect the point now in dispute.

The appellant's case is that the devise contained in the Will is to the two brothers jointly. He even produced oral evidence to prove that the testator had expressed this intention. One witness even went so far as to say that though the words "*ba hissa masari*" (in equal shares) usually mean "in equal shares", still in the Will they meant "jointly."

We are also asked to consider the decision in *Mankamma Kunwar* v. *Balkishan Das* (1), wherein it was observed that under the English Law a conveyance of land to two or more persons without words indicating an intention that they were to take as tenants-in-common constitutes a joint tenancy. The reply to this is a simple one. The Will in the present case clearly uses language indicating that the two brothers were to take the estate as tenants-in-common, for they were to take in equal shares. Furthermore, we would call attention to the language used by their Lordships of the Privy Council in *Jogeshwar Narain Deo* v. *Ram Chandra Dutt* (2), which was quoted in the case of *Gopi* v. *Jaldhari* (3): "In the first place, it appears to their Lordships that the learned Judges of the Madras High Court were not justified in importing into the construction of a Hindu Will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu Law except in the case of co-parcenary between the members of an undivided family." It is urged that the testator was on bad terms with his adoptive father and had great natural affection for his own father and brothers who formed a joint family, and that while he was disinheriting his own daughters, would not have wished to let the property go to the daughters of his brothers who at that time had no male issue. There is no force in any of these pleas. The brothers were not old men but young, and there was every probability of their having male issue and there is the plain simple language of the Will, which directed that the two brothers were to take "in equal shares". We have no hesitation in holding that the Will in clear terms created a tenancy-in common; moreover, we agree with the lower Court in holding on the second plea that the two brothers treated the tenancy as one in common and did not treat it as joint family property, which is the second plea raised before us and which we now proceed to discuss.

We have already noted that when this property came to the two brothers in 1906, the family was possessed of no joint family property except the ancestral house; that Anand Behari and Har Pershad were both separately earning small incomes by Government service, while Ganga Pershad (in 1906) was only a youth of 16 or 17 years of age. He died in 1911. We are asked to consider the following evidence: (1) The statements of Anand Behari Lal, Chimman Lal and Angan Lal,

(2) the accounts of the family produced by Angan Lal.

(3) The *khewats* of some of the villages concerned.

(4) The accounts of a certain cloth seller.

(5) A number of bonds in favour of Har Pershad and Ganga Pershad. The oral evidence is to the effect that Anand Behari and his two sons lived jointly and that the income of the new estate was thrown into the family chest and treated as joint family income. The evidence of Chimman Lal and Angan Lal is of little use, for they had no personal knowledge of the accounts kept. They are not in a position to say more than that the family to all outward appearance lived like a joint family.

Anand Behari Lal, of course, was in a position to testify fully on the point and his evidence would carry considerable weight, if it had been supported by the family

(2) 13 C. 679; 13 I. A. 37.
(3) 7 Ind. Cas. 697; 33 A. 41; 7 A. L. J. 941.

account books. He is far from being a disinterested witness, for if his and the defendant's contention be correct, then he himself has an interest in the property now in suit as he is one of the joint family with the defendant and his sons.

He stated that the income of the property all came into his hands and he defrayed therefrom all the expenses of the family, that he maintained accounts by entering all items of expenditure and income on slips of paper from which he from time to time wrote up the account books. He admitted that he made deposits in the Post Office Savings Bank in the names of himself and his two sons, each having a separate account. He had to admit that mutation of names was made only in favour of his two sons and not of himself, and that on the death of Ganga Pershad mutation was again not made in his favour, though, if his story be true, his name should certainly have been recorded especially as he was the managing member. The excuse he gives is that he was in Government service in the district where the property was situate, but Government rules do not forbid Government servants from inheriting property. The latter have merely to declare all properties belonging to themselves and their near relatives. He further had to admit that on the death of the widow of Gur Pershad, when under the Will the property went to his two sons, a claim was put forward to it on behalf of the two daughters of Gur Pershad (*Musammat* Jaggo and *Musammat* Rupo) and the Revenue Court of first instance passed an order in their favour, which was upset on appeal made by Har Pershad. In that case he appeared and acted as guardian on behalf of the two daughters, but was subsequently removed from the post and another person appointed. It thus appears that he at first at least was hostile to the claim of his two sons. As to his accounts, we note that these were not put forward by the defendant at the proper time. They were produced very late in the case and an affidavit was filed by Har Pershad to excuse the delay. It was to the effect that his father would not let him have them, saying he would produce them when he gave his evidence. We note that some other accounts in regard to the funeral expenses of Ganga Pershad, which also, if genuine, must have been in the hands of Anand Behari, were put forward at the proper time and that as Anand Behari is greatly interested in the suit, he could have had no reason for keeping back the family accounts. An examination of these accounts, as pointed out by the Court below, will show that they have not been regularly maintained They do not show the daily income and expenditure. A whole month's income and expenditure are frequently shown under one date, though, if the story of the slips be true, the details were all available. Finally, Anand Behari Lal had to admit that in a former case in regard to the village of Shahbazpore he had testified that no daily accounts had been kept and that he maintained no accounts whatever of the family expenditure. Combining this with the very late and suspicious production of the accounts in the present suit, we have no hesitation in describing them as "specially manufactured for the purposes of this suit." We agree with the lower Court in rejecting them as unworthy of any trust.

Again, this witness had to admit that there were separate accounts in the Post Office Savings Bank in the names of his two sons and a third one in his own name.

Gur Pershad's widow died in May 1906. A considerable period must have been taken up by the contested mutation case.

On 10th December 1907 the two accounts were opened in the names of the two sons with a deposit in each case of Rs. 200. Anand Behari states that the rules would not allow him to deposit more than Rs. 200 at a time in any one account, therefore he opened two accounts. The plea is absurd for he could have made a deposit every day. Moreover an examination of the two accounts shows that up to the time of Ganga Pershad's death in 1911 only five deposits were made in each of the two accounts, that they were all made on the same dates for each account and with one exception the sum deposited in each account was exactly the same. The one exception is that of the 30th April 1908 when Rs. 150 was deposited in Har Pershad's account and Rs. 100 only in

HAR PRASAD v. SUKHDEVI KUNWAR.

Ganga Pershad's account. Excepting the first deposits all were below Rs. 200.

These accounts were opened only when the estate came to the two sons and they are a clear indication that the income, far from being treated as a joint family income, was divided half and half and two separate accounts opened in the Savings Bank.

We do not place any value thus on the evidence of Anand Behari, for he has not hesitated to produce false documentary evidence.

The *khewats* prove nothing. In the case of some of the villages the names of Har Pershad and Ganga Pershad were recorded without any specification of shares, but in the cases of other villages they were recorded as owners in equal shares.

As for the accounts of the cloth-seller, they merely show that an account was opened with him in the name of Anand Behari and that purchases were made, now by one son and then by the other and some times by Anand Behari himself. This in itself proves nothing to the point.

Lastly, we are asked to consider the fact that loans were made and bonds taken in favour of both the brothers. We fail to see any assistance in this to the defendant's case. Ganga Pershad was but a youth and Anand Behari his guardian. If the family accounts had been maintained or true account books produced, these bonds might perchance have given some support to them. One loan was contracted on a bond executed by the two sons and Anand Behari signed as a witness. If the family had treated the estate as joint family property and the loans were made from joint funds, Anand Benari as manager ought to have carried out these transactions in his own name.

Where the two brothers inherited the property in equal shares, the burden of proof that after the inheritance they threw the property into the family hotch-potch, is upon those who assert it.

There is no presumption that this was so. The evidence produced by the defendant is not, in our opinion, worthy of belief and we, therefore, agree with the Court below and hold that the defendant has failed to prove his case. There remains one point for decision. The appellant claims credit for certain items of expenditure alleged to have been incurred by him. Five such are placed before us for our decision.

The two first are Rs. 940-9-0, funeral expenses of Ganga Pershad, and Rs. 10-11-0 spent on subsequent ceremonies in connection with the death. It is urged that the widow was bound by Hindu Law to perform these ceremonies and as the expense was incurred by the defendant, these sums should be made good by her before the estate is handed over to her. In the *first* place, assuming that the plea is correct, we have practically only the evidence of Anand Behari and his false accounts on which no reliance can be placed to prove the expenditure; *secondly*, the defendant had deliberately kept a woman out of the estate when he knew full well that she was entitled to possess it. His action has been, in our opinion *mala fide*, throughout. He seized her property and prevented her from receiving its income and doing her duty as a widow in this respect. He spent money as he pleased without consulting her in a matter in which the expenditure was in her discretion. The defendant was not protecting the estate or discharging a burden thereon when he thus took the law into his own hands, and we see no equity in forcing the widow to refund to him sums which he thus voluntarily spent. We decline to allow these claims. The two next claims are for Rs. 120 per annum as the pay of a *karinda* and Rs. 120 per annum as the pay of peons, expenditure incurred in managing the property since the death of Ganga Pershad.

The Court below had already in its decree allowed the defendant 10 per cent. on the income to cover his fees as a *lambardar* and the costs of management. This is a liberal allowance and we decline to allow any more. The fifth item is a sum of Rs. 25. The defendant voluntarily subscribed Rs. 12 to a hospital fund and Rs. 13 towards the cost of an exhibition at Etawah. He seeks to be generous at the expense of the respondent. They were not charges on the estate and he must bear the expense himself, as he did not consult the plaintiff.

We decline to award any of these items.

The result, therefore, is that the appeal fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL No. 27 OF 1914.

June 29, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

MEGHRAJ—PLAINTIFF—APPLICANT

versus

BIDYABATI KOER AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 109, O. IX, r. 8—Decree of dismissal of suit for default, order setting aside, if final under s. 109.

An order which deprives a party of the benefit of a final decree and the suit as against him is to be tried *de novo* is a final order within the meaning of section 109 of the Civil Procedure Code. [p. 567, col. 2.]

Krishna Chandra Ghosh v. *Maharaja Ram Narain Singh Bahadur*, 21 Ind. Cas. 430; 18 C. L. J. 124, distinguished.

Radha Kishan v. *Collector of Jaunpur*, 28 I. A. 28; 23 A. 220; 5 C. W. N. 153, *Muzhar Hossein* v. *Bodha*, 22 I. A. 1; 17 A. 112; 5 M. L. J. 20; 6 Sar. P. C. J. 580 and *Rahimbhoy* v. *Turner*, 18 I. A. 6; 15 B. 155, referred to.

Application for leave to appeal to the Privy Council from the decision of Coxe and D. Chatterjee, JJ., in Appeal from Original Order No. 587 of 1911, dated the 6th March 1914.

Dr. *Rash Behary Ghose* and Babu *Shoroshi Charan Mitter*, for the Applicants.

Babu *Satish Chunder Mukerjee*, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council against an order of this Court by which a decree of dismissal of a suit for default has been set aside and a trial of the case on the merits directed.

The question before us is whether this order is a final order within the meaning of section 109 of the Code of Civil Procedure. On behalf of the respondents it has been contended that it is not a final order and reliance has been placed on the case of *Krishna Chandra Ghosh* v. *Maharaja Ram Narain Singh Bahadur* (1). That case is clearly distinguishable. There the original Court had dismissed the suit as premature because brought during the pendency of settlement proceedings; the decree of that Court, however, did not finally terminate the controversy between the parties, but left it open to the plaintiff to enforce his rights, if any, in a fresh suit. This Court on appeal took a different view and directed the suit to be revived and to be tried on the merits after the settlement proceedings had terminated. In the present case, the dismissal of the suit for default under Order IX, rule 8, finally ended the controversy between the parties, as under Order IX, rule 9, the plaintiff was precluded from bringing a fresh suit in respect of the same cause of action. His only remedy was to have the dismissal set aside under Order IX, rule 9, but his application in that behalf was unsuccessful. On appeal to this Court, under Order XLIII, rule 1 (*c*), that order has been set aside. The order of this Court sets aside the final decree of the original Court which was in favour of the appellant. Before the decree was set aside, he was in the position that the litigation against him had finally terminated. The position now is, that he has been deprived of the benefit of the final decree and the suit as against him is to be tried.

An order which has this effect may, we think, be regarded as a final order within the meaning of section 109 of the Code. This conclusion receives some support from the observations in *Radha Kishan* v. *Collector of Jaunpur* (2), where the Judicial Committee held that an order merely reviving a proceeding to set aside an *ex parte* decree under section 108 of the Code of 1882, and not actually granting the application made for that purpose, was not a final order. The view we take is in no way opposed to the decisions in *Muzhar*

(1) 21 Ind. Cas. 430; 18 C. L. J. 124.
(2) 28 I. A. 28; 23 A. 220; 5 C. W. N. 153.

Hossein v. *Bodha Bibi* (3) and *Rahimbhoy* v. *Turner* (4). We hold accordingly that the order in question is a final order, and as it is not disputed that the value of the subject-matter is over Rs. 10,000, a certificate will be granted.

Leave granted.

(3) 22 I. A. 1; 17 A. 112; 5 M. L. J. 20; Sar. P. C. J. 580.

(4) 18 I. A. 6; 15 B. 155.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 321 OF 1914.

January 30, 1915.

Present:—Mr. Justice Piggott.

NARAIN SARUP AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NANDA—DEFENDANT—RESPONDENT.

Practice—Pleading in first Court—Defendant, whether allowed to change it in appeal—Agra Tenancy Act (II of 1901), s. 202—Transfer of Property Act (IV of 1882), s. 106.

In an ejectment suit in the Civil Court, the defendant pleaded that he was an agricultural tenant of the plaintiff. The Munsif acting under section 202 of Act II of 1901, asked the defendant to establish his plea in the Revenue Court within three months. The defendant failed to institute this suit within time in the Revenue Court. The suit was, therefore, decreed. The Appellate Court finding that the defendant was the tenant of the plaintiff and no notice of the termination of his tenancy had been given to him under section 106 of the Transfer of Property Act dismissed the suit:

Held, that having regard to the pleading of the defendant in the first Court it was not open to the lower Appellate Court to find as it had done. [p. 568, col. 2.]

Second appeal from a decree of the Subordinate Judge of Meerut, reversing that of the Munsif of Ghaziabad.

Mr. *Nihal Chand*, for the Appellants.

Mr. *Girdharilal Agarwala*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for ejectment. The defendant's reply was that the land had been leased to him, that he was holding on after the expiry of the lease and was doing so with the consent of the plaintiffs themselves, who had realized rent from him. He further expressly pleaded that, as the relationship of landlord and tenant is subsisting between the parties, the suit is not cognizable by a Civil Court. On this the Court of first instance took action under section 202 of the Agra Tenancy Act (Local Act II of 1901). The defendant failed to institute any suit within the prescribed period of three months, for the determination of the question whether he was holding the land as tenant of the plaintiffs. On this the Court of first instance rejected the defendant's plea of tenancy, as it was bound to do, and decreed the plaintiffs' suit. In appeal an extraordinary plea was taken by the defendant, that he ought to have been given the benefit of section 202 of Act II of 1901. The lower Appellate Court pointed out that the defendant had been given the benefit of this section, but had failed to institute a suit within the prescribed period. Nevertheless the learned Subordinate Judge has somehow arrived at the conclusion that the defendant was holding the land in question as tenant of the plaintiffs, and has dismissed the suit because the plaintiffs had failed to serve the defendant with a notice of the termination of his tenancy. I do not think this finding was open to the Court below in view of the provisions of section 202, clause (2), already referred to. It has been sought to support the decision of the Court below, by a plea that the land in suit is not an agricultural holding and is not subject to the provisions of section 202 aforesaid. This plea is not open to the defendant, in view of the attitude taken by him in the Courts below. Whether the land in suit is or is not an agricultural holding is a plain question of fact. It is by no means concluded by the circumstance that this land, along with a larger area, was originally leased to the defendant for grazing purposes. The defendant said that it was an agricultural holding and that the suit to eject him from it was not cognizable by the Civil Court. In the lower Appellate Court he pleaded that the provisions of section 202 of the Agra Tenancy Act did apply to this holding. It may be pointed out further that in this view of the case no question of notice under section 106 of the Transfer of Property Act (Act of IV 1882) arises. The Act exempts leases for agricultural purposes from the provisions of Chapter V. I accept this appeal, set aside the decree of the

lower Appellate Court and restore that of the Court of first instance. The plaintiffs will get their costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL No. 28 OF 1914.

May 29, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

DAMRA COAL COMPANY—PLAINTIFF—PETITIONER

versus

BENARES BANK—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 109—Final order, meaning of—Fit case for certificate.

The term 'final order' in section 109 of the Code of Civil Procedure denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. [p. 569, col. 2.]

The order of the High Court, made in reversal of the order of the Court of first instance, refusing to issue a temporary injunction against the execution of the mortgage decree, is not a final order within the meaning of section 109 of the Code of Civil Procedure [p. 569, col. 2.]

Chundi Dutt Jha v. *Pudmanund Singh*, 22 C. 928; *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji*, 10 Ind. Cas 439; 3 C. L. J. 507 and *Srinivasa Prasad Singh* v. *Kesho Prasad Singh*, 10 Ind. Cas. 444; 13 C. L. J. 681, referred to.

In a case where leave to appeal to His Majesty in Council is asked for on the ground of the case being a fit one for appeal, no question of an order being a final one arises. [p. 570, col. 1.]

Application for leave to appeal to the Privy Council from the decision of Fletcher and N. Chatterjea, JJ., in Appeal from Original Order No. 355 of 1913, dated the 9th March 1914.

Mr. *B. Chuckerbutty* and Babu *Bankim Chunder Mookerjee*, for the Petitioner.

Mr. *S. P. Sinha* and Babu *Bepin Behari Ghose*, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. The petitioner contends that the order in question is a final order within the meaning of clause (*a*) of section 109 of the Code of Civil Procedure, and that, in any event, the case is such that this Court should certify under clause (*c*) of section 109 that it is a fit one for appeal to His Majesty in Council.

This petitioner has instituted a suit for declaration that a mortgage decree obtained by the opposite party is fraudulent, and for permanent injunction to restrain the execution of that decree. During the pendency of that suit, an application was made for a temporary injunction to restrain the execution of that decree. The Subordinate Judge at one stage refused the application for a temporary injunction, but later on granted the application. On appeal to this Court that order has been reversed, and the application for temporary injunction refused. The petitioner now seeks for leave to appeal against this order. In our opinion, it is plain that the order is not a final order within the meaning of section 109 of the Code of Civil Procedure. It has been repeatedly ruled that the term final order denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. This the order in question does not profess to do. But it has been argued that the order embodies an expression of opinion on the matters in controversy between the parties; it is plain, however, that such an expression of opinion is not a final decision of the question at issue between the parties in the suit. It was ruled in *Chundi Dutt Jha* v. *Pudmanund Singh* (1), that an order refusing to appoint a Receiver is not a final order within the meaning of section 595 of the Code of 1882; it was similarly held in *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji* (2), that an order appointing a Receiver is not a final order. It has also been held in *Srinivasa Prosad Singh* v. *Kesho Prosad Singh* (3), that an order refusing to stay execution of a decree is not a final order. We are of opinion that the order of this Court, made in reversal of the order of the Court of first instance, refusing to issue a temporary injunction against the execution of the mortgage decree, is not a final order, and the petitioner is not entitled to ask for a certificate on that ground.

It has been argued in the next place

(1) 22 C. 928.
(2) 10 Ind. Cas. 439; 3 C. L. J. 507.
(3) 10 Ind. Cas. 444; 13 C. L. J. 681.

that this is a fit case for a certificate under section 109, clause (*c*). It is to be observed that whereas in clause (*a*) the expression "final order" is used, in clause(*c*) the term "order" is used, and consequently on the discussion of the second point, no question arises whether the order in question is final or not. It has been pointed out to us that if leave is refused and the order of this Court is allowed to stand, grave injury might be done to the petitioners and that needless complications might occur much to their detriment. On behalf of the opposite party it has been argued that this is not a circumstance which the Court should at all take into account to determine whether a certificate should or should not be granted under clause (*c*) of section 109. In this connection our attention has been drawn to the observation of Lord Hobhouse in *Banarsi Prasad* v. *Kashi Krishna Narain* (4), that the corresponding clause of the Code of 1882 was intended to cover very special cases, for example, those in which the point in dispute was not measurable by money, though it might be of great public or private importance. Lord Hobhouse added that to certify that the case was of that kind or not, was left entirely in the discretion of the Court, and it was a judicial process which should not be performed without special exercise of that discretion evinced by the fitting certificate. It has further been pointed out that the discretion vested in the Court under the corresponding provision of the Code of 1882 has been very sparingly exercised. We have attached due weight to these considerations but in view of all the circumstances of the case, we have arrived at the conclusion that this is a fit case in which a certificate should be granted. It is not necessary for us to express any opinion on the merits of the controversy between the parties: but after an anxious consideration of the whole situation, we feel no doubt that the case is a fit one for appeal to His Majesty in Council. A certificate will isssue accordingly.

Leave granted.

(4) 28 I. A. 11; 23 A. 227; 5 C. W. N. 193.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 7 OF 1914.

January 19, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

Musammat AJIMAN BIBI AND OTHERS—PLAINTIFFS

versus

REASAT SHEIKH AND OTHERS—DEFENDANTS.

Specific Relief Act (I of 1877), s. 9, object of—Main question for determination under s. 9—Joint possession, whether can be physically restored.

The object of section 9 of the Specific Relief Act is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed of it against his will and consent. [p. 570, col. 2.

Tarini Mohan Mozumdar v. *Ganga Prosad Chuckerbutty*, 14 C. 649, followed.

Under section 9 of the Specific Relief Act, the main question for determination is whether the plaintiff while in physical possession of property has been dispossessed of the same in the manner and within the time specified in the section. [p. 570, col. 2.]

A man in joint possession of immoveable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the whole, and such joint possession can as well be physically restored in respect of his share as the possession of the whole can be restored to the entire body of co-sharers. [p. 570, col. 2, 571, col. 1]

Hari Narain v. *Elemjan Bibi*, 23 Ind. Cas. 618; 19 C. L. J. 117; 19 C. W. N. 120, distinguished.

Reference under Order XLVI, rule 1, of the Code of Civil Procedure, in Title Suit No. 55 of 1914 of the Court of the Munsif of Dubrughur, District Beerbhoom.

JUDGMENT.—The object of section 9 of the Specific Relief Act is "to provide a speedy remedy for that class of cases where a person in physcial possession of property is forcibly dispossessed from it against his will and consent." See *Tarini Mohan Mozumdar* v. *Ganga Prosad Chuckerbutty* (1). The main question for determination, therefore, in a case under this section is whether the plaintiff while in physical possession of property has been dispossessed of the same in the manner and within the time specified in the section. If he was in physical possession he can be restored to such possession under the decree of the Court. A man in joint possession of immoveable property is as much in physical possession of his share as the entire body of co-sharers are in physical possession of the

(1) 14 C. 649.

whole and such joint possession can as well be physically restored in respect of his share as the possession of the whole can be restored to the entire body of co-sharers. The case of *Hari Narain Das* v. *Elemjan Bibi* (2) is quite distinguishable from this case, as there the dispossession was of the whole and possession was claimed in respect of a part, so that the Court was called upon to restore quite a different state of things from that which had been disturbed. The learned Judges distinctly say: "we have treated the case as being one where a party seeks possession of his share only of property from which he himself and his co-sharers have been dispossessed, and it is incompetent for the Court to give possession of the whole of the property in such a case.' The remarks as to exclusive possession in the judgment must be read in reference to the facts of that case and do not stand in the way of that joint physical possession being restored which existed before the disturbance.

The case before the learned Munsif will be decreed if the plaintiff proves his joint physical possession within six months of the suit.

Ordered accordingly.

(2) 23 Ind. Cas. 618; 19 C. L. J. 117; 19 C. W. N. 120.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 47 OF 1912.

July 11, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

AMBICA CHARAN DUTT—PLAINTIFF—APPELLANT

versus

RAMGATI GUHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage, decree on—Payment by mortgagee to set aside sale of mortgaged property in rent decree—Mortgagor and mortgagee, relationship of—Mortgagee, right of—Lien—Contract—Remedy provided in mortgage-deed, nature of—Transfer of Property Act (IV of 1882), s. 73—Civil Procedure Code (Act V of 1908), O. XXI, r. 89.

The fact that a mortgagee's rights under a mortgage-deed have merged in his rights under the decree obtained on the mortgage does not put an end to the relationship of mortgagor and mortgagee. [p. 572, col. 1.]

Surjiram v. *Barhamdeo*, 2 C. L. J. 202, referred to.

A mortgagee is entitled to add the amount deposited by him to set aside a sale in execution of a rent decree, under Order XXI, rule 89 of the Code of Civil Procedure, and acquires a lien for that deposit on the mortgaged property, which is not discharged by the mere payment of the sum due under the preliminary decree. That payment satisfies the decree, but leaves the lien (acquired subsequent to the decree) outstanding. [p. 572, cols. 1 & 2.]

Rakhohari v. *Bipradas*, 31 C. 975, referred to.

The inclusion in the deed of a remedy which the mortgagee already has by law (section 73 of the Transfer of Property Act) cannot debar the mortgagee from pursuing any other remedy which may be open to him. [p. 572, col. 2.]

Letters Patent Appeal against the decision of Mr. Justice Richardson, dated the 16th April 1912, in Appeal from Appellate decree No. 188 of 1910, reported in 14 Ind. Cas. 718, affirming that of the Subordinate Judge of Faridpur, dated the 11th October 1909, which affirmed that of the Munsif, 2nd Court, at Goalundo, dated the 15th May, 1909.

Babu *Surendra Chunder Sen*, for the Appellant.

Babu *Harendra Narayan Mitter* and *Priya Sankar Mozumdar*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—It appears that the husband of the defendant No. 1 in this suit mortgaged certain land to the plaintiff in May 1902 and the following dates are of some importance in reference to the only question which arises for determination.

In 1908 the plaintiff brought a suit on his mortgage and on the 6th April 1908, he obtained a preliminary decree under which he was entitled to recover the sum of Rs. 900-5-0 or in default of payment of that sum to bring the mortgaged property to sale.

In 1906 the mortgagee's landords brought a suit for the rent of the land and on the 27th June 1906, obtained a decree for Rs. 116-4-6. In execution of that decree the land was sold on the 23rd April 1908 for something under Rs. 900.

On the 20th May 1908, the plaintiff deposited in Court the sum of 116-4-3 and had the sale in execution set aside under section 310A of the old Civil Procedure Code.

On the 26th August 1908, the defendant No. 1 sold the mortgaged property to the defendant No. 2 by private sale. The amount due under the plaintiff's preliminary decree was then paid into Court and that decree was, therefore, satisfied.

AMBICA CHARAN DUTT v. RAMGATI GUHA.

In January 1909, the plaintiff brought the present suit to establish his right to a lien on the mortgaged property for the amount paid by him to have the execution sale set aside with interest, and to obtain an order for the sale of the property in the event of the sum claimed not being paid.

The plaintiff has succeeded in both the lower Courts and this appeal is preferred by the defendant No. 2.

The lower Courts relied on the decision of this Court in the case of *Rakhohari* v. *Bipradas* (1), and the principle of that decision is applicable to the circumstances of the present case; there is no more to be said.

Before me it was contended for the appellant that the present case was distinguishable from the case referred to.

It was urged, in the *first* place, that the deposit then was made after the plaintiff's security was merged in the decree. To this plea I thinl' a good answer was made on behalf of the plaintiff. The fact that the plaintiff's rights under the mortgage-deed had merged in his rights under the decree did not put an end to the relationship of mortgagor and mortgagee which still subsisted as between the plaintiff and the defendant No. 1 at the date of the deposit made under section 210A. At that date security was not extinguished (*Surjiram* v. *Barhamdeo* (2)) and the plaintiff was entitled to add the amount of the deposit to his charge.

It was urged, *secondly*, that even if that be so, the security was at any rate extinguished by the payment into Court of the amount due to the plaintiff under the preliminary decree on his mortgage, that the mortgage was then redeemed and the plaintiff then lost any lien which he might previously have enforced. The argument is plausible, but I cannot assent to it. It cannot be supposed that the plaintiff intended to make a gift to the mortgagor of the amount deposited to avoid the execution sale. The plaintiff can have had no other intention than to add that amount to his charge. It is only just and equitable to conclude that by making the deposit the plaintiff acquired a lien from which the mortgaged property was not discharged by the mere payment of the sum due under the preliminary decree. That payment satisfied the decree, but left the lien (acquired subsequent to the decree) outstanding.

It must be remembered that the sale to the defendant No. 2 was a private sale behind the plaintiff's back. He could not prevent the sale and he could not prevent a part of the price from being paid into Court in satisfaction of his decree. The two defendants are near relatives and it has never been suggested at any stage of this litigation that the defendant No. 2 was not fully aware of the action which the plaintiff had taken to avoid the execution sale. Whether the sale to defendant No. 2 was a real sale or colourable sale, the result must be the same. The sale and the payment into Court cannot be used as a device to defeat the plaintiff's right to a lien.

The mortgage-deed contains a clause to the following effect:—

"If at the instance of the landlord, the mortgaged property is sold in execution of a decree for arrears of rent, then the mortgagee will be entitled to realise the principal money and interest from the sale-proceeds."

It was somewhat faintly argued that this clause indicated the remedy contemplated by the parties in case of the sale of the mortgaged property in execution of a decree for arrears of rent and precluded the plaintiff from acquiring any lien in respect of the deposit made by him. The point does not appear to have been taken in the Courts below and has no substance. The inclusion in the deed of a remedy which the mortgagee already had by law (section 73 of the Transfer of Property Act) cannot debar the mortgagee from pursuing any other remedy which may be open to him.

In my view the lower Courts were right in adopting and applying the principle adverted to in *Rakhohari's* case (1) and this appeal must be dismissed with costs.

The cross-objection relating to interest filed on the plaintiff's behalf was not pressed and is dismissed without costs.

JENKINS, C. J.—The appeal is dismissed with costs.

Appeal dismissed.

(1) 31 C. 975

KHUSHHALI RAM *v.* BHOLAR MAL.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 113 OF 1914.

February 5, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

KHUSHHALIRAM—APPLICANT—APPELLANT

versus

BHOLAR MAL AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—One creditor challenging another's debt—Judge, jurisdiction of, to inquire.

Where in a proceeding under the Insolvency Act one of the creditors challenges the mortgage debt of another on the ground that the mortgage deed was fictitiously executed by the insolvent to prejudice other creditors, the Judge is bound to enquire into the question.

First appeal from an order of the Additional District Judge of Meerut.

Mr. *Sital Prasad Ghosh*, for the Applicant-Appellant.

Dr. *Surendra Nath Sen*, for the Opposite Parties-Respondents.

JUDGMENT.—This is an appeal from an order passed by the Additional Judge of Meerut in an insolvency proceeding. One Mutsaddi Lal applied to be adjudicated an insolvent, on the 10th of March 1914. His application was opposed by one of his creditors, named Khushhali Ram, on various grounds, but he was so adjudicated by an order of the same date. On April 6th, 1914, Khushhali Ram, who was a creditor shown on the insolvent's schedule, presented an application to the Court, the rejection of which has led to the present appeal. The application was badly drafted. It referred to no definite section of the Provincial Insolvency Act and it alluded in a confused manner to two separate transactions, with one of which we are not now concerned. In substance, however, the application was one which deserved more consideration at the hands of the Additional Judge than it has received. The allegation was that a mortgage deed executed by the insolvent on the 26th of November 1913 in favour of one Bholar Mal, for a sum of Rs. 1,500, was a fictitious transaction, entered into merely to prejudice the creditors of the executant. Whether the application is to be regarded as one asking for the removal of the name of Bholar Mal from the schedule of creditors, or as one falling under the provisions of section 36 of the Provincial Insolvency Act (III of 1907), the matter was one which required investigation. The learned Additional Judge seems to have thought that it was quite sufficient for him to note that he had before him a registered document admittedly executed by the insolvent. He held that no further enquiry was required, or could properly be conducted, in the insolvency proceedings, and that Khushhali Ram's remedy, if any, was by way of a separate suit. In our opinion the learned Judge misconceived the extent of his jurisdiction in insolvency proceedings. He was bound to enquire into this question of the alleged mortgage, at the instance of any creditor who claimed to be prejudiced thereby. He might have come to the conclusion that there had been a transfer by way of mortgage under circumstances calling for interference on his part under section 36 of the Insolvency Act, or he might have found that there had been a purely fictitious transaction, not involving any transfer; in either case the name of Bholar Mal would require to be removed from the list of creditors and the property purporting to be affected by this mortgage would become available for the benefit of all the creditors, free of incumbrance. We think that Khushhali Ram's application should have been taken up, notice of the same given to the insolvent and to Bholar Mal, and the questions raised enquired into and decided. We set aside, accordingly, the order complained of and remand the case to the Court below with directions to enquire into the matter as stated above. The costs of this appeal will abide the result of the further enquiry hereby directed.

Appeal allowed; Case remanded.

B. N. DAR, B. A. LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

DWIJENDRA NATH v. GOLOK NATH SARMA.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 390 OF 1912.

July 30, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

DWIJENDRA NATH PURKAYASTHA—APPLICANT—APPELLANT

versus

GOLOK NATH SARMA PURKAYASTHA—RESPONDENT.

Probate of Will, grant of—Citation, issue of—Revocation, application for—Minor—Burden of proof—Party cognizant of proceedings for Probate, when can come in for revocation—Sound and disposing mind—Court, duty of.

A person affected by a Will was the infant son of the testator, and his mother was a minor incompetent in law to act as his guardian, and his (infant's) three uncles were named as successive executors in the Will. One of the uncles applied for Probate. Citations were issued upon the other uncles as also upon the minor and his mother but there was no opposition and the Probate was granted. The minor applied for revocation of the Will:

Held, that the principle that a party who is cognizant of the proceedings and might have intervened is bound by their result and cannot be allowed to re-open them, has manifestly no application to this case and the infant is entitled to have the proceedings re-opened. [p. 575, col. 1.]

The object of the issue of a citation is that all persons, whose interests are or may be adversely affected by the decree of the Probate Court, should have notice of the proceedings, and, an opportunity, should they choose to avail themselves of it, of intervening for the protection of their interests. This purpose is clearly not achieved merely by issue of citations to infants. The proper course for the propounder of the Will to follow is to have a guardian *ad litem* appointed for the infant concerned. [p. 575, col. 2.]

Walter Rebells v. *Maria Rebells*, 2 C. W. N. 100, and *Shoroshibala* v. *Anandamoyee*, 12 C. W. N. 6, referred to.

Where on an application by a minor to revoke a probate the District Judge did not revoke the grant but called upon the executor to prove the Will:

Held, that the only defect in his order is one of form and not of substance. [p. 575, col. 2.]

The *onus* is upon the executor to establish that the deceased had sound and disposing mind at the time when he is said to have executed the Will. [p. 576, col. 1.]

Waring v. *Waring*, 6 Moore P. C. 341; 12 Jur. 947; 13 E. R. 715; 79 R. R. 73, referred to.

The Court, before pronouncing for the Will, must be satisfied beyond all reasonable doubt that the testator was fully cognizant of its contents and in a condition to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing. [p. 576, cols. 1 & 2.]

Dujaur v. *Croft*, 3 Moore P. C. 136; 13 E. R. 59 and *Harwood* v. *Baker*, 3 Moore P. C. 282; 13 E. R. 117; 50 R. R. 37, referred to.

Appeal against the decision of the District Judge of Sylhet, dated the 9th July 1912.

Babu *Hemendra Kumar Das*, for the Appellant.

Babu *Birendra Chandra Das* (for Babu *Ambica Charan Das*), for the Respondent.

JUDGMENT.—This appeal is directed against the grant of probate of a Will alleged to have been executed by one Janakinath Sarma on the 9th September 1901, the day previous to that of his death. Janaki, who was one of a family of four brothers, left a widow Sushila, who was at the time 14 years of age, and a boy, Dwijendra Nath, only two months old. By the Will, his brothers Golok Nath, Baikuntha Nath and Mathura Nath were appointed successive executors. On the 10th February 1901, Goloknath applied for probate of the Will. Citations were issued upon Baikuntha and Mathura Nath as also upon Sushila and Dwijendra Nath. There was no opposition and probate was granted on the 13th March 1902. On the 22nd December 1911, Dwijendra Nath, still an infant, made the present application through his mother, Sushila, for revocation of the probate on the allegation that the alleged Will had not been executed by his father. The District Judge was satisfied upon the evidence that notices had not been properly served upon Sushila and Dwijendra Nath, and held that the matter should be re-opened; but without formally revoking the probate, as he should have done, he called upon the executor to prove the Will in the presence of the objector. Witnesses were then examined, and the District Judge came to the conclusion that the original grant should not be revoked. The present appeal is directed against that order.

Before we deal with the case on the merits, we must examine a special ground assigned by the respondent in support of the order of the Court below, namely, that the application for revocation should not have been entertained inasmuch as citations were issued upon Sushila and Dwijendra Nath, and notwithstanding the service of such notice, there was at the time no opposition on their part to the grant of the probate. In support of this argument, reliance has been placed upon the cases of *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1) and *Durgagati*

(1) 11 C. 492.

Debi v. *Saurabini Debi* (2). It need not be disputed that if a party is cognizant of the proceedings for Probate or Letters of Administration and chooses to stand by and allow the proceedings to be concluded in his absence, he will not be allowed to come in afterwards and have the grant revoked or the proceedings re-opened. This principle has been repeatedly recognised in this Court: *Komollochun Dutt* v. *Nilruttun Mundle* (3), *Brinda Chowdhrain* v. *Radhica Chowdhrain* (1), *Nistarini Dabya* v. *Brahmomoyi Dabya* (4), *In the goods of Bhuggobutty Dasi* (5) and *Durgagati Debi* v. *Saurabini Debi* (2). This is in the accord with the rule followed in England: *Newell* v. *Weeks* (6), *Ratcliffe* v. *Barnes* (7), *Wytcherley* v. *Andrews* (8), *Bell* v. *Armstrong* (9). But in *In the goods of Bhuggobutty Dasi* (5), Ameer Ali, J., pointed out that even in cases where a party has upon notice failed to appear and contest the proceedings, the Court may for sufficient reason allow the proceedings to be re-opened: *Young* v. *Holloway* (10), *Peters* v. *Tilly* (11), *Ritchie* v. *Malcolm* (12). The principle, however, that a party who is cognizant of the proceedings and might have intervened, is bound by their result and cannot be allowed to re-open them, has manifestly no application to the circumstances of the case before us. Here the person affected by the Will was the infant son of the testator. He was, at the time of the issue of the citation, a child a few months old; his mother also was a minor, incompetent in law to act as his guardian. Service of notice upon them was wholly useless for the protection of the interest of the infant.

(2) 33 C. 1001; 10 C. W. N. 955.
(3) 4 C. 360; 4 C. L. R. 175; 2 Shome L. R. 126.
(4) 18 C. 45.
(5) 27 C. 927; 4 C. W. N. 757.
(6) (1814) 2 Phillim. 224.
(7) (1862) 2 Sw. & Tr. 486; 31 L. J. P. 61; 8 Jur. (N. S.) 313; 6 L. T. 658.
(8) (1871) 2 P. & D. 327; 40 L. J. P. 57; 25 L. T. 134; 19 W. R. 1015.
(9) (1882) 1 Add. 372.
(10) (1895) P. D. 87; 64 L. J. P. 65; 11 R. 596; 72 L. T. 118; 43 W. R. 429.
(11) (1886) 11 P. D. 145; 55 L. J. P. 75; 35 W. R. 183.
(12) (1902) 2 I. R. 403; 36 I. L. T. R. 56; 6 Irish Law Reports 783.

The object of the issue of a citation is that all persons whose interests are or may be adversely affected by the decree of the Probate Court should have notice of the proceedings, and an opportunity, should they choose to avail themselves of it, of intervening for the protection of their interests. This purpose is clearly not achieved merely by issue of citations to infants. From this point of view, the opinion was expressed in *Walter Rebells* v. *Maria Rebells* (13) and *Shoroshibala* v. *Anandamoyee* (14), that in these circumstances the proper course for the propounder of the Will to follow is to have a guardian *ad litem* appointed for the infant concerned. [Mortimer on Probate, p. 535.] It is plain, however, that there may be cases where such a course may be impracticable, or, if adopted, may not afford sufficient protection to the infant. This is well illustrated by the case before us. The son of the testator was an infant; his mother was a minor: neither could, in law, take steps in Court for his or her protection. The three uncles of the infant were named as successive executors in the Will and their interest was clearly adverse to that of the infant. Whether the appointment of an officer of the Court as guardian of the infant son would have really afforded him any protection, is more than doubtful: a stranger to the family, not cognizant of the surrounding circumstances, could hardly make an adequate defence. The propounder of the Will, who obtains probate in these circumstances, takes the obvious risk of an application for revocation by the infant when he comes of age, or, possibly earlier, as here, through his guardian. In our opinion, the District Judge has correctly held that the Will must be proved by the executor in the presence of the appellant. The only defect in his order is one of form and not of substance, namely, that he did not revoke the grant and then call upon the executor to prove the Will: *Brindaban* v. *Sureshwar* (15), *Durgagati* v. *Surabini* (2). This defect, however, has not prejudiced either party, as the executor and the objector have both produced evidence in support of their respective cases.

(13) 2 C. W. N. 100.
(14) 12 C. W. N. 6.
(15) 3 Ind. Cas. 171; 10 C. L. J. 263.

As regards merits, we are of opinion, after an anxious consideration of the circumstances of the case, that the order of the District Judge cannot be supported. The real controversy between the parties is, whether the testator had testamentary capacity at the time when he is alleged to have executed the Will. It is proved that he had been ill of fever for at least two weeks before his death, and complications had supervened. Of the many witnesses to the Will, only two (inclusive of the scribe) have been examined; no explanation has been offered why the others have not been called. There is also the significant fact that the Kabiraj who attended on the deceased during his last illness has not been called. The onus was upon the executor to establish that the deceased had sound and disposing mind at the time when he is said to have executed the Will: *Waring* v. *Waring* (16). On this question, the evidence of the medical attendant would naturally have been of great value, and it is a matter for legitimate comment that he has not been cited. We have, on the other hand, evidence on the side of the objector that for two or three days before his death, Janakinath was unconscious, and although he now and then responded to questions put to him, his mental faculties had been greatly impaired. This fact alone will induce the Court to scrutinize with care and caution the evidence of execution of the Will. But we have here the additional fact that the Will contains a somewhat singular provision, namely, that the executor would not be responsible to the beneficiary for the accounts of the estate. The testator also assumes sole responsibility for debts which stood in the names of his brothers and would, in ordinary course, be payable by them as they had separated from him. It is further clear that one of the brothers, Baikuntha, took a leading part in the preparation and execution of the Will. Circumstances like these, as the Judicial Committee observed in *Dufaur* v. *Croft* (17) and *Harwood* v. *Baker* (18), will rouse the vigilance of the Court; and the Court, before pronouncing for the Will, must be satisfied beyond all reasonable doubt that the testator was fully cognizant of its contents, and in a condition to exercise, and did exercise, thought, judgment and reflection respecting the act he was doing. On the evidence taken as a whole, we are unable to say in the present case that this has been established. But we may add that though the main point in controversy between the parties was the mental condition of the testator at the time of the execution of the Will, the genuineness of the signature in the Will is not admitted by the objector. In view of the opinion we have already expressed upon the question of testamentary capacity, it is needless, however, to consider whether the Will was actually executed by the deceased.

The result is that this appeal is allowed, the decree of the District Judge discharged and the application of the 10th February 1902 for probate of the alleged Will of Janakinath Sarma dismissed. Each party will bear his own costs both here and in the Court below.

Appeal allowed.

(16) (1848) 6 Moore P. C. 341; 12 Jur. 947; 13 E. R. 715; 79 R. R. 73.

(17) (1840) 3 Moore P. C. 1[illegible]; 3 E. R. 59.

(18) (1840) 3 Moore P. C. 232; 13 E. R. 117; 50 R. R. 37.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 53 AND 54 OF 1911.

July 8, 1913.

Present:— Sir Lawrence Jenkins, KT., Chief Justice, and Justice, Sir Asutosh Mookerjee, KT.

JAGAT CHANDRA SARMA CHOWDHURY—PLAINTIFF—APPELLANT

versus

RADHA NATH CHAKRAVARTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 283—*Declaratory suit—Partial interest in property, parting with—Valuable consideration—Vendor's right to continue in occupation—Sale.*

Where in a suit under section 283 of the Civil Procedure Code of 1882, for a declaration that the disputed property belonged to the judgment-debtor, it was found that the vendor (plaintiff's judgment-debtor) did not part with his entire interest in the property and that he had retained a right to continue in occupation inasmuch as the purchaser from the plaintiff's judgment-debtor had paid less than the ordinary market-value of the land:

HAZARI SINGH *v.* TERBENI SINGH.

Held, that the plaintiff was entitled to a declaration that he was entitled, in execution of his decree, to bring to sale the right, title, and interest of the judgment-debtor in the disputed property, namely, the right to remain in occupation thereof. [p. 577, col. 2.]

Letters Patent Appeals against the decisions of Mr. Justice Coxe, dated the 21st February 1911, in Appeals from Appellate Decrees Nos. 157 and 399 of 1909, affirming those of the Subordinate Judge, first Court, Sylhet, dated the 21st September 1908, which reversed those of the Additional Munsif, Bamangunj, dated the 6th April 1908.

FACTS appear from the judgment of Coxe, J., reported in 9 Ind. Cas. 623.

Babus *Tarakishore Chowdhury* and *Brojo Lal Chuckerbutty*, for the Appellant.

Babu *Brojendra Nath Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent against the judgment of Mr. Justice Coxe in a suit under section 283 of the Civil Procedure Code of 1882. The plaintiff asks for a declaration that the property in suit belongs to his judgment-debtor and that he is entitled to bring it to sale in execution of his decree. The claim is resisted by a purchaser from the judgment-debtor who contends that the title has vested in him. The Court of first instance decreed the suit. Upon appeal, the Subordinate Judge dismissed it. He held that the purchaser had aquired title *bona fide* for valuable consideration. At the same time he found that the purchaser had paid less than the ordinary market value of the land. He explained this fact on the ground that the vendor had retained a right to continue in occupation of the land. On appeal to this Court the decree of the Subordinate Judge has been confirmed by Mr. Justice Coxe.

On the present appeal, it has been argued that upon the facts found by the Subordinate Judge it is clear that the vendor did not part with his entire interest in the property and that as it has been found that he has retained a right to continue in occupation, the plaintiff is entitled to a decree declaring that that interest is liable to be sold in execution of his decree. In our opinion, there is no answer to this contention.

The result, therefore, is that this appeal must be allowed, the decree of Mr. Justice Coxe as also that of the Subordinate Judge discharged and a declaration made in favour of the plaintiff to the effect that he is entitled in execution of his decree to bring to sale the right, title and interest of the judgment-debtor in the disputed property, namely, the right to remain in occupation thereof.

Each party will pay his own costs throughout.

This judgment, it is conceded, will govern the other appeal, in which a similar decree will be passad.

Appeals allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 2 OF 1914.

May 12, 1914.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

HAZARI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

TERBENI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence—Agricultural lease, unregistered, for less than five years, admissibility of—Exemption from registration—Government Notification, 1885, force of—Registration Act (XVI of 1908)—General Clauses Act (X of 1897), s. 24.

An unregistered agricultural lease for a term not exceeding five years and reserving a rent less than Rs. 50 is admissible in evidence, as such leases were exempted by a notification of the Government—still in force—dated 3rd September 1885, from registration. [p. 578, col. 2.]

First appeal from an order of the District Judge of Azamgarh.

FACTS.—Plaintiffs sued for possession of certain plots and for damages on the basis of an unregistered lease dated 14th October 1912. The defendants, among other pleas, raised a plea that the lease, not having been registered, was not admissible in evidence. The first Court held that the lease was inadmissible in evidence being unregistered. The lower Appellate Court reversed the first Court's decree, holding that the lease was an agricultural lease and need not be registered.

Defendants appeal.

Mr. *Braj Nath Vyas*, for the Appellants, submitted that on a true construction of the lease, it appeared to be an ordinary lease

and not an agricultural lease. Moreover, the notification dated 3rd December 1885 was issued by the Local Government under the old Registration Act III of 1877. No such notification was issued under the new Act XVI of 1908. The lease was executed when the new Act came into force.

In Act III of 1877, section 2 provided that old rules and notifications, etc., would remain in force which were issued under the old Act unless expressly repealed.

No such section existed in the new Act. There were such sections in the Civil Procedure Code of 1908 and other Acts where it was intended to keep the old notifications in force.

Mr. *Harnandan Pershad*, (for Dr. *S. N. Sen*), for the Respondents, referred to section 24 of Act X of 1897.

There being no provision in the new Act to keep the old notification in force, it ceased to have any validity.

Mr. *Harnandan Pershad* (for Dr. *S. N. Sen*), for the Respondent, was not called upon.

JUDGMENT.—This appeal arises out of of a suit brought by the plaintiffs respondents for recovery of possession on the basis of a lease dated the 14th October 1912. The claim was resisted on the ground, among others, that the lease, the basis of the claim, was inadmissable in evidence as it was unregistered. The Court of first instance accepted this plea in defence and dismissed the claim.

On appeal the learned District Judge, disagreeing with the first Court, held that the lease in question being an agricultural lease for a term not exceeding five years and reserving a rent less than Rs. 50 was exempted by a notification of the Local Government from registration and was admissible in evidence. The decree of the first Court was set aside and the case was remanded under Order XLI, rule 23 Civil Procedure Code, for trial on the merits. The defendants have come up in appeal to this Court and object to the order of the lower Appellate Court on two grounds. They say that the lease dated the 14th of October 1912 is not an agricultural lease and that the notification of the Local Government dated 1885 is inapplicable in view of the new Registration Act, XVI of 1908. We think that neither of the contentions is well founded. We agree with the lower Appellate Court in holding, after a perusal of the lease in question, that it is an agricultural lease. The notification of the Local Government dated 1885 exempting certain leases from registration is still in force in spite of Act XVI of 1908, as by that Act the said notification was not modified or cancelled and will be considered to be still in force in view of section 24 of the General Clauses Act, X of 1897. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 89 OF 1911.

CIVIL RULE No. 346 OF 1914.

May 20, 1914.

Present:— Mr. Justice N. Chatterjea and Mr. Justice Beachcroft.

Srimati INDUBALA DASEE—OBJECTOR—APPELLANT—PETITIONER

versus

Srimati PANCHUMANI DASEE—APPLICANT—RESPONDENT—OPPOSITE PARTY.

Will—Probate, application for—Order refusing to allow caveator to oppose grant of probate, appeal from—Hindu Law—Maintenance—Widowed daughter-in-law of predeceased son, right of, to oppose probate of Will of her father-in-law in favour of his daughter—Maintenance, right of, if enforced against devisee—Civil Procedure Code (Act V of 1908), s. 115.

An order refusing to allow a caveator to oppose the grant of probate of a Will on the ground that he has no interest sufficient to enable him to appear in proceedings on an application for probate, is an order refusing to make the caveator a party to the proceedings and is, therefore, not appealable. [p. 579, col. 1.]

A Will executed in favour of a widowed daughter of the testator, who was not a heiress, provided that all the properties should be sold a certain sum should be paid to the widowed daughter-in-law of the testator and certain other sums to two other persons, and the whole of the balance should be appropriated by the daughter. The daughter entered into an agreement to sell the property and applied for probate of the Will:

Held, that under the circumstances the Will seriously affected the interest of maintenance of the widowed daughter-in-law and that she had sufficient interest to oppose the grant. [p. 580, col. 2.]

Upon the death of a son, the father has no legal obligation to maintain his daughter-in-law except under certain circumstances. His obligation is merely a moral or an imperfect obligation, which, however, ripens into a legal obligation on the part of the heir who gets his estate after his death. [p. 579, col. 2.]

INDUBALA DASI *v.* PANCHUMANI DASI.

A daughter-in-law can legally enforce her right to maintenance as against the heir in possession of the estate of her father-in-law. [p. 579, col. 2.]

Appeal against the decree of the District Judge of 24-Pergannas, dated the 26th February 1914.

Babu *Monmohan Dutt*, for the Appellant.

Babu *Sib Chunder Palit*, for the Respondent.

JUDGMENT.—This is an appeal against an order refusing to allow the appellant to oppose the grant of probate of a Will, on the ground that she has no interest sufficient to enable her to appear in proceedings on an application for probate. The order is, therefore, one refusing to make the appellant a party to the proceedings. It was held in the case of *Khettra Moni Dasi* v. *Shyama Churn Kundu* (1) that no appeal lies against such an order, and that case has recently been followed in *Sri Proshad Narayan Singh* v. *Dulhin Genda Koer* (2).

We accordingly hold that no appeal lies against the order, and the appeal is accordingly dismissed. We make no order as to costs.

RULE NO. 346 OF 1914.

We can, however, deal with the order under section 115 of the Civil Procedure Code in the Rule which was granted in the case.

The petitioner is the widow of the predeceased son of one Haridas, and the opposite party is the widowed daughter of Haridas. The opposite party applied for probate of a Will said to have been executed by Haridas, and the question is whether the petitioner has any *locus standi* to oppose the application.

It is alleged by the petitioner that she lived as a member of a joint family, governed by the *Mitakshara* School of Hindu Law, with her husband and her father in-law until the death of the latter. If, therefore, the properties dealt with by the Will were the ancestral properties of Haridas in which the petitioner's husband was a co-parcener, she could enforce her legal claim to maintenance even against her father-in-law himself, had he been alive, and although the latter did not take the son's interest by inheritance, but by survivorship, he could not resist her claim. See *Devi Persad* v. *Gunwanti Koer* (3). And in such a case a Will by the father-in-law disposing of his entire estate could not affect the right of maintenance of the daughter-in-law. There is no allegation, however, in the petition that the properties dealt with were ancestral properties and under the circumstances the petitioner is in the same position as regards the right to maintenance as a widowed daughter-in-law under the Bengal School, there being no difference between the two schools in this respect. See *Siddessury Dassee* v. *Janardan Sarkar* (4).

Now, upon the death of a son, the father has no legal obligation to maintain his daughter-in-law, except possibly under certain circumstances which need not be considered in the present case. His obligation has been held to be merely a moral or an imperfect obligation which, however, ripens into a legal obligation on the part of the heir who gets his estate after his death.

It may be taken as settled law that as against the heir in possession of the estate of the father-in-law, the daughter-in-law can legally enforce her right to maintenance. But the question raised in the present case involves the question whether such right can be enforced against a *devisee* of the entire estate under a Will executed by the father-in-law. The question has been answered in the negative in the case of *Bai Parvati* v. *Tarwadi Dolatram* (5), but a contrary opinion has been expressed by the Madras High Court in *Rangammal* v. *Echammal* (6). It is unnecessary to consider which of the two conflicting views is correct. If the daughter-in-law as contended on behalf of the opposite party cannot legally enforce her claim to maintenance as against a *devisee*, there can be no doubt that she is vitally interested in showing that the Will was never executed by her father-in-law, and she should certainly be allowed to appear and oppose the grant of probate, for once the Will is established her right to maintenance which could have been enforced in case of intestacy, is gone. If, on the other hand, the right to maintenance can be legally claimed against a *devisee*, the question arises whether

(1) 21 C. 539.
(2) 22 Ind. Cas. 276; 18 C. L. J. 612.
(3) 22 C. 410.
(4) 29 C. 557; 6 C. W. N. 530.
(5) 25 B. 263; 2 Bom. L. R. 894.
(6) 22 M. 305; 9 M. L. J. 14.

in such a case she has any interest sufficient to entitle her to appear in the probate proceedings. In the cases of *In the goods of Sarat Chander Patro* (7), *Garabini Dassi* v. *Pratap Chandra Shaha* (8) and *In the goods of Gobinda Chandra* (6) it was held that the persons who had merely a claim for maintenance in those cases, had no interest to appear in the probate proceedings. The first was the case of an illegitimate son of a *Sudra*, the second that of a widow of the adoptive father of the testator and the third of a widowed daugter-in-law. The principle upon which these cases were decided appears to be that the right to maintenance cannot be affected by the Will, which proceeds upon the view that the right can be enforced against the *devisee*. We need not consider whether such a person has sufficient interest to oppose the grant of probate in all cases. There may be cases, for instance, where the right to maintenance is expressly recognized and the maintenance is provided for by the Will itself. In such a case, a person claiming maintenance might have no interest in appearing in the probate proceedings. In the case of *Garabini Dassi* v. *Pratap Chandra Shaha* (8), the learned Judges(Banerjee and Stevens, J.J.) were of opinion that the provisions of the Will may be looked at, to see if the Will really affects the rights to maintenance, and in that particular case they held that it did not affect that right in any way whatever. The Will set up in the present case is in favour of the widowed daughter who is not the heiress of Haridas. The Will itself directs that all the properties shall be sold, that a certain sum of money shall be paid to the petitioner, and certain other sums to two other persons, and the whole of the balance is to be appropriated by the opposite party herself. It is alleged by the petitioner that the opposite party has already entered into an agreement to sell all the properties, including the family dwelling house in which the petitioner had been residing. Assuming that the widowed daughter-in-law can enforce her right to maintenance and right of residence in the family dwelling-house as against the purchaser where the Will itself directs the sale of all the properties (a question not free from doubt) the petitioner will have the greatest difficulty in following the properties in the hands of the purchasers, specially if they are sold to different persons.

Under these circumstances, we think, the Will in this case seriously affects the interest of the petitioner and that she has sufficient interest to oppose the grant.

We accordingly direct that the order of the Court below be reversed and that the Will be proved in solemn form in the presence of the petitioner as in a contentious case.

The petitioner will be entitled to costs, three gold *mohurs*.

Appeal dismissed:
Rule made absolute.

(7) 2 C. W. N. cclvi.
(8) 4 C. W. N. 602.
(9) 23 Ind. Cas. 539; 17 C. W. N. 1141.

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL DECREE No. 574 OF 1910.
June 18, 1914.
Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

ANAND KISORE CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS
versus
DAIJI THAKURAIN—DEFENDANT—RESPONDENT.

Hindu Law—Partition, how effected—Metes and bounds, division by, whether necessary—Intention to separate—Res judicata—*Matter directly and substantially in issue—Partition, establishment of—Oral evidence—Separate enjoyment—Inference.*

A partition is effected, under the Hindu Law, between members of a joint family, if there is a division of their rights; an actual distribution of the property by metes and bounds is not necessary. [p. 582, col. 1.]

Apporier v. *Rama Subba Aiyan*, 11 M. I. A. 75: 8 W.R. (P.C.) 1; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 219; 20 E. R. 31; *Brijraj Singh* v. *Sheodan Singh*, 19 Ind. Cas. 826; 17 C. W. N. 949; (1913) M. W. N. 575; 11 A. L. J. 698; 14 M. L. T. 11; 18 C. W. N. 57; 15 Bom.L.R. 652; 25 M.L.J. 188; 35 A. 337; 40 I. A. 161, referred to.

To determine whether two persons, members of a joint *Mitakshara* family, have separated so as to make the principle of survivorship no longer applicable between them, the Court must find whether they had an intention to separate, and, whether as a result of such intention, there has been severance of title and interest. [p. 582, col. 2.]

Where the question whether the lands of one of the villages, which formed part of the estate, had or had not been divided between the parties by arbitrators, was not directly and substantially in issue in the former suit:

Held, that the finding in the previous suit did not operate as *res judicata*. [p. 582, col. 2.]

A partition may be occasionally established by oral evidence, which, though not directly proving the factum of partition, may be of such a character as

to justify the inference that a partition must have been made between the parties or their predecessors. [p. 583, col. 1.]

Budha Mal v. *Bhagwan Das*, 18 C. 302 (P. C.) and *Murari* v. *Mukund*, 15 B. 201, referred to.

The mere separate enjoyment of parcels in severalty does not indicate complete partition between the parties. [p. 583, col. 1.]

Lakhshmi Devi Garu v. *Surya Narayana Dhatrazu Bahadur Garu*, 24 I. A. 118; 20 M. 256, referred to.

There may be a mutual arrangement for the management and enjoyment of separate portions of joint property which does not amount to partition. On the other hand, the inference in favour of the theory of partition would be strengthened if it is proved that not only had the parties enjoyed separate and distinct portions of the family property for many years, but had also dealt with the separate portions in every respect as their own property, for instance, carried out improvements on them, or effected alienations, to strangers or to members of the family. [p. 583, col. 1.]

Makhun Lall v. *Ram Lall*, 3 C.W.N. 134, referred to.

Appeal against the decree of the Subordinate Judge of Durbhanga, dated the 26th September 1910.

Babus *Joges Chunder Roy* and *Rajendra Chunder Guha*, for the Appellants.

Babus *Umakali Mookerjee* and *Anilendra Nath Ray Chaudhuri*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiffs in a suit for declaration that the disputed properties are not joint properties of the parties and that they are not liable to be partitioned, and for a prohibitory order on the Collector not to effect a partition of them under the Bengal Estates Partition Act, 1876. The suit was commenced on the 9th April 1906 and was dismissed by the Subordinate Judge on the 9th March 1907 on the ground that it was not maintainable under the provisions of the Bengal Estates Partition Act, 1897. This decision was reversed by this Court on the 9th March 1909, and the case was remitted to the Court below for trial on the merits: *Ananda Kishore Choudhry* v. *Daiji Thakurani* (1). On trial after remand, the Subordinate Judge has dismissed the suit on the ground that the alleged private partition of the lands in 1850 was not established by the evidence. The plaintiffs have appealed to this Court and urged two grounds against the decision of the Subordinate Judge, namely, *first*, that the question of previous partition is *res judicata* by virtue of a decision between the predecessors of the parties in a litigation of 1855, and, *secondly*, that if the matter is not *res judicata*, the balance of evidence supports the theory of a previous partition.

To test the validity of the first objection, we must examine the scope of the previous suit and of the decision therein. The plaintiffs are the descendants of one Bechu Chaudhuri, while the defendant is the daughter of one Bichak Chaudhuri. Bechu Chaudhuri and Bichak Chaudhuri were cousins, related through their fathers. Upon the death of Bichak Chaudhuri in 1853, his estate was successfully claimed by his mother and widow before the Revenue Authorities. Thereupon, on the 2nd April 1855, Bechu Chaudhuri instituted a suit against the mother and widow of Bichak Chaudhuri for recovery of possession of the estate left by the latter, on the ground that it had vested in him by survivorship. The daughter of Bichak Choudhuri, who was at that time an infant and who is the defendant in this litigation, was not a party to that suit. The then defendants pleaded that Bechu Chaudhuri and Bichak Chaudhuri were not joint and that their village and Court affairs, collections and residence were separate. On these pleadings, four issues were raised; of these, the *first* raised the question, whether the properties in suit were or were not joint at the time of the death of Bichak Chaudhuri; the *second* raised the question, whether or not in 1850 the plaintiff and Bichak Chaudhuri had partitioned by arbitrators the lands of village Rohara (which was one of the properties included in the estate of Bichak Chaudhuri and is the property now in suit). The Court found upon the first issue that there had been a separation in estate between Bechu Chaudhuri and Bichak Chaudhuri. Upon the second issue, the Court observed that the allegation of the defendants with respect to the portion of lands of Rohara by arbitrators was proved by the deposition of three witnesses. The Court thereupon dismissed the suit on the 5th July 1855. On behalf of the plaintiffs, it is argued that the decision on the second issue operates as *res judicata* between the parties, and in support of this view reliance is placed

(1) 1 Ind. Cas. 549; 36 C. 726; 10 C. L. J. 189.

upon the cases of *Mitha* v. *Fuzl Rub* (2), *Soorjomonee* v. *Suddanund* (3) and *Peary Mohun* v. *Ambica Churn* (4). In our opinion, the contention of the appellant is unsound and must be overruled. The only question which could be and was directly and substantially in issue in the previous litigation was, whether or not there had been a separation in interest between the two cousins. As was pointed out by Lord Westbury in *Apporier* v. *Rama Subba Aiyan* (5), under the Hindu Law a partition is effected between members of a joint family, if there is a division of their rights; an actual distribution of the property by metes and bounds is not necessary. This view has been repeatedly affirmed by the Judicial Committee: *Doorga Persad* v. *Kundun Koowar* (6), *Ram Kissen Singh* v. *Sheonundun Singh* (7), *Suraneni Venkata Gopala Narasimha Row* v. *Suraneni Lakshma Venkama Row* (8), *Gajapathi Radhika Pata Devi Garu* v. *Gajapathi Nilamani Patta Maha Devi Garu* (9), *Madho Pershad* v. *Mehrban Singh* (10), *Balkishen* v. *Ram Narain* (11), *Ram Pershad Singh* v. *Lukhpati Koer* (12), *Musammat Parbati* v. *Nannihal Singh* (13), *Raghubir Singh* v. *Moti Kunwar* (14), *Suraj Narain* v. *Iqbal Narain* (15), *Brijraj Singh* v. *Sheodan Singh* (16). To determine whether two persons, members of a joint *Mitakshara* family, have separated so as to make the principle of survivorship no longer applicable between them, the Court must find whether they had an intention to separate, and, whether as a result of such intention, there has been severance of title and interest. Consequently, the question whether the lands of one of the villages, which formed part of the estate, had or had not been divided between the parties by arbitrators, was not directly and substantially in issue. Indeed, the question did not arise upon the pleadings as set out in the judgment. To enable the then plaintiff to succeed by survivorship, he would have to prove that the parties had remained joint in respect of the whole estate, and the defendants, to defeat the claim of the plaintiff, must prove, not so much that particular tracts of land had been divided by metes and bounds and enjoyed separately, but rather that there had been a complete separation in interest, a total disruption of the tie of joint family. We hold accordingly that the finding in the previous litigation as to the lands of Rohara does not operate as *res judicata*. It is further worthy of note that the finding is inconclusive, as it does not show that all the lands of the village had been partitioned. The first ground urged by the plaintiffs consequently fails.

To test the soundness of the second objection, namely, that the balance of evidence supports the theory of a private partition, we must remember that no direct evidence, oral or documentary, is available to prove a complete partition of the lands of Rohara in 1850. The Subordinate Judge has on good grounds refused to place any reliance on the *khasra* which was not produced in the litigation of 1855. The predecessor of the plaintiffs then strenuously maintained, though unsuccessfully, that there had been no division of the lands, and could not very well produce measurement papers, if any, drawn up with a view to effect a partition. The Subordinate Judge has suspected, not with-

(2) 6 B. L. R. 148; 15 W. R. (P. C.) 15; 13 M. I. A. 573; 2 Suth. P. C. J. 387; 2 Sar. P. C. J. 626; 20 E. R. 665.

(3) 12 B. L. R. 304 (P. C.); 20 W. R. 377; I. A. Sup. Vol. 212.

(4) 24 C. 900.

(5) 8 W. R. (P. C.) 1; 11 M. I. A. 75; 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 31.

(6) 13 B. L. R. 235; 21 W. R. 214; 1 I. A. 55.

(7) 23 W. R. 412 (P. C.); 9 B. L. R. 310 *note*.

(8) 3 B. L. R. (P. C.) 41; 12 W. R. (P. C.) 10; 13 M. I. A. 113; 2 Suth. P. C. J. 265; 2 Sar. P. C. J. 496; 20 E. R. 494.

(9) 6 B. L. R. 202; 14 W. R. (P. C.) 33; 13 M. I. A. 497; 2 Suth. P. C. J. 365; 2 Sar. P. C. J. 601; 20 E. R. 677.

(10) 18 C. 157; 17 I. A. 194.

(11) 7 C. W. N. 578; 5 Bom. L. R. 461; 30 C. 738; 30 I. A. 139.

(12) 30 C. 231; 7 C. W. N. 162; 5 Bom. L. R. 103; 30 I. A. 1.

(13) 3 Ind. Cas. 195; 36 I. A. 71; 31 A. 412; 10 C. L. J. 121; 6 A. L. J. 597 (P. C.); 5 M. L. T. 327; 13 C. W. N. 983; 11 Bom. L. R. 878.

(14) 17 Ind. Cas. 766; 35 A. 41; 13 M. L. T. 162; (1913) M. W. N. 127; 11 A. L. J. 146; 17 C. W. N. 453; 17 C. L. J. 306; 15 Bom. L. R. 426; 25 M. L. J. 28.

(15) 18 Ind. Cas. 30; 13 M. L. T. 191; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40.

(16) 9 Ind. Cas. 826; 17 C. W. N. 949; (1913) M. W. N. 515; 11 A. L. J. 698; 14 M. L. T. 11; 18 C. L. J. 57; 15 Bom. L. R. 652; 35 A. 337; 25 M. L. J. 188; 40 I. A. 161.

ANAND KISORE CHOWDHURY *v.* DAIJI THAKURAIN.

out good reason, that the *khasra* might have been manufactured during the pendency of the partition proceedings before the Collector. In the absence of direct evidence of a partition in 1850, we are thus thrown back upon circumstantial evidence. As was pointed out by the Judicial Committee in *Budha Mal* v. *Bhagwan Das* (17), and by the Bombay High Court in *Murari* v. *Mukund* (18), a partition may be occasionally established by oral evidence, which, though not directly proving the factum of partition, may be of such a character as to justify the inference that a partition must have been made between the parties or their predecessors. The plaintiffs in the present case rely upon the circumstance that the representatives of Bechu Chaudhuri and Bichuk Chaudhuri have, for a long period of time, occupied distinct parcels of land, have apparently exercised in respect thereof the rights of a sole owner, and have recognised each other as entitled to possession in severalty. This, no doubt, is an important circumstance, but is by no means conclusive. It is well-settled that the mere separate enjoyment of parcels in severalty does not indicate complete partition between the parties: *Runjeet Singh* v. *Gujraj Singh* (19); *Lakhshmi Devi Garu* v. *Surya Narayana Dhatrazu Bahadur Garu* (20); *Sreeram* v. *Sreenath* (21); *Lalljeet Singh* v. *Raj Coomar Singh* (22). To put the matter briefly, there may be a mutual arrangement for the management and enjoyment of separate portions of joint property which does not amount to partition. On the other hand, that inference in favour of a theory of partition would be strengthened, if it was proved that not only had the parties enjoyed separate and distinct portions of the family property for many years, but had also dealt with the separate portions in every respect as their own property, for instance, carried out improvements on them, or effected alienations to strangers or to members of the family: *Peary Lall* v. *Bhawoot Koer* (23); *Bodh Singh* v. *Gunesh Chunder Sen* (24); *Udoy Chand* v. *Panchoo Ram* (25); *Makhun Lall* v. *Ram Lall* (26). In the case before us, there is no evidence of the existence of any circumstances which weigh in favour of the theory of permanent partition as distinguished from temporary distribution for the sake of convenience of enjoyment. On the other hand, there are significant facts which are inconsistent with the case of the plaintiffs. Thus, though in some cases the parties have collected rent exclusively from separate sets of tenants, most of the lands are still joint, and most of the tenants have been paying rent jointly to the parties. This is emphasised by the rent decree obtained, on the 15th May 1905, against Ramruch Raot, in a suit in which the present respondent was joined as a co-sharer landlord. Again, so recently as 1895, both the parties jointly sued one Mr. Crowdy and his partner of the Hoti Indigo Factory and on the 5th June 1896, obtained a decree for joint possession of lands which had been purchased by the Crowdys on the 1st June 1895, from cultivators who had no transferable rights in their holdings. Again, between the 17th and 24th October 1894, the parties accepted joint *kabuliyats* from numerous tenants; and in February and March 1905, they jointly took *kabuliyats* from other tenants, who subsequently sued them jointly in respect of the lands of their tenancy. It is also plain from the Record of Rights that there were at least 120 *bighas* of land in the joint possession of the parties. Finally, it is indisputable that the areas in the occupation of the parties are not in exact proportion to their respective shares in the entire estate. In view of all these circumstances, the Subordinate Judge has rightly held that although there may have been a distribution of some of the lands and separate enjoyment thereof by mutual consent and for mutual convenience, there was no such final and definitive partition as is contemplated in section 12 of the Estates Partition Act, 1876, and as would effectively deprive the Collector of his jurisdiction. This is in harmony with the view of the facts accepted by the Board of Revenue on five successive occasions, as appears from the orders of Mr. Cockerell

(17) 18 C. 302 (P. C.). (18) 15 B. 201.
(19) 1 I. A. 79.
(20) 24 I. A. 218; 20 M. 256.
(21) 7 W. R. 451.
(22) 25 W. R. 353.
(23) W. R. F. B. 18; 1 Ind. Jur. (o. s.) 100.
(24) 19 W. R. 356 at p. 357; 12 B. L. R. (P. C.) 317; 3 Sar. P. C. J. 253.
(25) 11 C. L. R. 514.
(26) 3 C. W. N. 134.

(22nd April 1886), Sir Henry Harrison (19th June 1890), Mr. Buckland (25th March 1903), Mr. Slacke (21st December 1905) and Mr. Macpherson (4th December 1906). The plaintiffs have wholly failed to discharge the heavy burden which lay upon them to prove conclusively that the partition proceedings commenced before the Revenue Authorities on the 3rd December 1884 and concluded on the 30th January 1907, after the lapse of more than 22 years, have been without jurisdiction.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at ten gold *mohurs*.

BEACHCROFT, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

CIVIL REFERENCE NO. 25 OF 1914.

February 26, 1915.

Present:—Sir Basil Scott, KT., Chief Justice, Mr. Justice Batchelor and Mr. Justice Beaman.

In re GANGARAM NARAYANDAS TELI.

Stamp Act (II of 1899), Art. 35—Lease reserving rent and Government assessment—Stamp to be paid only on amount of rent.

In the case of a lease containing a stipulation regarding the payment by the lessee to the lessor of Government assessment, etc., for its eventual payment by the lessor to the Government, stamp duty should be calculated only on the amount of rent reserved and not also on Government assessment. [p. 584, col. 1]

Civil reference made by the Commissioner, C. D., under section 59 of the Indian Stamp Act, 1899.

Mr. *S. S. Patkar*, Government Pleader, in support of the Reference.

JUDGMENT.—This is a reference to the Court under section 59 of the Indian Stamp Act in the matter of a lease executed in favour of Gangaram Narayandas Teli by Vithoba *valad* Onkari Patel Vani, and the question, as stated in the reference, is whether in the case of a lease containing a stipulation regarding the payment by the lessee to the lessor of Government assessment, etc., for its eventual payment by the lessor to the Government, stamp duty should be calculated on the total amount of rent and Government assessment, etc. The stipulations in the lease are as follows:—

"The above-described land has been taken from you for five years and has been given into my possession from the same date. I will take great pains for cultivating the land and one half portion of every kind of produce that may be raised will be given to you every year, and the remainder will be appropriated by me. I will pay you every year Rs. 16-8-0 on account of Government assessment which you may pay. I will repair and keep in order the earthen *bandhas* round the fields. I shall protect the trees and manage to pay other dues. If, in any one year, I make default in giving you moiety of the produce, I shall pay you Rs. 100 as damages in addition to the assessment of Rs. 16-8-0."

The Article of the Indian Stamp Act which applies to the case is Article 35. Assuming this to be a lease for a term in excess of five years, it would fall under clause (*a*), sub-clause (3), and the duty prescribed would be "the same duty as on a conveyance (No. 23) for a consideration equal to the amount or value of the average annual rent reserved," and the question is whether the rent is anything more than the moiety of the produce contracted to be given, or whether it includes Rs. 16-8-0 which is payable to Government as assessment by whoever may hold the land under the Government. The term "rent" is explained in Woodfall on Landlord and Tenant as "a retribution or compensation for the lands demised." "Rent must always be a profit;...This profit must also be certain, or capable of being reduced to a certainty by either party, and must issue out of the thing granted, and not be part of the land, or thing itself." Now applying that description to the present case, it appears to us that the only profit for the lands demised which the landlord would realise is the half of the produce, and that Rs. 16-8-0 is not part of the profit. It is a liability attaching to the thing itself in the hands of the lessor. The lessor under this covenant is really in no better position than if he had a covenant by a tenant to pay the assessment direct to Government, and if it were paid direct to Government, it could not be contended, as is admitted by the Government Pleader, that Rs. 16-8-0 should be deemed

to be part of the rent. We answer the question referred in the negative. A question arising upon this lease appears not to have occurred to the referring authority, *viz.* whether the lease does not fall under the exemption from Article 35, being a lease executed in the case of a cultivator for the purposes of cultivation, the average annual rent reserved not exceeding Rs 100.

Reference answered.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 261 OF 1913.

March 4, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

RAM NARESH LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SADHU SARAN LAL AND OTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Agreement—Family arrangement, effect of.

In order to settle a dispute as to the property of a deceased Hindu a settlement was arrived at between the nearest collaterals of the deceased Hindu on the one side and his widow and his daughter as guardian of his daughter's minor son, on the other, whereby the collaterals were put into immediate possession of a very substantial portion of the property of the deceased and the daughter's son was put in absolute proprietary possession of the rest of the property in dispute "from generation to generation:"

Held, that under the circumstances of the case the daughter's son acquired a full proprietary title in the property under the settlement. [p. 586, col. 1.]

First appeal from the decision of the Subordinate Judge of Ghazipur, dated the 13th March 1913.

The Hon'ble. Dr. *Sunder Lal* (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the Appellants.

The Hon'ble Mr. *Madan Mohan Malaviya* (with him Dr. *S. C. Banerji* and Mr. *Permeshwor Dayal*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession. The claim seems an unjust one devoid of merit. The pedigree of the family will be found at page 11. The property which is in dispute belonged to one Manogilal. The plaintiffs are very distant reversioners being some seven degrees removed. Manogilal died in the year 1858 leaving a widow *Musammat* Dakho and a daughter *Musammat* Raji Kunwar. Raji Kunwar had a son Adit Prasad who left a widow *Musammat* Pranpat Kunwar who died in the year 1911. The present suit was instituted on the 27th of September 1912. Dakho Kunwar died in the year 1880. Her grandson, Adit Prasad, died also in 1880. It is not quite certain whether he died before or after his grandmother. Raji Kunwar died according to the plaintiffs in 1905. According to the defendants she died about 14 years before the institution of the suit. The plaintiffs' claim is that upon the death of Manogilal the estate vested in his widow *Musammat* Dakho for the ordinary estate of a Hindu widow, that on her death it vested on her daughter, *Musammat* Raji Kunwar, and that accordingly the plaintiffs, as reversioners, became entitled upon her death, which, as we have mentioned above, is alleged by the plaintiffs to have taken place in the year 1905. It is somewhat remarkable (even if we assume that this lady died in the year 1905) that the plaintiffs did not institute their suit until September 1912, which was about a year after the death of *Musammat* Pranpat, the widow of Adit Prasad. We find that prior to the year 1879 there had been disputes as to the succession to the property between the persons who would have been the apparent reversioners had the property descended in the way alleged by the plaintiffs and had *Musammat* Dakho been in possession as a Hindu widow. The persons who then disputed were the sons and grandsons of one Subhao Singh, the plaintiffs all claim in this line of descent. These persons seem to have attempted to make out that Manogilal was a member of a joint Hindu family with them at the time of his death. They apparently had failed in this attempt. A settlement, however, to avoid further litigation was arrived at between the then claimants and *Musammat* Dakho and *Musammat* Raji Kunwar acting on behalf of themselves and of Adit Prasad, who was then a minor. Under the terms of the settlement the then claimants, that is to say, the forefathers of the present plaintiffs, were put into immediate possession of a very substantial portion of the property and Adit Prasad was put in

absolute proprietary possession of the property in dispute "from generation to generation." It is to claim this last mentioned property that the present suit has been instituted by the plaintiffs. We find that after this settlement mutation of names was effected in accordance with the settlement in favour of Adit Prasad and after his death in favour of his widow. The Court below has held that the widow of Manogilal accelerated the estate of Adit Prasad. It seems to us that having regard to the terms of the settlement this result was highly probable. It is a fair presumption from the manner in which the entry of names was made, that the devolution of the estate was so accelerated. As a matter of fact Adit and after him his widow continued in possession; we have already pointed out that this suit was not instituted until after the death of the widow of Adit. We find that litigation ensued in the year 1884 and the compromise, referred to above, was the subject of that litigation and came before the High Court in an appeal. The High Court held on the 27th of November 1888 that Adit Prasad acquired a full proprietary title in respect of the property dealt with by the agreement. If Adit Prasad did acquire proprietary possession, then the plaintiffs are not the reversioners to his estate. We agree with the finding of the Court below that Adit Prasad did acquire a full proprietary title in the property, and we entirely agree with the decision of the Court below and dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 49 OF 1914.

December 9, 1914.

Present:—Mr. Justice Hannay.

KRISHNA UPADYA AND ANOTHER—COUNTER-PETITIONERS—PETITIONERS

versus

GANAPAYE UPADYE AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XLIII, r. 1—Decree in partition suit—Order amending judgment and decree pending appeal—Jurisdiction—Appeal—Interference in revision.

A Court has no jurisdiction to make an order amending its decree after it has been affirmed on appeal. [p 587, col. 1.]

No appeal lies against an order of amendment but the High Court can set it aside on revision. [p. 587, col. 1.]

Visvanathan Chetti v. *Ramanathan Chetti*, 24 M. 646, distinguished.

Lala Brij Narain v. *Kumar Tejbal Bikram Bahadur*, 6 Ind. Cas. 669; 32 A. 295; 14 C. W. N. 667 (P. C.); 7 A. L. J. 507; 11 C. L. J. 560; 12 Bom. L. R. 444; 8 M. L. T. 57; 20 M. L. J. 587; (1910) M. W. N. 392; 37 I. A. 70, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Udipi, in Interlocutory Appeal No. 833 of 1913, in Original Suit No. 124 of 1909.

Mr. *B Sitarama Row*, for the Petitioners.

Mr. *K. Y. Adiga*, for the Respondents.

JUDGMENT.—The facts of this case appear to be these. The petitioners were defendants Nos. 1 and 2 in Original Suit No. 124 of 1901 on the file of the Court of the District Munsif of Udipi, a partition suit. A decree was passed against them on 27th December 1909. The defendants appealed to the District Court in Appeal Suit No. 260 of 1910. The appeal was dismissed. It appears from the order of the lower Court dated 5th August 1910, in Interlocutory Application No. 328 of 1910 that while the appeal was pending in the District Court the plaintiff obtained an order from the District Munsif amending his judgment in the suit. Nothing apparently was done on this order till 1913 when the plaintiffs wanted to execute the decree. Finding that the amendment ordered in 1910 had not been effected, the plaintiffs then applied to the District Munsif that those amendments might be carried out in judgment and decree and the District Munsif passed orders accordingly. It is this order of the District Munsif which is now sought to be revised. It appears that the petitioners have also appealed to the District Court against the order.

The preliminary objection is taken that the order of the District Munsif isnot open to revision and the case *Visvanathan Chetti* v. *Ramanathan Chetti* (1) is relied upon. For the petitioners the case of *Lala Brij Narain* v. *Kunwar*

(1) 24 M. 646.

Tejbal Bikram Bahadur (2) is cited, and I think the latter case is the one which must govern the decision of this case, as the facts of the latter case are very similar to the present. The fact that the petitioners have appealed against the order of the District Munsif does not, I think, affect the case, if the order of the District Munsif was without jurisdiction (as I think it must be held to be), and there is no appeal. It is difficult to see how there can be an appeal on the facts of the case.

The original decree of the District Munsif was appealed against in 1910 and that appeal has been disposed of. There cannot be another appeal against the same decree and there is no appeal under Order XLIII, rule 1, against the order of amendment.

Following the decision in *Lala Brij Narain* v. *Kunwar Tejbal Bikram Bahadur* (2), I set aside the decision of the District Munsif and dismiss the petition, Interlocutory Application No. 833 of 1913, with costs. The respondents will pay the petitioners their costs of this petition.

Petition allowed.

(2) 6 Ind. Cas. 669; 32 A. 295; 14 C. W. N. 667 (P. C.); 7 A. L. J. 507; 11 C. L. J. 560; 12 Bom. L. R. 444; 8 M. L. T. 57; 20 M. L. J. 587; (1910) M. W. N. 392; 37 I. A. 70.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 39 OF 1914.

March 16, 1915.

Present:—Mr. Justice Chamier.

Musammat FATIMA BIBI—PLAINTIFF—APPLICANT

versus

Musammat HAMIDA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41—Decree for arrears of rent against joint tenants, realized from one tenant only—Tenants in possession of separate fields in joint khata—*Suit for contribution, whether maintainable.*

Where a decree for arrears of rent against several tenants occupying separate fields in one and the same *khata* has been realized from one of them, a suit for contribution as against others, at the instance of one who had paid the decree is barred by Article 41 of the Provincial Small Cause Courts Act. [p. 588, col. 1.]

Civil revision against an order of Judge of Small Cause Court, Allahabad, dated the 27th of November 1913.

FACTS.—Parties to the suit are tenants in one *khata* paying rent to the *zemindar* Sher Ali. There is no regular partition of fields, but for the sake of convenience parties are in possession of separate fields in the same *khata*. Sher Ali, *zemindar*, obtained a joint decree for arrears of rent against both plaintiff and defendants and realized the whole rent due under the decree from plaintiff only. The present suit was instituted by the plaintiff in the Court of Small Causes for contribution in respect of a payment made by her of rent due from the defendants. The defence among others was that the suit is barred by Article 41, Schedule II, of the Provincial Small Cause Courts Act. The lower Court returned the plaint to the plaintiff for presentation to the proper Court.

The plaintiff applied in revision.

Mr. *Rahmat Ullah*, for the Applicant:—The whole question depends upon the interpretation of the term "joint property" in Article 41, Schedule II, of the Provincial Small Cause Courts Act. The mere fact that the *khata* is joint does not make the parties joint tenants, as they are in the enjoyment of separate fields and pay separately their quota of rent to *zemindars*.

He relied on *Srinivasa* v. *Sivokolundu* (1).

The case in *Thakur Jawahir Singh* v. *Jai Karan Singh* (2), relied on by the lower Court, does not apply as the parties were admittedly joint tenants.

Mr. *Baleshri Prasad* (for Mr. *Lakshmi Narayan*), for the Opposite Party:—The case in *Srinivasa* v. *Sivakolundu* (1), cited for the applicant, is distinguishable from the present case. In that case the land assessment of which was paid by the plaintiff was in the exclusive enjoyment of defendant. In the present case there is no partition of holding. It may be that for the sake of convenience parties have put themselves in the enjoyment of separate fields. Further, the liabilities of the parties are joint.

The case of *Thakur Jawahir Singh* v. *Thakur Jai Karan Singh* (2) is on all fours with the present case.

Mr. *Rahmat Ullah*, in reply:—The parties may be jointly liable to the *zemindar* who is no party to this case, but

(1) 12 M. 349.
(2) 4 Ind. Cas. 59.

with regard to each other, their position cannot be said to be joint. The property is not joint in the present case, consequently Article 41 cannot apply.

JUDGMENT.—The parties to this suit are tenants of several fields included in one and the same *khata* and they pay a lump sum as rent to the *zemindar* for all the fields. The rent having been realized from the plaintiff alone, she has sued the rest of the tenants for contribution. The plaint has been returned by the Judge of the Small Cause Court, on the ground that cognizance of the suit is barred by Article 41 of the second Schedule to the Provincial Small Cause Courts Act, as the suit is a suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer. It appears that the parties are all related to each other being descendants of the same person, and that they have for convenience' sake allotted to each party a separate field or fields. It is contended that the allotment of fields shows that the property is no longer joint property. I cannot accept this contention. Certainly as regards the *zemindar* all the parties to this suit are jointly liable for the rent. There has been no division of the land between them. I cannot hold that the property has ceased to be joint property because for the sake of convenience each party cultivates separate fields. It appears that each party is liable for his share of the rent without regard to the actual area of the field. I hold that the Court below was right in deciding that the cognizance of this suit is barred by Article 41. This application is dismissed with costs.

Application dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 41 OF 1913.

December 23, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

LINGANGOWDA GOVINDGOWDA—DEFENDANT—APPELLANT

versus

TULSAWA MARIGOWDA—PLAINTIFF—RESPONDENT.

Hindu Law—Succession—Mitakshara—*Grandmother, whether includes step-grandmother—Sister, preference of, to step-grandmother.*

Under the *Mitakshara* system of Hindu Law a grandmother does not include step-grandmother and, therefore, a sister is entitled to succeed in preference to the paternal step-grandmother.

Second appeal from an order passed by the District Judge of Dharwar, in Appeal No. 117 of 1912, reversing the decree passed by, and remanding the suit to, the Additional Subordinate Judge at Gadag, in Civil Suit No. 402 of 1910.

Mr. *Setlur* (with him Mr. *Nilkanth Atmaram*), for the Appellant.

Mr. *N. V. Gokhale*, for the Respondent.

JUDGMENT.—In this case we are of opinion that the judgment of the District Judge must be affirmed. If we were to accede to the argument urged on behalf of the appellant, the extraordinary result would follow, as has been pointed out by the learned District Judge, that since a sister has precedence over a step-mother, if a step-grandmother had precedence over the sister, she would have precedence over the step-mother, though she herself is more remote. No authority has been cited in support of the argument which has been advanced before us. References have been made only to certain *dicta* in a judgment of Mr. Justice Ranade in *Vithalrao* v. *Ramrao* (1), in which an entirely different point arose, and it is by no means clear that those *dicta* would lead to the conclusion that the grandmother, who has a special position assigned to her in the *Mitakshara*, includes what is called a step-grandmother. We affirm the order of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) 2 Bom. L. R. 139; 24 B. 317.

BOMBAY HIGH COURT.

FIRST CIVIL APPEALS NOS. 293 OF 1912, 271 OF 1913 AND 26, 50, AND 67 OF 1914.

February 2, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

IN F. A. NO. 293 OF 1912

THE MUNICIPAL COMMITTEE OF NASIK —APPELLANT

versus

THE COLLECTOR OF NASIK—RESPONDENT.

IN F. A. NO. 271 OF 1913

AMIRUDDIN MAHOMED HUSAIN—APPELLANTS

versus

MAHOMED SAYAD MAHOMED ALI—RESPONDENT.

IN F. A. NO. 26 OF 1914

EKOBA GANASHET VANI—APPELLANT

versus

SARAF ALLI MAHMADALLI—RESPONDENT.

IN F. A. NO. 50 OF 1914

MAHMAD HUSSEIN MAHMAD ALLI—APPELLANT

versus

MARYAMBIBI AYAL SAMSUDDIN—RESPONDENT.

IN F. A. NO. 67 OF 1914

GULAB CHAND RAUTMAL—APPELLANT

versus

BALIRAM NARAYAN—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2, 97, O. XX—Preliminary decree, nature of--Finding whether a party is or is not an agriculturist, if preliminary decree—Appeal, maintainability of—Decree, form of—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13.

An order that a Court will proceed to hear a suit on the merits is not an order which should be immediately followed by a decree. [p. 590, col. 1.]

The finding that a party is or is not an agriculturist is not a judgment such as is intended by Order XX of the Civil Procedure Code and therefore not the proper basis for a decree; and a decree drawn upon the basis of such a finding alone and specifying such a conclusion alone, is not a legal decree at all and cannot be the subject of an appeal. [p. 591, col. 1.]

But where such a finding necessarily involves a direction that an account be taken between the parties in the manner provided by section 13 of the Dekkhan Agriculturists' Relief Act, it amounts to a preliminary decree and is appealable. [p. 591, col. 1.]

The form of decree to be passed in such cases pointed out. [p. 591, col 2.].

IN NO. 293 OF 1914.

First appeal from the decision of the Assistant Judge at Nasik, in Suit No. 93 of 1912.

IN NO. 271 OF 1913.

First appeal from the decision of the First Class Subordinate Judge at Thana, in Suit No. 107 of 19 0.

IN NO. 2; OF 1914.

First appeal from the decision of the Additional First Class Subordinate Judge at Dhulia, in Suit No. 253 of 1912.

IN NO. 50 OF 1914.

First appeal from the decision of the First Class Subordinate Judge at Thana, in Suit No. 107 of 1910.

IN NO. 67 OF 1914.

First appeal from the decision of the Additional First Class Subordinate Judge at Dhulia, in Civil Suit No. 357 of 1912.

IN APPEAL NO. 293 OF 912.

Mr. *D. R. Patwardhan*, for the Appellant.

Mr. *S. S. Patkar* (Government Pleader), for the Respondent.

IN APPEAL NO. 271 OF 1913.

Mr. *S. S. Patkar*, for the Appellants.

Mr. *V. B. Virkar*, for the Respondent.

IN APPEAL NO. 26 OF 1914.

Mr. *M. V. Bhat*, for the Appellant.

Mr. *D. G. Dalvi*, for the Respondent No. 1,

IN APPEAL NO. 50 OF 1914.

Mr. *V. B. Virkar*, for the Appellant.

Mr. *S. S. Patkar*, for Respondents Nos. 2 to 6.

IN APPEAL NO. 67 OF 1914.

Mr. *G. S. Rao*, for the Appellants.

Mr. *P. B. Shingne*, for the Respondents.

JUDGMENT.

HEATON, J.—We are dealing with five appeals:—First Appeal No. 50 of 1914, First Appeal No. 271 of 1913, First Appeal No. 67 of 1914, First Appeal No. 26 of 1914 and First Appeal No. 293 of 1912. They all raise the same point and we have now to decide whether a finding on the issue, "Is the plaintiff an agriculturist" can legally form the basis of a preliminary decree and, therefore, be the subject of an appeal. The subject of preliminary decrees in general is discussed in the referring judgments in the case of *Chanmalsvami* v. *Gangadharappa* (1), and we have the decision of the Full Bench in that case.

(1) 26 Ind. Cas. 885; 16 Bom. L. R. 954.

There is no doubt now that the words "the rights of the parties with regard to all or any of the matters in controversy in the suit" which occur in the definition of "decree", have not their widest possible meaning: they have a meaning restricted in some way or another. No one, for example, asserts that they include the right to ask a particular witness a particular question or the right to put in evidence a particular document; and it is now decided by a Full Bench of this Court that they do not include the right to proceed with a suit in a particular Court or after a particular time.

How then are we to find out how the meaning of the words is restricted? To me it seems that the correct course is to ascertain their meaning from the provisions of the Code in which the occur. The words "decree" and "order" are so defined as to include all the orders a Court makes. We have some clue to what an order is in the enumeration of appealable orders given in Order XLIII of the Code. They certainly seem to include generally an order by the Court that it will or will not hear a suit on the merits, and this general intention is not seriously disturbed by the provision that an order rejecting a plaint is a decree or by the fact that the dismissal of a suit on a preliminary point is a decree. Generally speaking, therefore, I infer that an order that a Court will proceed to hear a suit on the merits is not an order which should be immediately followed by a decree. And the decision of the Full Bench, so far as it goes, supports this conclusion.

A decision that a party is or is not an agriculturist is something more than a decision to go on with a suit, for it determines also the law that the Court will apply: whether the Dekkhan Agriculturists' Relief Act or the ordinary law. That does not seem to make any difference in principle for the principle, so far as I can understand it, is that the progress of a suit is not to be interrupted by an appeal until there has been a decision, either partial or entire, on the merits.

This is, I think, plainly to be inferred from the provisions of the Code relating to the trial of suits. These provisions are discussed by Hayward, J., in his referring judgment in the Full Bench case. It is unnecessary here to repeat the discussion. I will only summarise it by saying that the Code intends the Court to hear and decide that which the parties come to Court to have decided then to pronounce judgment and then to make a decree. As is pointed out by Beaman, J., in his referring judgment, the parties come to Court to get decided some claim to property or to money or to an easement or the like. They do not come to Court for the purpose of having it decided whether one or another of them is an agriculturist. That is an incidential or accidental matter not intimately related to the claim itself, but related to the procedure the Court must follow and the law it must apply.

This conclusion that the Court before pronouncing judgment and making a decree must determine the real claim in whole or part, is very strongly supported by the provisions of rule 3 of Order XV of the Code. This rule covers the case of preliminary issues and provides that the findings on some only of the issues conclude the suit if those findings are enough for the decision of the suit: if not, the suit must proceed. To my mind, having regard to the provisions of Order XX relating to judgment and decree, this means that if the suit is to proceed, there shall not be a true judgment and consequently not a decree at that stage. There may be a pronouncement of the Court's finding so far as it goes, but this is not a judgment of the kind which must be followd by a decree.

On purely general grounds I arrive at the same conclusion. If a finding on a preliminary issue can properly be the basis of a decree, then each preliminary issue could lawfully be tried separately and each such trial could be followed by an appeal. There might thus be two or three or more preliminary trials and appeals before the trial of the real claim was reached. I do not believe the Legislature intended to enact so vicious a law. How vicious, is plainly indicated by the observations of the Privy Council quoted in the referring judgment of Hayward, J.

Again, we have the assistance of the Code in discovering what, within its intention, are preliminary decrees. There is an enumeration of such decrees in Orders XX and XXXIV. Not necessarily a complete,

but a very suggestive enumeration; suggestive as showing that a preliminary decree is not to be drawn up until the real claim has been investigated and in part decided.

My conclusion, therefore, is that in the cases before us except First Appeal No. 293 of 1912, the finding that a party is or is not an agriculturist is not a judgment such as is intended by Order XX of the Code and is not a proper basis for a decree: and that a decree drawn upon the basis of such a finding alone and specifying such a conclusion alone, is not a legal decree at all and cannot be the subject of an appeal.

It follows from this that in First Appeals Nos. 26 of 1914, 50 of 1914, 67 of 1914 and 271 of 1913, we find that no appeal lies and the order of the Court will be that these cases be remanded to be tried according to law; costs to be costs in the suit.

In Appeal No. 271, as no appeal lies, there cannot be any hearing of the cross-objections. The costs of these like the costs in the appeal will be costs in the suit.

The question which arises in Appeal No. 293 of 1912 is different. It has been determined in that suit that the plaintiff is an agriculturist. Though it seems to me that the decree which has been drawn up is not in proper form a preliminary decree, yet in substance it may be taken to be a preliminary decree directing that an account be taken between the parties in the manner provided by section 13 of the Dekhan Agriculturists' Relief Act. If that were in fact the form of the decree there could not, I think, be any real doubt that it was a true preliminary decree and that an appeal would lie. The only doubt that occurred to my mind is this, that, owing to the understanding of the Judge of the law as it then stood, he never applied his mind (of course this was no fault of his) to the question whether he should or should not at that stage draw up a preliminary decree. But seeing that this appeal is now before us, and that a true preliminary decree could have been drawn up, it seems to me far better in the interests of justice to assume that the decree is defective only in form and not in substance, to hold that an appeal does lie and to determine the appeal on the merits. To do otherwise would lead to a remand and this matter which is before us and which the parties are ready to argue, would be delayed for an indefinite time. I wish particularly, however, to add this: Judges will now come to understand the view of the law which we have here set out, which is that in order that the preliminary decrees in these cases may be in proper form, they must be in the form of decree for taking an account as provided by rule 16 of Order XX of the Code of Civil Procedure. But whether the Judge will make such a preliminary decree immediately on finding that a party is an agriculturist is a matter which lies within the Judge's discretion. Rule 16 no doubt requires that a preliminary decree is to be made where an account has to be taken; but as will appear from rule 17 the Court may, if it is so minded, determine various matters which go to help the taking of the account before it makes this preliminary decree. The Court may, for example, (taking the case before us) determine the amount of the principal; the amount that is to be taken as the annual profits or rent of the house; and the rate of interest that it will allow as provided by section 71 (*a*) of the Dekkhan Agriculturists' Relief Act. It is open to the Court, if it is so minded, to determine such matters before making a preliminary decree under rule 16 of Order XX. That is all that I wish to say in this matter. Appeal No. 293 of 1912 will be set down for hearing on its merits.

SHAH, J.—The question that arises in these appeals is whether the decision that a party is or is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, when formally expressed, is a preliminary decree within the meaning of section 2 of the Code of Civil Procedure. Apparently, prior to the decision of the Full Bench in *Chanmalswami* v. *Gangadharappa* (1), it was accepted that such a finding, when formally expressed, would be a preliminary decree; it seems to me that after the Full Bench ruling the view requires to be reconsidered.

According to the definition a formal expression of an adjudication, which

conclusively determines the rights of the parties with regard to all or any of the matters in controversy, is a decree, which may be preliminary or final. Reading the definition in the light of the other provisions of the Code as to preliminary decrees, and taking the scheme of the Code with regard to the disposal of the suits, it seems to me that the word 'matter' in the definition means the actual subject-matter of the suit with reference to which some relief is soughts, and the word 'rights' means substantive rights of the parties, which directly affect the relief to be granted or which, in the words of the definition, relate to all or any of the matters in controversy. The explanation to the definition shows that a partial or complete disposal of the suit is involved in a decree. This interpretation of the definition derives support from the ruling in *Chanmalswami's* case (1)

An adjudication which satisfies these conditions would form the basis of a decree, and may be preliminary or final according as it partially or completely disposes of the suit. It is not essential that an adjudication should be covered by any one of the specific cases of preliminary decree mentioned in Order XX of the Code, in order that it may form the basis of a preliminary decree. Those cases are illustrations of preliminary decrees and help us in determining the true meaning of the definition of the term 'decree.'

Having regard to the view I take of the definition, it seems to me that in all these cases it must be determined with reference to the pleadings whether the finding that a person is or is not an agriculturist can form the basis of a preliminary decree. No such finding by itself, in my opinion, can be the basis of a preliminary decree, unless it necessarily involves a conclusive determination of the rights of the parties with regard to the matter in controversy. To illustrate my meaning, I would take two cases: one in which the plaintiff sues for redemption of a mortgage contrary to the terms of the mortgage alleging that he is an agriculturist, and claims the benefit of the provisions of the Dekkhan Agriculturists' Relief Act, and the other in which the plaintiff sues for the redemption of a mortgage which is in form a sale, and which he seeks to prove to be a mortgage in virtue of the provisions of section 10A of the Dekkhan Agriculturists' Relief Act. If it be found that he is an agriculturist, in the former case he will be entitled to have the accounts taken under section 13 of the Dekkhan Agriculturists' Relief Act in supersession of the original contract between the parties: in the other case the finding by itself will not entitle him to such accounts, as he will have further to establish that the transaction is a mortgage and not a sale. According to my view, the finding in the former case may form substantially the basis of a preliminary decree, while in the latter it cannot. The ruling in *Krishnaji* v. *Maruti* (2), as I read it, seems to be quite consistent with this view.

It is common ground in First Appeals Nos. 271 of 1913 and 50 of 1914 that before the plaintiffs could be held entitled to have accounts taken under section 13 of the Dekkhan Agriculturists' Relief Act, there are other questions to be determined. It is clear, therefore, that there is no proper preliminary decree to appeal from. In Appeal No. 26 the finding that the plaintiff is not an agriculturist is either sufficient to dispose of the suits completely or insufficient to dispose of anything. The pleadings are not fully stated to us. But it is clear that in any case there is no proper *preliminary* decree to appeal from. In Appeal No. 67 of 1914 the finding that the defendants are not agriculturists does not dispose of any matter in suit, and affords no basis for a proper preliminary decree.

In Appeal No. 293 of 1914, it seems to me that there is a preliminary decree, which could be appealed from. Having regard to the pleadings it is clear that the finding necessarily involves the result that the accounts should be taken under section 13 of the Dekkhan Agriculturists' Relief Act despite the terms of the contract to the contrary, and that the original contract to the extent is superseded. It may be that in order to take the accounts the rate of interest and the amount of the principal will have to be determined hereafter. But that would not, in my opinion, affect the question whether the adjudication, when it is formally expressed, is a preliminary decree. In this

(2) 7 Ind. Cas. 966; 12 Bom. L. R. 762.

case I hold that substantially there is a preliminary decree, from which an appeal would lie. It is, however, necessary to point out that in such a case the decree should be in form a proper preliminary decree. As I have already stated, it is not the formal expression of a finding that a person is an agriculurist but of its necessary consequence that accounts should be taken under the Dekkhan Agriculturits' Relief Act in supersession of the contract between the parties that forms a preliminary decree. In a properly framed decree this result should appear clearly on the face of it, and should not be left to be inferred by the Appellate Court as in this case. It is, I think, open to the Court to draw up a proper decree directing accounts to be taken under the Dekkhan Agriculturists' Relief Act either before or after deciding all matters which are necessary for the actual taking of the accounts.

I concur, therefore, in the orders proposed by my learned brother in all the appeals.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 239 OF 1914.

January 19, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Piggott.

INDAR PAL AND ANOTHER—OBJECTORS—APPELLANTS

versus

THE IMPERIAL BANK—DECREE-HOLDER—RESPONDENTS.

Hindu Law—Debt—Decree against father—Liability of sons—Sons at first impleaded as parties to suit but claims against them subsequently withdrawn—Effect of such withdrawal on sons' liability—Res judicata.

Where a son is impleaded as a party to a suit brought upon a promissory note executed by his father, but subsequently the claim as against him was withdrawn and the decree is passed against the father alone, the creditor cannot be put in a worse position as regards the execution of his decree than he would have occupied if he had not impleaded the son. [p. 595, cols. 1 & 2.]

In execution of a simple money decree against a father, the decree-holder can put to sale the family property, and the sons are entitled to an opportunity of contesting it either on the grounds of non-existence of the debt or of immorality. [p. 594, col. 2.]

Shiam Lal v. *Ganeshi Lal*, 28 A. 288; A. W. N.(1906) 33; 3 A. L. J. 10; *Chhannu Tewari* v. *Dwarka Kuar*, 3 A. L. J. 433, A. W. N. (906) 137, followed.

Nanomi Babuasin v. *Modhun Mohan*, 13 C. 21; 13 I. A. 1, *Krishnasami Konan* v. *Ramasami Ayyar*, 22 M. 519; 9 M. L. J. 197, referred to.

First appeal from an order of the first Additional District Judge of Aligarh.

Dr. *Surendra Nath Sen*, for the Appellants.

Mr. *Durga Charan Banerji*, for the Respondents.

JUDGMENT.

TUDBALL, J.—The respondent in this appeal is the Official Liquidator of the Imperial Bank of Aligarh and this appeal arises out of execution proceedings taken under a decree obtained by the Bank, on 24th April 1910, against one Moti Lal, the father of the two appellants, on the basis of a pro-note executed by Moti Lal alone.

The sons were also impleaded as defendants to the suit but as they were not parties to the pro-note, the suit as against them was withdrawn.

The family to which Moti Lal belonged consisted of himself and the two sons and his brother and thus Moti Lal on partition would have been entitled to a 1/6th share. When the decree was obtained it was put into execution and the interest of Moti Lal, *i. e.*, 1/6th share in certain property was put to sale.

It was again put into execution as this did not satisfy the decree against Moti Lal and the decree-holder sought to put the remaining five-sixth share to sale. The brother, Babu Lal, and the two sons both filed objections. Those of Babu Lal were allowed and his share released.

The objections of the two sons were disallowed and hence the present appeal.

The ground of objection in the Court below, as entered in the petition filed jointly by the brother and sons, was merely that the attached property belonged to the objectors and not to the judgment-debtor and was, therefore, not liable to be sold The lower Court's judgment, however, shows that the case presented to it was :—

(1) That there had been a partition in July 1910, *i. e.*, just after the Bank's decree had been obtained, under which Moti Lal had separated, leaving his sons still joint

with his brother and, therefore, the attached property was not liable.

(2) That the liability of the sons' share was *res judicata*, because the Bank after making the sons parties to the suit withdrew it as against them.

The Court below held (1) that the alleged partition was one collusively and fraudulently made, if at all, to defeat the creditor and, therefore, could not rid the sons of their liability for the father's debt, quoting the ruling in *Krishnasami Konan* v. *Ramasami Ayyar* (1), and (2) that the rule of *res judicata* did not apply in the circumstances of the case.

In their memorandum of appeal the grounds taken are really only three in number. The first, fourth and fifth relate to the partition. The second and third relate to the question of *res judicata*. The sixth is a fresh plea that the debt is not of such a nature as to bind the sons.

At the first hearing of the appeal it was stated that the pleas as to the partition and *res judicata* would not be pressed, but at a subsequent hearing it was stated that the plea as to the legal effect of the partition would not be dropped. Nothing has been said on the sixth ground of appeal.

The plea mainly pressed before us is that the decree-holder, not having obtained a decree against the sons, is not entitled in law to execute his decree against the shares of the sons ; that if he wishes to make their shares liable he must bring a separate suit.

The other point taken is that Moti Lal having separated, the share of the sons is no longer liable for the father's debt and there is no sufficient evidence to show that the partition was a collusive or colourable transaction. In regard to the former the present case is very similar to the case of *Shiam Lal* v *Ganeshi Lal* (2). The facts there were that a Hindu father borrowed money on a promissory note which he alone executed. A suit was instituted against him and his son on the basis of the pro-note. It was dismissed as against the son on the ground that he was no party to the pro-note. It was decreed against the father.

In execution of the decree the family property was attached and sold. The son thereupon instituted a suit for a declaration that the decree could not be properly executed against his interest in the family property, in view of the fact that the suit had been dismissed against, him and for possession of his share. It was held by a Bench of this Court that he was not entitled to any such declaration as the dismissal of the suit left him in the same position as if he had not been impleaded, *i. e.*, it left him liable as a Hindu son to pay any debt of his father not shown to be tainted with immorality and as the question of immorality had not been raised his suit must fail. This ruling was followed by Banerji, J., in *Chhannu Tiwari* v. *Dwarka Kuar* (3 . *Prima facie* a decree obtained against *A* cannot be executed by the attachment and sale of *B*'s property, *i. e.*, if *B* objects. But the position of a son in a joint Hindu family is by reason of his pious duty to pay his father's debt not incurred for immoral purposes very different from that of an ordinary third party. In *Nanomi Babuasin* v. *Modhun Mohan* (4), their Lordships of the Privy Council say (at page 35): "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, *or against his creditors' remedies for their debts*, if not tainted with immorality." A creditor having obtained a decree against the father, therefore, is entitled to put to sale the family property, *i e.*, the Court can do that which the father himself would be empowered to do under the law. The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt, and there is nothing in law to prevent him from coming into Court in the execution department and preventing, if possible, on these two grounds the passing of his interests to the auction-purchaser. If the points are decided against him, the Court in execution can put the property to sale.

(1) 22 M. 519; 9 M. L. T. 197.
(2) 28 A. 288; A. W. N. (1906) 33; 3 A. L. J. 10.
(3) 3 A. L. J. 433; A. W. N. (1906) 137.
(4) 13 C. 21; 13 I. A. 1.

MONINDRA MOHAN ROY v. RAM KRISHNA SADHUKHAN.

No plea of immorality "or" non-existence of the debts has been pressed before us, nor indeed is there anything in the suit itself to raise even a suspicion as to the factum or nature of the debt.

In regard to the alleged partition between Moti Lal on the one side and his brother and sons on the other, I would point out that the plea was at first dropped and then revived and that I have no hesitation in holding that if any such partition was formally made, it was only a colourable transaction carried through with a view to defraud and defeat the Bank. The facts noted in the lower Court's judgment leave no doubt in my mind on this point. The appellants cannot be allowed to defeat the respondent in this manner. In this view it is unnecessary to decide the question whether, if a *bona fide* partition had taken place, the decree-holder would, in execution of his decree obtained against the father alone, be able to attach and sell the son's separate share or whether it would be necessary for him to bring a fresh suit, as held in *Krishnasami Konan* v. *Ramasami Ayyar* (1). I do not wish it to be considered that I agree with this ruling. There is a good deal perhaps to be said for the opposite view, but it is unnecessary to decide the point in the view I take of the facts. I would dismiss the appeal.

PIGGOTT, J.—I concur generally, though I should be disposed to insist more strongly than my learned colleague has done on the finding against the alleged partition. That being found against the appellants, the joint family property in the hands of the father and his sons remains liable, at any rate, to the extent of their total shares. If execution had been taken out in the first instance against the shares of the father and the sons, I do not see how the sons could have avoided execution except on proof of the non-existence of the debt or of its being tainted with immorality. The question is whether the creditors are put in a worse position in this particular case by reason of the fact that they brought their suit in the first instance against the father and sons jointly, or by reason of the fact that they took out execution in the first instance against what they described as the father's share in the joint family property. As to the first point, it seems to me that the creditors made a mistake in impleading the sons along with the father, but recognised that mistake in time and cannot be put in a worse position as regards the execution of their decree than they would have occupied if they had simply sued the father on his unsecured debt and obtained a money-decree against him as they actually did. With regard to the second point, I do not think it can be held that the decree-holders, in taking out execution against a certain specified share as the property of Moti Lal, thereby admitted that no other share in the same property was capable of attachment in execution of their decree. Their position admits of being stated thus:—"To the extent of a one-sixth share no one will deny that this property is liable to attachment and sale in execution of our decree. We, therefore, try, first of all, whether our decree cannot be satisfied by the sale of this share." Finding that the decree could not be so satisfied, they claimed to proceed against the rest of the joint family property. The sons cannot defeat this claim, except on grounds which could have been successfully pleaded if the share of the father and that of the sons had been jointly attached in the first instance. I concur in dismissing this appeal.

BY THE COURT:—The order of the Court, therefore, is that the appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1184 OF 1914.

February 8, 1915.

Present:—Mr. Justice Coxe and Mr. Justice Beachcroft.

MONINDRA MOHAN ROY MUKHOPADHYA—DEFENDANT—RESPONDENT—PETITIONER

versus

RAM KRISHNA SADHUKHAN—PLAINTIFF—APPELLANT—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 32 (5)—Suit against minor—Minor's age, proof of—Statement by minor's aunt as to date of birth in application to be appointed his guardian, if admissible in evidence—Relationship

MONINDRA MOHAN ROY v. RAM KRISHNA SADHUKHAN.

In a suit against a minor, a statement made by the minor's aunt in an application to be appointed his guardian, to the effect that he was born on a particular day is admissible in evidence under section 32, clause (5) of the Evidence Act, as it relates to the existence of relationship. [p. 596, col. 1.]

Ram Chandra Dutt v. *Jogeswar Narain Deo*, 20 C. 758, referred to.

Oriental Government Security Life Assurance Company Limited v. *Narasimha Chari*, 25 M. 183; 11 M. L. J. 379, referred to.

Application for review of the judgment of Mr. Justice Coxe and Mr. Justice Beachcroft, dated the 21st May 1914, in Second Appeal No. 868 of 1913, reported in 27 Ind. Cas. 30.

Babus *Samatul Chandra Dutta* and *Satis Chandra Mookerjee*, for the Petitioner.

Babu *Sarat Chandra Roy Choudhury*, for the Opposite Party.

JUDGMENT.

COXE, J.—The only question that arises in this review is whether a statement by the defendant's aunt, in an application to be appointed his guardian, to the effect that he was born on the 29th *Pous* 1296, is admissible under section 32, clause (5), of the Evidence Act. The District Judge, relying on the decision of *Dhanmull* v. *Ram Chunder Ghose* (1), held that the statement was admissible. In appeal we preferred to follow the decision in *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathuk* (2) and held that it was inadmissible. The defendant then obtained this Rule to show cause why the decision should not be reviewed and we have now heard both parties again on the point.

On re-consideration, I think that we are bound by authority to hold that the statement is admissible. The application of the minor's aunt has been put in. The second paragraph contains a statement that the defendant was born on the 29th *Pous* 1296, and the ninth recites that the applicant is the defendant's aunt. Speaking for myself I must say that I think it a great straining of simple English words to call the former statement a statement relating to the existence of any relationship. The only way in which the words can answer to this description is by taking them to imply that the relationship existed on the 29th *Pous* and did not exist on the 28th *Pous*, a mode of interpretation that seems to me very far fetched. But this interpretation of the section is certainly supported by authority. It was accepted in the case of *Ram Chandra Dutt* v. *Jogeswar Narain Deo* (3) and apparently was not questioned when that case was appealed: *Jogeswar Narain Deo* v. *Ramchandra Dutt* (4). It was also accepted in *Oriental Government Security Life Assurance Company Limited* v. *Narasimha Chari* (5). The decision of a single Judge in the case of *Bipin Behary Daw* v. *Sreedam Chunder Dey* (6), cannot weigh against these decisions. If, however, the case rested merely on judicial decisions, I should have some hesitation in treating the words of the section with what seems to me considerable violence, but the terms of illustration (*e*), which I regret that I overlooked when the appeal was first heard, indicate that the decisions have correctly interpreted the intentions of the Legislature. I think, therefore, that our former decision must be held to be wrong and that the appeal must be dismissed with costs.

BEACHCROFT, J.—I agree that this review must be allowed. At the first hearing the case of *Ram Chandra Dutt* v. *Jogeswar Narain Deo* (3) was not cited, nor was our attention drawn to illustration (*e*) of section 32 of the Evidence Act. Under that section a statement of a relevant fact by a deceased person is relevant if the statement relates to the existence of relationship. The line of thought which influenced me at the first hearing was that the statement of the date of birth in Nistarini's application for guardianship was not a statement relating to the existence of relationship. But that statement must be read with the statement in paragraph 9 of the application, and that the two statements when read together are admissible to prove the defendant's age is shown by illustration (*e*) of section 32.

Petition allowed.

(1) 24 C. 265; 1 C. W. N. 270.
(2) 17 C. 849.
(3) 20 C. 758.
(4) 23 C. 670; 23 I. A. 37.
(5) 25 M. 183; 11 M. L. J. 379.
(6) 13 C. 42.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 240 OF 1914.
March 9, 1915.
Present:—Mr. Justice Heaton and Mr. Justice Shah.
DAYABHAI RAGHUNATHDAS—APPLICANT—APPELLANT
versus
BAI PARVATI AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 25—Ward leaving or removed from guardian's custody—Application under s. 25—Certificated guardian, whether necessary.

Where a ward leaves or is removed from the custody of a guardian of his person, it is open to an aggrieved party to make an application to the Court under section 25 of the Guardians and Wards Act. In such a case it is not essential that there should be a certificated guardian before an application under section 25 can be entertained by the Court.

First appeal from the decision of the District Judge of Surat in Miscellaneous Application No. 85 of 1914.

Messrs. *T. R. Desai*, *B. G. Rao* and *M. D. Daru*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondents.

JUDGMENT.—This is an appeal under the Guardians and Wards Act. It arises out of an application made by the appellant to the District Court of Surat under section 25 of the Guardians and Wards Act for the custody of his minor daughter, Bai Mani.

The lower Court has rejected this application on the ground that unless the appellant takes steps to be appointed a guardian of the minor, no application under section 25 could be entertained by that Court.

The correctness of this view has been questioned before us in this appeal. A 'guardian,' as defined by the Act, means a person having the care of the person of a minor or of his property, or of both his person and property. The appellant is the father of the minor and claims to be her natural guardian. Section 25 refers to the custody of a guardian and not of a guardian appointed under the Act. This distinction between a guardian and a guardian appointed under the Act is to be noticed throughout the Act. As an illustration we may refer to section 26 of the Act, where provision is made with reference to a guardian of the person appointed or declared by the Court.

It seems that it is open to an aggrieved party to make an application to the Court under section 25 where the ward leaves or is removed from the custody of a guardian of his person. It is not essential that there should be a certificated guardian before an application under section 25 could be entertained by the Court. We do not see anything either in the scheme of the Act or in the position of section 25 in Chapter III, which relates to duties, rights and liabilities of a guardian, which can be said to be in conflict with this view; on the contrary, it appears that the scheme of the Act supports it.

We say nothing as to the merits of the application. It was suggested on behalf of the respondents that the application may be disposed of on the merits here. But the lower Court has decided the application on a preliminary ground and it would not be right to say anything as to the merits at this stage. This appeal is decided only on the allegations made in the petition, which contains an averment that the applicant is a guardian of the minor as defined by the Act and that the ward is removed from his custody.

It follows, therefore, that the order of the lower Court must be set aside and the application sent back to that Court for disposal according to law.

Costs to be costs in the application.

Order set aside.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 187 OF 1915.
February 23, 1915.
Present:—Sir George Knox, Kt., Judge.
DODRAJ AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat NATHO—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 6—Objection to finding not filed within time allowed, effect of—Appellate Court, power of, to go behind finding.

Order XLI, rule 6, of the Civil Procedure Code, 1908, provides that after the expiration of the period fixed by the Appellate Court to file objections to the finding returned by the Court of first instance, it should proceed to determine the appeal. The effect of not presenting a memorandum of objections within the period fixed is not that the finding becomes final: the Appellate Court can still go behind and upset it. [p. 598, cols. 1 & 2.]

RAGHUNATH SINGH v. PREYA SAKHI DEBI.

Second appeal from the decision of the District Judge of Shahjahanpur, dated the 29th September 1915.

Mr. *Lachmi Narain*, for the Appellants.

JUDGMENT.—The lower Appellate Court has found upon evidence that *Musammat* Natho was the *dharona* wife of Chet Ram and his heir. This finding is attacked in appeal. The contention is that the lower Appellate Court has erred in law in setting aside a finding returned by a lower Court when no objections had been taken in respect of it.

The lower Appellate Court had sent back to the Court of first instance this issue:—Is the plaintiff the widow of Chet Ram? If it is found that her statement is true, there should also be a finding whether the *dharona* form is a valid form of marriage?

The Court of first instance found that *Musammat* Natho was not the widow of Chet Ram. It does not appear why it went on to consider the second of the issues returned to it, but it did, and it found that *dharona* was a prevalent form of marriage among Hindus.

A definite time was given for taking objections to these findings—no objection was taken within the time given.

The position before the lower Appellate Court then was this. Two findings had been returned by the Court of first instance, one finding under authority given, the second finding without authority given; but both findings only entitled to such weight as attaches to findings by a Court of first instance upon any issue before it. No finding of a Court of first instance on a question of fact is a finding of fact behind which the lower Appellate Court cannot go. Order XLI, rule 6, never says that after the expiration of the period fixed for presenting a memorandum of objections, the finding becomes final.

It is easily conceived that a Court of first instance might return findings preposterous on the face of them and that for some cause, negligence or otherwise, no objection is taken within the period fixed; is the lower Appellate Court, which is a final Court in questions of fact, to be bound by a finding on the face of it preposterous? All that this Order XLI, rule 6, says is that after the expiration of the period fixed the Appellate Court should proceed to determine the appeal. The Appellate Court is responsible for its finding and cannot shift the responsibility upon any one else. The present case is very like the case I have just mentioned. The Court found *Musammat* Natho was not a *dharona* wife, but it also found that *dharona* was a prevalent form of marriage.

The lower Appellate Court in proceeding to determine the appeal found that the evidence in favour of *Musammat* Natho being a *dharona* wife was far more preferable than the evidence on the other side. This being the case, I hold that the lower Appellate Court would have failed in its duty and would have arrived at a wrong conclusion of fact on evidence, if it had blindly followed the Court of first instance.

The lower Appellate Court has arrived at its finding of fact upon evidence and in second appeal I have no right to go behind it. I dismiss the appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 784 OF 1914.

November 18, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Sharfuddin.

RAGHUNATH SINGH MOHOPATRA AND OTHERS—DEFENDANTS—RESPONDENTS—PETITIONERS

versus

Srimati PREYA SAKHI DEBI—PLAINTIFF—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), O. XLI, r. 10—Appeal, security for costs of—Suit not vexatious—Appellant having no money, whether bound to give security.

Where it cannot be said that the suit is merely vexatious, the mere fact that an appellant has no money of his own but has got relations who have money to pay, is no sufficient ground for demanding security for the costs of the appeal.

Application in Second Appeal No. 3482 of 1913 against the decree of the Sub-Judge of Bankura, passed in Title Appeal No. 142 of 1912, dated the 16th July 1913, reversing that of the Munsif, 3rd Court, Bankura, passed in Title Suit No. 272 of 1911, dated the 30th March 1912.

Babu *Bepin Chandra Ghose*, for the Petitioners.

Babu *Rishendra N. Sircar*, for the Opposite Party.

JUDGMENT.—In this case the only ground which is alleged for the application is that the appellant has no money of her own. That is, as it has often been held, in itself no sufficient ground for demanding security for costs. It cannot be said that the suit is merely vexatious in its nature, as one Court has held that the appellant is entitled to relief and the fact that her husband and her father-in-law may, as is alleged, have money to pay, is not to the point, as they are not called upon to pay costs which may be due by the appellant.

The Rule must, therefore, be discharged with costs, which we fix at one gold *mohur*.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2856 OF 1913.

January 15, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

RAGHAVA CHARLU—DEFENDANT—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF SOUTH CANARA, AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mulgeni *lease—Transfer of Property Act (IV of* 1882), *applicability of—Registration, whether necessary.*

The Transfer of Property Act does not apply to *mulgeni* leases. Where the defendant has been asserting for 40 years that he has *mulgeni* rights over a land, the only inference is that the defendant had such rights. No registered document is necessary to prove such a lease.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 323 of 1912, preferred against that of the Court of the District Munsif of Karkal, in Original Suit No. 214 of 1911.

Mr. *B. Sitarama Row*, for the Appellant.

Messrs. *Nugent Grant* and *K. P. Madhava Row*, for the Respondents.

JUDGMENT.—The Subordinate Judge has found on a consideration of Exhibits A, B and C that the defendant was a *chalgeni* tenant. In so far as this is a finding of fact it is binding on us. But the assumption of the Subordinate Judge that after Exhibit C there could not have been any *mulgeni* tenancy because a registered document would be necessary to prove it, is erroneous in law. A *mulgeni* lease may have been granted subsequently to Exhibit C without a registered document. The Transfer of Property Act does not apply.

Except the documents A, B and C, there is no other evidence in support of the finding that the defendant was holding the land on *chalgeni* lease. On the other hand, there is the fact that the defendant has for 40 years been asserting that he has *mulgeni* rights over the property. The only inference that was open to the lower Court was, therefore, that the defendant had *mulgeni* rights over the land. *Kitu Hegadthi* v. *Chinnamma Shettathi* (1) and foot-note: Letters Patent Appeal No. 59 of 1910 and Second Appeal No. 1952 of 1913.

The Subordinate Judge's finding is supported before us on the ground that the defendant alleged that there was a *mulgeni* chit; and that the Subordinate Judge has found as a matter of fact that there was no *mulgeni* chit till 1864 and that if there was a chit after 1864, it ought to have been registered. The defendant, however, did not assert the chit as his only title. He said no doubt that there was a chit which was burnt. But his real case was, as fully set out in paragraph 4 of the written statement and as found by the District Munsif, that he had been asserting ever since he has been in possession that he is a *mulgeni* tenant. The mere fact that he alleged that there was a *mulgeni* chit which was burnt cannot entitle the plaintiff to a decree.

The Subordinate Judge's decree will be reversed and the District Munsif's decree restored with costs throughout.

Decree reversed.

(1) 30 M. 538.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL NO. 2916 OF 1914.

February 5, 1915.

Present:—Mr. Justice Shadi Lal.

KHIALI RAM—OBJECTOR—APPELLANT

versus

THE OFFICIAL LIQUIDATORS OF THE PEOPLES' BANK OF INDIA, LTD., CLAIMANTS—RESPONDENTS.

Companies Act (VI of 1882), s. 169—Companies Act (VII of 1913), s. 284—Liquidation commenced before new Act came into force—Course of appeal—Limitation—Extension of time.

Where the liquidation of a Limited Company began before the new Act VII of 1913 came into force, all the proceedings in the winding up including the course of appeal are governed by the old Law as is provided by section 284 of the said Act VII of 1913. Therefore an appeal is barred by time if notice of appeal is not served on respondent within three weeks according to the provisions of section 169 of the old Act VI of 1882.

But if an appeal be presented within the prescribed period, the Appellate Court can extend the time if required for service of the notice.

Miscellaneous first appeal from the order of the Additional Judge, Lahore, dated the 23rd November 1914, holding that his Court had jurisdiction to hear the case and passing *ex parte* decree.

Lala *Hukum Chand*, for the Appellant.

Messrs. *Herbert* and *Madan Gopal*, for the Respondents.

JUDGMENT.—This appeal and the connected Appeals Nos. 2917, 2918 and 2919 are barred under the provisions of section 169 of the Indian Companies Act VI of 1882, because the notices of the appeals were not served upon the respondents, the Official Liquidators, within the three weeks provided by that section. It is clear that, as the liquidation began before the Indian Companies Act VII of 1913 came into force, all the proceedings in the winding up are governed by the old law (*vide* section 284, Act VII of 1913).

The order under appeal was passed on the 23rd November 1914, and the appeals in this Court were instituted on the 15th December 1914, more than three weeks after the date of the order appealed from. It is obvious that the notice of the appeal could not possibly be served within the time allowed by law. If the appellants had instituted their appeals within three weeks, I would have been prepared to consider the question whether the time for service of notice should be extended, but as the facts stand at present, they have absolutely no right to ask this Court to extend the time. I accordingly dismiss the appeal, but in the circumstances of the case I direct that the parties pay their own costs in this Court.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 307 OF 1914.

February 8, 1915.

Present:—Justice Sir P. C. Banerji, KT.

MOHAMMAD HUSAIN—PLAINTIFF—APPELLANT

versus

MOHAMMADI BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 131, 120—Suit to establish right to recover rent—Periodically recurring right.

A right to recover rent is a periodically recurring right and a suit to establish such a right is governed by Article 131 of the Limitation Act, and not by Article 120. [p. 601, col. 1.]

Jagannath Pandit v. *Muthia Pillai*, 14 M. L. J. 477, referred to.

Second appeal from the decision of the Additional Subordinate Judge of Moradabad.

Mr. *Narmadeshwar Upadhyaya* (for Dr. S. N. *Sen*), for the Appellant.

Mr. *Rahmat Ullah*, for the Respondents.

JUDGMENT.—The parties to the suit out of which this appeal arises are near relatives. The plaintiff has brought this suit against the heirs of his brother, Ahmad Husain, for establishment of his right to recover rent for the site of the house occupied by the defendants at the rate of eight annas per mensem and for recovery of arrears of rent for nearly three years. Both the Courts below have dismissed the suit on the ground of limitation. They are of opinion that Article 120 of the first Schedule of the Limitation Act applies to the suit and bars the claim. That Article would be applicable if there is no other Article in the Schedule which would govern a claim of this description. It is contended on behalf of the appellant that the Article which is applicable to this suit is Article 131, which provides a limitation of twelve

years for a suit to establish a periodically recurring right to be computed from the date when the plaintiff had first been refused the enjoyment of that right. A right to recover rent is a recurring right and the present suit is one for establishment of the plaintiff's right to recover rent for the site of the house occupied by the defendants. It is true that in the plaint the prayer, as framed, is a prayer to assess rent, but that is in substance a prayer to establish the plaintiff's right to obtain rent at a particular rate. The claim is clearly one to establish a periodically recurring right and, therefore, the suit is governed by Article 131 and Article 120 is inapplicable. It was held by the Mardas High Court in *Jagannath Pandia* v. *Muthia Pillai* (1), that a right to establish a periodical right to recover rent is governed by Article 131. Of course, it will be open to the defendants to show that the plaintiff was refused the enjoyment of the right claimed by the defendants' predecessor-in-title at some time prior to twelve years preceding the date of the suit. If they can do so, the claim is beyond time, otherwise it would not be time-barred as the title of Ahmad Husain accrued only under the deed of gift executed in his favour by his father on July 30th, 1900, and this suit was filed on July 30th, 1912. However, the case has not been tried on the merits and these questions have not been determined. I allow the appeal, discharge the decrees of both the Courts below and remand the case to the Court of first instance with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the cause.

Appeal allowed: Case remanded.

(1) 14 M. L. J. 477.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 451 OF 1914.

February 19, 1915.

Present:—Mr. Justice Rafique.

JADUNANDAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEOBALAK—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Suit referred to arbitration—Joint application of both plaintiff and defendant to withdraw suit without obtaining permission to bring fresh suit—Second suit, maintainability of.

A suit for profits was dismissed on a joint application of the parties on the ground that the dispute between the parties had been referred to arbitration. The plaintiff did not ask the Court for permission to bring a fresh suit in case the arbitration fell through:

Held, that a second suit for profits for the same years was barred by the provisions of Order XXIII, rule 1 of the Civil Procedure Code. [p. 602, col. 2.]

Niaz Ahmad v. *Abdul Hamid*, 5 A. L. J. 278; A. W. N. (1908) 131; 30 A. 279, followed.

Juggobundo Chatterji v. *Watson & Co.*, (1865) Bourke, A. O. C. 162, referred to.

Second appeal from the decision of the District Judge of Cawnpore.

Mr. *Gulzari Lal*, for the Appellants.

Mr. *Kailas Nath Katju* (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit for the recovery of profits. The plaintiffs-appellants are co-sharers and the defendant-respondent is the *lambadar* in the village of Arjunpur. The plaintiffs sued for the recovery of profits from 1317 to 1319 *Fasli*. One of the pleas in defence was that the claim was barred under clause (3) of rule 1, Order XXIII. The learned Assistant Collector, in whose Court the suit was filed, disallowed this plea and disposed of the case on the merits. On appeal the learned District Judge held that the claim was barred under Order XXIII, rule 1, clause (3), and accordingly reversed the decree of the first Court. The plaintiffs have come up in appeal to this Court, and the only point raised in this appeal is whether their claim is barred under the order mentioned above. It appears that the plaintiffs had brought a similar suit in 1912 against the same defendant for the recovery of profits for the three years now in suit. During the pendency of the former suit, both parties filed a joint application to the Assistant

Collector asking for the dismissal of the suit, on the ground that the matters in dispute between them, both the claim for profits and other matters, had been referred to arbitration. The plaintiffs did not take the precaution of asking the Court then to allow them to bring a fresh suit in respect of the profits of 1317 to 1319 *Fasli* in case the arbitration fell through. The joint application of both parties was allowed and the suit was dismissed on the 20th of September 1912. The arbitrators mentioned by the parties for some reason or other declined to decide the dispute between them. On the 7th of April 1913, the suit out of which this appeal has arisen was instituted by the plaintiffs for recovery of profits for 1317 to 1319 *Fasli*. The cause of action alleged in the plaint of the present case is the same as that given in the plaint of the former case, namely, the dates on which the plaintiffs become entitled to recover the profits from the *lambardar*. It is true that the plaintiffs allege in their plaint that the arbitration has fallen through; but they do not state that the failure of the arbitration has given them a fresh cause of action. They, however, contended that their real cause of action accrued on the failure of the arbitrators to decide the disputes referred to them. The present suit is, therefore, based on a cause of action different from that alleged in the former suit. Moreover, it is said that as the defendant had joined in the application with the plaintiffs in asking the Court to dismiss the claim, Order, XXIII, rule 1, clause (3), does not apply. In support of this last contention they rely on the case of *Juggobundo Chatterjee* v. *Watson & Co.* (1). That case was decided under section 67 of Act VIII of 1859. One of the learned Judges in that case remarked:—"The section only applies when the plaintiff withdraws his suit without the consent of the defendants and then renews it without a cause and that it is intended to prevent his doing so *ad libitum*. The result of applying the section quoted to the present case is so startling as to show that the section does not contemplate such a case as this." The case relied upon by the plaintiffs-appellants no doubt supports their contention. But on the other hand there is a case of this Court, namely, that of *Niaz Ahmad* v. *Abdul Hamid* (2), which is in favour of the contention of the respondent that where a case was withdrawn by the plaintiff without obtaining any permission to bring a fresh suit, a subsequent suit on the same cause of action in respect of the same property is barred. It seems to me that the language of Order XXIII does not make any difference as to whether the application for withdrawal is made solely by the plaintiff or is made jointly by the plaintiff and the defendant. In the present case the defendant joining with the plaintiffs in asking the Court to dismiss the suit without any reservation would not bar the operation of the provisions of Order XXIII, Code of Civil Procedure. The contention that the present suit is based on a different cause of action is not borne out by the statement made in the plaint. It is distinctly told in the plaint that the cause of action accrued on certain dates, that is, dates on which the plaintiffs became entitled to claim their share of the profits from the defendant. In my judgment the decree of the lower Appellate Court is correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1865) Bourke, A. O. C. 162.

(2) 5 A. L. J. 278; A. W. N. (1908) 131; 30 A. 279.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 102 OF 1914.

February 8, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ANAND SARUP AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ASAD ALI—DEFENDANT—RESPONDENT.

Practice—Redemption suit—Mortgage not proved—Adverse possession—High Court, power of, to remit issue to find if plaintiff in possession himself or through others.

Where the lower Appellate Court has found in a redemption case that the mortgage is not proved, a Judge of the High Court is not entitled to remit an issue to enquire whether the mortgagor has been in possession either personally or through others within 12 years. [p. 603, col. 2.]

Letters Patent Appeal from the judgment of Sir Henry Richards, Kt., Chief Justice

and Justice Sir P. C. Banerji, Kt., reported in 27 Ind. Cas. 35.

Mr. *Gulzari Lal*, for the Appellants.
Mr. *Abdul Raoof*, for the Respondent.

JUDGMENT.—This is an appeal in a suit which has been repeatedly before this Court and has given rise to considerable differences of opinion. As was pointed out by Mr. Justice Tudball in the first instance, the trouble began with the framing of the plaint, and it is really doubtful whether a plaint such as this, seeking possession by redemption of an alleged mortgage against one set of defendants, and possession by ejectment of another set of defendants as mere trespassers, should have been allowed to come to trial. However, the actual point for decision is a narrow one. The respondent, *Syed* Asad Ali, is in possession of only a portion of the property originally in dispute with which we are now concerned. He has throughout put the plaintiffs to proof of their entire case. The plaintiffs said that the property in possession of *Syed* Asad Ali formed part of a larger property which had originally belonged to them and had been mortgaged with possession to another set of defendants. Their case was that *Syed* Asad Ali had entered into possession as a trespasser by ousting the persons whom the plaintiffs call their mortgagees. On the pleadings the plaintiffs were bound to prove that they had a subsisting title against the defendant, Asad Ali. The original finding of the Appellate Court was that the plaintiffs had proved title to the whole of the property in dispute, but had not proved the mortgage set up by them or that the defendants whom they call their mortgagees had ever been in possession as such mortgagees. When the case was brought in second appeal before a single Judge of this Court an issue was remitted, asking for a definite finding as to whether the plaintiffs themselves, or any person holding through or on behalf of the plaintiffs, had been in possession of this particular part of the property in dispute within twelve years prior to the institution of the suit. The remanded issue came before a Judge other than the Judge who originally disposed of the appeal. On a persual of the two judgments it would seem that the learned Judges were inclined to differ as to the facts of the case. The second Judge, however, felt himself unable to dissent from the finding of his predecessor against the existence or validity of the alleged mortgage. Accordingly he returned a finding couched in guarded language, to the effect that the persons whom the plaintiffs call their mortgagees had been in possession within limitation. The contention for the plaintiffs as appellants now before us is that this is a finding in their favour. Their case all along was that their possession within limitation had been through certain persons who were their mortgagees. There was no suggestion that these persons were in possession otherwise than as mortgagees of the plaintiffs. Practically, therefore, the finding that the possession of these so-called mortgagees was in reality the possession of the plaintiffs could only be arrived at by reversing the finding that these persons were not in possession as mortgagees of the plaintiffs. We think the view taken by the learned Chief Justice was right and that the plaintiffs have failed to prove their possession within limitation as against the defendant, *Syed* Asad Ali. One point in the case has, however, been overlooked in this Court. *Syed* Asad Ali is in possession of one half share only in the *parao* referred to in the judgment and decree of the lower Appellate Court. It was probably by an oversight that the learned District Judge, in the order by which he disposed of the appeal in his Court, directed that the decree of the first Court should be drawn up so as to make it clear that the *parao* was not included in the land covered by that decree. He should have said that one half share of the *parao* in possession of *Syed* Asad Ali was not so included. We must now order accordingly. Otherwise we dismiss this appeal. We make no order as to costs.

Appeal dismissed.

TIRUMALAI EACHAMBADI *v.* ROYADURGAM KRISHNASAMI.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 175 OF 1910.

January 15, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

TIRUMALAI EACHAMBADI THIRUVENGADACHARIAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

ROYADURGAM KRISHNASAMI THATHACHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Temple—Mirasi office—Worship, right of—Right to form Vedic goshti *before and behind—Interference by other sects—Rights in Conjeevaram temple.*

Only one *mantram* can be recited in a temple on all occasions in which the *puja* ceremony is performed and that by the *mirasdars*. Recital of a different *mantram* or *prabandham* during any ceremonial worship or by any *goshti* would be performance of the duties of the office of *mirasdars*. Any interference in the *puja* from its commencement with the ringing of the bells to its close with the distribution of the *theertham* and *prasadam*, is a violation of this *mirasi* right. [p. 608, col. 2; p. 609, col. 1.]

The different steps in the course of *puja* discussed. [p. 609, col. 1.]

There is nothing in law to prevent any sect worshipping the deity consistently with the equal rights of other worshippers, nor is there anything in law to prevent any worshipper from repeating any portion of the *prabandham* separately and as an act of personal devotion. The question whether any individual may repeat any particular *mantram* or portion of the *prabandham* is one not for the Civil Courts to decide. The right of any individual worshipper to worship the deity without interfering with others by the recital of any appropriate *mantrams* or *prabandhams* in a temple is very different from the right to form a *goshti* or congregation of his own sect and recite anything different from the *prabandhams* which are recited by the *mirasdars*. [p. 609, cols. 1 & 2.]

All sects are entitled to use the public streets for processions. [p. 609, col. 2.]

During a procession other sects than the *mirasdars* are not entitled to interfere with it and carry on a different worship. Recital of *prabandhams* and *mantrams* in front of the idol can only be intended as a worship of the idol. [p. 610, col. 1.]

In the Conjeevaram temple the *Vedic goshti* behind is composed of Vadagalai *mirasdars* and the Thengalais can only join as ordinary worshippers. The Tengalais form the *prabandham goshti* reciting their *mantrams* before the idol and the Vadagalais are entitled to join only as ordinary worshippers. [p. 610, col. 2.]

Appeal against the decree of the District Court of Chingleput, in Original Suit No. 10 of 1906.

Mr. *T. R. Ramachandra Iyer*, for the Appellants.

Mr. *T. Narasimma Iyengar*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs—Tengalais against the decree of the District Judge of Chingleput disallowing their claim to restrain the defendants—Vadagalais—from reciting their Vadagalai *mantrams* and *prabandhams* on certain occassions in the Varadarajaswami temple at Conjeevaram. The defendants—Vadagalais—have filed a memorandum of objections against the decree in so far as it restrains them from reciting their own *mantrams* and *prabandhams* at certain times and places.

The suit was brought by the plaintiffs—Tengalais—alleging that the only form of Adhyapaka worship in the temple of Sri Devaraja Swami at Chinna Conjeevaram and in all the shrines attached thereto, whenever the *prabandham i. e.*, the the Tamil Veda, may be recited in the shrines or in the processions of the deity, is the Tengalai form of worship, that is, by invoking the Tengalai saint at the commencement of the ceremonial by reciting *Sri Sailesa Daya Patram* which is followed by the recitation of the *prabandham* and concluded by the Tengalai Thiunamam in honour of the Tengalai saint invoked at the beginning of the ceremonial. They allege that the exclusive right of carrying on this Adhyapakam worship rests with the Tengalai Brahmins permanently residing at Conjeevaram and if any other Sri Vaishnava Brahmin, whether a Tengalai or a Vadagalai, wishes to recite these *prabandhams* either within the temple or in the street he can only join the Tengalai *mirasdars*, that is, residents of onjeevaram, by invoking the Tengalai saint and following the lead of the Tengalai *mirasdars*; he must form a member of the congregation of the Tengalai *mirasdars*, and the Vadagalais are not entitled to form a separate *goshti* or congregation.

The defendants, the Vadagalais, contend that the form of worship is that prescribed by the Sastras common to all Brahmins; that besides the Tamil *prabandham*, recitations from others sacred works like the Vedas are also made ,and any person who is qualified for that purpose has got every right to take part in the different kinds of recitations at times of worship: the Tengalai Adhyapakam *mirasdars* are only the servants of the temple who are bound to recite the *Nalayira praban-*

dham in consideration of the emoluments which they receive from the temple, and this does not interfere with the rights of an ordinary worshipper to carry on the worship in his own way. They (the Vadagalais) have accordingly the right to invoke their saint by reciting *Ramanuja Daya Patram* before the *prabandham* which is common to both the sects; and they allege that they have always been so reciting the *mantram* of *Ramanuja Daya Patram* as not to disturb the Tengalai Adhyapakam *mirasdars* while doing the service, without any interference by the Tengalais. They contend that they are entitled to form separate *goshtis* of their own for reciting *prabandham* in their own way and for invoking their own saint within the temple or outside it; and in order to avoid coming into conflict with the Tengalai *goshti* they have been reciting their *prabandham* during processions behind the idol which is calculated not to lower but to enhance the sanctity of the service. They also say that the suit is not cognizable by the Civil Courts. There were also other contentions raised in the Court below, which it is not necessary now to notice as they have not been pressed before us in appeal.

The District Judge decided that the suit is cognizable by the Civil Courts although the claim is in part of a religious nature. He found that the permanent Tengalai residents of Conjeevaram are exculsively entitled to conduct the Adhyapakam service in connection with the ceremonial worship of the idol in the suit temple, that is, at the time of the *puja* and when the idol is taken in procession within or outside the temple, and on such occasions the Vadagalais may, if they choose, join the Tengalais in the service Adhyapakam, and if they do so they must recite the same *mantram*, *i. e.*, the Tengalai *mantram*, and those portions of the *prabandham* which are recited by the Tengalais either in the temple or during the processions. He was of opinion that the Vadagalais may form a separate *goshti* and recite their own *mantrams* and *prabandhams* at other times than during the *puja* in the temple and even during the *puja* period they may do so in a different part of the temple so as not to interfere with the Tengalais while carrying on their Adhyapakam service. With regard to processions the Vadagalias are entitled to form a *goshti* behind the idol and before the *Vedic goshti* reciting their own *mantram* and *prabandham*, taking care that by doing so they do not disturb the Tengalai *prabandham goshti* in front of the deity. He accordingly passed a decree in the following terms :—

"This Court doth order and decree that the defendants.....Vadagalais, be restrained from reciting their own *mantrams* and *prabandhams* during the *puja* period in the shrines or other places of worship where *puja* is performed whether the service of Adhyapakam is going or not, that this injunction does not extend to other parts of the temple nor to other times than the *puja* period, and that with regard to processions the injunction be to restrain the Vadagalais from reciting their own *mantrams* and *prabandhams* by forming a separate *goshti* in front of the deity, and this Court doth further order and decree that the rest of the plaintiff's suit be, and the same hereby is, dismissed and that each party do bear its own costs."

In appeal it is contended by the Tengalais that the decree which restrains the Vadagalais from reciting their *mantrams* and *prabandhams* during the *puja* period is indefinite and calculated to lead to further disputes and that, therefore, it should be expressly stated in decree that the *puja* closes only with the distribution of the *theertham* and *prasadam*, as otherwise it might be said—and it was actually said by the Vadagalais in certain proceedings after this decree was passed—that the Vadagalais are entitled to recite their *mantram* and *prabandham* immediately the Tengalais closed their own, so as to make it a continuation of the worship. It is also contended that inside the temple at other times and places also, the Vadagalais must recite only the Tengalai *mantram* and repeat only that part of the *prabandham* which is being recited by the Tengalais.

The Vadagalais, on the other hand, contend that they should not be restrained from reciting their *prabandham* during the entire *puja* period, that as the Tengalais recite their *parbandham* only during a certain period of the *puja*, the Tengalais are not entitled to restrain the Vadagalais from reciting their *prabandham* before the Tengalais commence their *mantram* or after they

have finished the recitation of their *prabandham*.

With regard to processions the Tengalais contend that the *Vedic goshti* which follows the idol forms a part of the procession and allowing the Vadagalais to form a *goshti* and recite their *prabandhams* between the idol and the *Vedic goshti* would break up the procession. They also maintain that it would be a disturbance of the *Vedic goshti* and they, therefore, contend that the Vadagalais cannot form an independent *goshti* anywhere but must recite their *prabandham* only in conjunction with the Tengalais.

The documentary evidence adduced in this case has been fully discussed by the District Judge. The same evidence was also adduced in the suit which was finally decided by the judgment in *Krishnasami Tatacharyar* v. *Krishnamacharyar* (1), and the High Court's judgment sets out in detail the result of that documentary evidence. We propose, therefore, to make only a brief reference to it.

It appears to be admitted that the Adhyapakam service consists of *thodakam*, *mantram* and the Tamil *prabandhams*. The *thodakam* is the call to prayer. It was decided by the High Court in 1882 that a person should be appointed by both the Tengalais and the Vadagalais to recite the formula usually uttered on such occasions. No person has been appointed yet and the call to prayer has, therefore, fallen into disuse. The *mantram* uttered by the Tengalais is the *Sri Sailesa Daya Patram* which is in honour of Manavala Mahamuni, a Tengalai saint. The Vadagalais repeat the *mantram*, *Sri Ramanuja Daya Patram*, in honour of Vedantachariar, a Vadagalai saint. The Tamil *prabandhams* which follow the *mantram* are common to both the Tengalais and the Vadagalais.

The dispute between the parties is whether the Vadagalais are entitled to repeat the Vadagalai *mantram* on any occasion within the temple and whether they are bound to repeat the same verses in the *prabandhams* as the Tengalais or whether they may repeat any portion of the *prabandham* though it may happen to be different from that which is at that time being repeated by the Tengalais.

(1) 5 M. 313.

The dispute has been going on between the parties for a very long time.

The earliest record is Exhibit A of the year 1711. It purports to have been executed by a member of the leading Vadagalai family of Thathachariars, who were entitled to recite the *thodakam*, that they shall after that date repeat only the Tengalai *mantram* of *Sri Sailesa Daya Patram* "as has been done under existing *mamul* for a very long time," not only during the *utsavams* in all the 18 temples but also at all the ceremonies in the house of the temple servants like the *archakas*, *parichârakas swayampaki*, *modali* and *karanam*. Exhibit B is a similar agreement by certain others in 1770 that the Tengalai *mantram* alone will be recited in the temples and in the houses. In 1774 there was another agreement (Exhibit C) to the same effect. These three documents, therefore, show the existence of the disputes before 1800 and agreement between the parties that the Tengalai *mantram* alone should be recited in all the temples. In 1799 the matter was brought to the notice of the authorities and the Collector passed an order that he had learnt that the Vadagalai hymu was recited in certain *pagoda* for some days "which was never before done and which is contrary to religious doctrines," and he accordingly put a stop to it and imposed a fine of ten *pagodas* on two of the Thathachariars for having done so (Exhibit D). This order was confirmed in 1801 by his successor who held an enquiry (Exhibit E). Some years afterwards the question was raised before the Civil Courts. One of the temples in Chinna Conjeevaram is that of Velakkadi which has an image of Vedanta Desikar. It is the blessing of this saint that the Vadagalais invoke by their hymn *Ramanuja Daya Patram*. They recited it in his temple and the Tengalais took objection to it. Thereupon it was decided in that case that as it was contrary to the practice which had prevailed for a long time and which even at that time prevailed in all the other *pagodas* in Conjeevaram, according to which the *mantram Sri Sailesa Daya Patram* should be used, the Vadagalais should not be allowed to repeat their *mantram* even in the temple which was associated with Vedanta Desikar, and the decree was: "The prayer *Ramanuja*

Daya Patram should not be recited in the temple of Vedantachariar. If *puja* (worship) and festival should be celebrated they should be celebrated by reciting '*Sri Sailesa Daya Patram*' as in the other Vishnu *pagodas* at Conjeevaram" (Exhibit H). The Appellate Court in confirming that decree observed that the recitation of the Vadagalai *mantram* "is an innovation of which not one out of the eighteen *pagodas* at Conjeevaram furnishes an example" (Exhibit HI). It is plain that if this *mantram* could not be recited in the temple of Vedantachariar, it could not be recited in any other temple. As pointed out by the District Judge, there is little doubt that this litigation was with reference to the *mantram* and the judgment clearly established that the *mantram* to be used was the Tengalai *mantram*.

The next litigation is Original Suit No. 231 of 1828. In that suit it was decided by the Zilla Judge on the 1st July 1839 that the Adhyapakam *miras* belongs to the Tengalais whose *mantram* alone, the *Sri Sailesa Daya Patram*, should be recited at the commencement of the ceremonies of the *pagoda* and that those persons who hold the Adhyapakam *miras* should enjoy the income of sacred rice and cakes. This decree was confirmed by the Sudder Court on the 25th November 1839.

After this we have the litigation started in 1879 between the Tengalais and the Thathachariars. In that case the final decision of the High Court was that the members of both the sects may join as worshippers in the *mantram* and the *prabandham*, but the *mantram* is the *Sri Sailesa Daya Patram* and in joining as worshippers, the Vadagalais had no right to invade the office of the Tengalai Adhyapakam *mirasdars* who have got the exclusive right of discharging the duties on all occasions in which the Adhyapakam ceremony is performed as well at the time of processions as at services in the *pagodas*, and those Vadagalais who were defendants in the suit were enjoined to abstain from interference with the Tengalais in the recital of the *mantram* and *prabandham* otherwise than as ordinary worshippers.

The same question was also raised in connection with the Velakkadi temple in a suit where the Munsif passed a similar decree.

It is not argued before us that so far as the temple in question, that of Devarajaswami, is concerned the matter is *res judicata* by the decision in *Krishnasami Tatacharyar* v. *Krishnamacharyar* (1). But there is little doubt that even if it is not *res judicata*, that decision is very strong evidence of the rights of the parties and it is supported by the documentary evidence to which we have briefly adverted. So far as the Velakkadi temple is concerned, the question is apparently *res judicata*. The documents to which we have drawn attention show that there is no distinction, so far as the questions in dispute before us are concerned, between any of these temples, and unless a different practice is shown to have prevailed in some of the temples there can be no doubt that the usage must be held to be uniform, and if in the Velakkadi temple sacred to the memory of Vedanta Desikar the Vedagalai *mantram* in his honour cannot be recited, it is very improbable that it can be recited in the other shrines. The decree in the Velakkadi case, which follows the decision in the case reported in *Krishnasami Tatacharyar* v. *Krishnamacharyar* (1), runs thus

"(1) The Adhyapaka *miras* except *thodakam*.....belongs exclusively to the Tengalai sect residing at Conjeevaram.

* * * *

(4) The rights of the Adhyapana *miras* are—

(*i*) the exclusive right of chanting the *mantram Sri Sailesa Daya Patram*";

(*ii*) the exclusive right of reciting the usual *Tamil prabandhams* in the temple;

.....

(5) The Tengalais are entitled to discharge the duties on all occasions, in which the ceremony is performed, as well at the time of procession as at services in the said temple and its shrines."

The final decree of the High Court in *Krishnasami Tatacharyar's* case (1) does not define what the duties of the Adhyapakam *miras* are, but they are set out in the judgment of the lower Court which was confirmed in appeal.

These decisions supported by the documents to which we have referred place

beyond all doubt that the Tengalais of Conjeevaram have got the Adhyapakam *miras* and that it consists of the right of chanting the *mantram* of *Sri Sailesa Daya Patram* and also the exclusive right of reciting the usual Tamil *prabandhams* inside the temple. They establish that the Tengalais are entitled to discharge the duties on all occasions in which the ceremony is performed. The learned Pleader for the Vadagalais did not really attempt to controvert the conclusions arrived at by the learned Judges in *Krishnasami Tatacharyar* v. *Krishnamacharyar* (1). What he really attempted to show was that the claims now urged by the Tengalais go far beyond those decisions.

On behalf of the Tengalais it is objected that the Judge is wrong in deciding that the Tengalais have got the right claimed only at the time of service of *puja* in the temple, and that at other times not being office-holders, they are not entitled to protection in the enjoyment of their office, and that the Vadagalais, if they do not like to join the Tengalai office-holders, may form a separate assembly and recite their own *mantrams* and *prabandhams* at other times than during *puja* in the temple. It is quite true that in Original Suit No. 16 of 1879, *Krishnasami Tatacharyar* v. *Krishnamacharyar*(1), while the Tengalais claimed that the Vadagalais should not form part of the congregation or *goshti* at all, what the Vadagalais claimed was a right to recite their own *mantram* and *prabandham* at the same time and at the same place; or in other words, they did not assert a right to recite separately at any other than the prescribed occasions for service nor at any other places than where the service was conducted by the office-holders. The attention of the learned Judges was not, therefore, expressly directed towards the consideration of the question whether this could be done by the Vadagalais, but there is no doubt from the records to which we have briefly drawn attention and which are set out in detail in the judgment in *Krishnasami Tatacharyar* v. *Krishnamacharyar* (1), and in the judgment of the Court below, that the only *mantram* that could be recited in the temples was the Tengalai *mantram* of *Sri Sailesa Daya Patram*. The order of the Collector at a time when it had the effect of a judicial decision, the decisions in the litigations of 1811 and of 1885 which terminated in 1939 to which we have adverted leave no room for doubt on that point; and the decrees in Original Suit No. 16 of 1879 and the Valakkadi temple case also support that view. The judgment of the High Court in the Srivilliputhur case (Exhibit EEE), *Srinivasa Thathachariar* v. *Srinivasa Aiyangar* and *Srinivasachariar* v. *Srinivasa Thathachariar* (2), holds that only one *mantram* can be recited in a temple. This appears also reasonable. That the resident Tengalais have got a superior right to the Tengalais who do not reside in Conjeevaram and to all Vadagalais cannot be denied. They have got the *mirasi*, *i.e.*, the office to recite the prayers in question and receive the emoluments of the office. It is not likely that other persons also would be entitled to perform the duties of the office. Recital of a different *mantram* or *prabandham* during any ceremonial worship or by any *goshti* would be performance of the duties of that office. That *Sri Sailesa Daya Patram* is the only *mantram* that is repeated appears also from the evidence of the 4th witness for the defendants, who is a Vadagalai and a trustee of this temple. He said that this is being done on account of the agreements into which the parties had entered. We are, therefore, of opinion that it is only the Tengalai *mantram* of *Sri Sailesa Daya Patram* that may be recited within the temple during any ceremonial worship or by any *goshti*. We must accordingly modify the decree of the District Judge on this point.

So far as the *prabandham* is concerned at the time of the *puja*, the Tengalais being the *mirasdars* have the right to recite it and the Vadaglais are entitled to join in the recitation only as worshippers, that is to say, they must repeat the same portions of the *prabandham* as the Tengalais. The dispute with reference to the period of the *puja* is whether the Vadagalais are entited to recite it before the Tengalais begin the *mantram* and *prabandham* and also just after the Tengalais have finished the *prabandham* and before the *puja* is actually over by the distribution of the *theertham* and the *prasadam*. It appears that the *puja* which

(2) 9 M. L. J. 355.

begins with the ringing of the bells consists of six *asanas*. The first *asana* is the *mantrasana* which is the invocation of the deity. The second is *snanasana* when the deity is bathed. The third is *alankarasana* when the deity is adorned. The fourth is *bohjy-asana*. The fifth is also *mantrasana*; and the sixth is *sayyasana*, and after that the *puja* is closed. The Tengalais begin the recitation of the *prabandham* during the third *asana*. There is a conflict of evidence as to whether it goes to the end of the *puja*. According to the Tengalai witnesses the Sathumurai, that is, the closing stanzas of the *prabandham*, is chanted at the time of the distribution of the *prasadam*, *etc.* According to the Vadagalai witnesses it is chanted before; and during the *asana* other *mantras* or *slokas* are recited. It is contended that when the actual recitation by the Tengalais of the *prabandham* is not going on, the Vadagalais are entitled to recite the *prabandhams* in their own way. It cannot be denied that when the worship is carried on and when it is necessary to recite the Tamil *prabandhams*, the Tengalais as the *mirasdars* are bound to and are entitled to recite them. Any recitation, therefore, during the *puja*, before they begin it, would be, as we have already pointed out, an anticipation of their worship; would perhaps render their worship even superfluous and would be an undoubted interference with their right to perform the *puja*. Such interference would also result from the recitation of the Tamil *prabandhams* during the period, if any, after the Tengalais' recitation and before the close of the *puja*. We are, therefore, of opinion that during the *puja* period, that is, from the commencement of the *puja* to its end, *i. e.*, till the distribution of the *theertham* and the *prasadam* the Vadagalais cannot repeat any *prabandham* of their own, but are only entitled to join the Tengalais as worshippers by reciting the same *prabandhams* which they recite. The decree of the District Judge will be modified and made clear on this point.

The next question is whether the Vadagalais are entitled to recite their *prabandham* either at the time of the processions within the temple or at other places in the temple where the Tengalais do not carry on the worship. There is nothing in law to prevent any Vadagalais from worshipping the deities consistently with the equal rights of other worshippers. Neither according to the decisions nor according to the records to which we have above referred does there seem to be anything to prevent any Vadagalai from repeating any portion of the *prabandham* separately and as an act of personal devotion. The question whether any individual may repeat any particular *mantram* or portion of the *prabandham* is one not for the Civil Courts to decide. We can only decide the question whether any act would be an interference with the Adhyapakam *miras* of the Conjeevaram Tengalais. Any interference in the *puja* from its commencement with the ringing of the bells to its close with the distribution of the *theertham* and *prasadam* is, we have held, a violation of the plaintiffs' *mirasi* right. The processions are a part of the worship. Vadagalais cannot therefore form any *goshti* of their own and repeat any *prabandham* which is different from that portion of the *prabandham* which is being recited by the *mirasdars*. The right of any individual Vadagalai to worship the deity without interfering with others by the recital of any appropriate *mantrams* or *prabandhams*, *etc.*, in a temple is very different from the right to form a *goshti* or congregation of his own sect and recite anything different from the *prabandhams* which are recited by the *mirasdars*. The decision in the case *Vijiaraghavachariar* v. *Emperor* (3) has nothing to do with processions inside a temple. The observations of the Chief Justice in that case on the other hand are applicable to such processions, and they show that such processions cannot be interfered with by any Vadagalai *goshti*.

We now proceed to deal with the case of processions outside the temple. There can be no doubt that the Vadagalais as well as the Tengalais are entitled to use the public streets for processions. Whatever rights the Tengalais may have, those rights the Vadagalais also are entitled to. But one sect should exercise the right without any interference with the other. The Vadagalais are entitled, if they like,

(3) 26 M. 554; 13 M. L. J. 171.

to go in a procession of their own by forming their own *goshti* and reciting their own *mantram* and their own *prabandham*: they cannot be interfered with in that by the Tengalais. The Tengalais have an equal right to go in a procession of their own. The right to go in procession has now been recognized by a series of decisions in India and the right has also been upheld by the Judicial Committee of the Privy Council. When the Tengalais, therefore, carry the idol in procession, they are entitled to do so without any disturbance. The drummers, etc., march at the head of the procession; then the Tengalais form what is called the *prabandhams* in which the Vadagalais are entitled to join as ordinary worshippers. But it is not denied that the Vadagalais are not entitled at that time to recite their own *mantram* or any other *prabandham*. This is in front of the idol. Behind the idol comes the Vadagalai *Vedic goshti* reciting the Vedas, etc. The Tengalais are entitled to join it as ordinary worshippers, subject to the same restrictions as Vedagalais when they join the *prabandham goshti* in front. This closes the procession. In the case in *Vijiaragharachariar* v *Emperor* (3), the Vadagalai *goshti* interposed between the idol and the *Vedic goshti*, and it was decided that as the Tengalais were not disturbed in their recitation of the *prabandham* the Vadagalais were not guilty of any offence, and the judgment in that case cannot be taken, therefore, to have dealt with the question whether in law they are entitled to form themselves, so to say, a part of the procession by so interposing between the idol and the *Vedic goshti*. We are clearly of opinion that the intention in so doing is to make themselves a part of the procession and to take part in the worship of the idol. It is argued that no worship can be carried on in public streets. But that is not the question before us for decision. The question for decision before us is whether, while the Tengalais are going in procession and actually carrying on the worship, others are entitled to interfere with it and carry on a different worship. We have no hesitation in holding that they are not entitled to do so.

The next question is whether the Vadagalais are entitled to form a *goshti* behind the *Vedic goshti* and sing their own *prabandham* and *mantram*. If they do not interfere with the *Vedic goshti*, we do not think that there would be any objection to their doing so. As we have pointed out above, they have got as much right as the Tengalais to use the public street, and it has also to be observed that the *Vedic goshti* behind is composed of Vadagalai *mirasdars* and the Tengalais only join as ordinary worshippers. We think, therefore, that the Tengalais are not entitled to an injunction to prevent the Vadagalais from doing so.

As to the *goshti* in front, it stands on a different footing. The recital of the *prabandhams* in front of the idol is considered more appropriate than behind the idol, and the Vadagalais insist upon their claim to do so on that ground. But we think the Judge is right in holding that this should not be allowed. The recitation of the *prabandhams* and the *mantrams* in front of the idol can only be intended as a worship of the idol. If it is not intended as such, then there is no reason for insisting that they must be allowed to march in front, and the right to carry on such ceremonial worship resides in the resident Tengalais. For the reasons we have already given, to allow this claim would enable them to perform the duties of the office and destroy the value of the *miras*.

The decree of the lower Court will be modified accordingly.

The parties will bear their own costs in appeal.

Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 464 OF 1910.

June 10, 1914.

Present:—Mr. Justice Stephen and Mr. Justice Mullick.

RAM SHARAN LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharaja Sri Sri RAM NARAIN SINGH *Bahadur*—PLAINTIFF—RESPONDENT.

Jagir, *grant of, nature of*—"Putrapoutradi krame," *construction of—Absolute and heritable estate.*

A grant of a *jagir* is a grant for life only, but where the grant is made with the words "*putrapout-*

RAM SHARAN LAL *v.* RAM NARAIN SINGH.

radi krame, the grantee takes an absolute heritable and alienable estate and all his heirs are capable of inheriting it. [p. 611, col. 2; p. 612, col. 1.]

Ram Lal Mookerjee v. *Secretary of State*, 8 I. A. 46 at p. 62; 7 C. 304 at p. 310; 10 C. L. R. 349 (P. C.); 4 Sar. P. C. J. 225; 5 Ind. Jur. 327, followed.

Bhujanga Rao v. *Ramayamma*, 7 M. 387; 8 Ind. Jur. 238; *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*, 24 C. 834; 24 I. A. 76; 1 C. W. N. 387 (P. C.), *Perkash Lal* v. *Rameshwar Nath Singh*, 31 C. 561, referred to.

Appeal against the decree of the Subordinate Judge, Hazaribagh, dated the 12th of August 1910.

Babus *Umakali Mookerjee*, *Manmatha Nath Mookerjee* and *Satindra Nath Mookerjee*, for the Appellants.

Babus *Provas Chandra Mittra* and *Susil Madhab Mullick*, for the Respondent.

JUDGMENT.—The plaintiff in this case is the *zemindar* of *Pergana* Raj Ramgarh which includes *Mouza* Salga, of which he says that a *jaigir* was granted to one Kanshi Singh in 1852. Kanshi had two sons, of whom one predeceased him, dying childless, and the other Banshi Lal succeeded him, but died in 1897 without leaving male issue. The plaintiff succeeded in collecting rents for two years, but was dispossessed by the defendants in 1899. He now sues for possession and mesne profits, alleging that he is entitled to resume his ancestor's grant on the failure of male issue of the grantee.

To this claim the defendants set up two defences, one based on fact and one on law. The first was that the grant was made not to Banshi, as the plaintiff says, but to Raghu, Banshi's father, of whom the defendants are descendants in the male line. There are many difficulties about this defence, which is not supported by the evidence, and it was given up in the lower Court and not raised here, and need not, therefore, be further noticed. The second defence raises a question of some importance. The facts are that the subject-matter of the original grant was certainly a *jaigir* and it was conveyed to Banshi with the words or word *putrapoutradi* the significance of which we have to determine. Also there is evidence which may be summarised by saying that it shows that *jaigirs* granted by the Raj were terminable on the death of male heirs, though there is no case to show that this was so where the words *putrapoutradi* were used.

There is good authority for saying that a grant of a *jaigir* is a grant for life only, see Regulation XXXVII of 1793, section 15, and *Gulaldas Jugjivandas* v. *Collector of Surat* (1); the question is how is this estate extended by the addition of *putrapoutradi*. The words literally translated are, as we understand, *putra*=son, *poutra*=grandson, and *ade*=others, but the expression must of course be construed in the first place according to any construction that has been legally recognised. Such a construction is to be found in the following cases. In *Ram Lal Mookerjee* v. *Secretary of State* (2), the Privy Council recognised as correct a construction of *putrapoutradi krame* which regarded it as implying an absolute and heritable estate and as passing an estate of inheritance. The principal question then argued was whether the words would apply to a female as well as a male descendant; but the question arose in an administration suit, and the decision that the words in question passed an absolute estate of inheritance cannot be treated as *obiter*. The same view seems to have been taken in *Bhujanga Rao* v. *Ramayamma* (3). In *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (4), the same words as before were treated by the Privy Council in the same way. On the other hand in *Perkash Lal* v. *Rameshwar Nath Singh* (5), this Court laid down that in Chota Nagpur the general rule recognised by the Privy Council was modified by a custom that the words *al alaud* were to be interpreted as limiting a grant to the lineal male descendants of the grantee, and it is argued, and in our opinion cannot be denied, that no wider construction can be given to the words *putrapoutradi*. But this custom was in effect applied only to a village in the *Pergana* Kanda. It is stated to be applicable to Chota Nagpur, which may mean the *Pergana* so named, or the area now known as Chota Nagpore Division. If the former the custom does not apply in this case; if the latter it seems that the decision was wider

(1) 6 I. A. 54; 3 B. 186 (P. C.).
(2) 8 I. A. 46 at p. 62; 7 C. 304 at p. 310 (P. C.); 10 C. L. R. 349; 4 Sar. P. C. J. 225; 5 Ind. Jur. 327.
(3) 7 M. 387; Ind. Jur. 238.
(4) 24 C. 834; 24 I. A. 76; 1 C. W. N. 387 (P.C.).
(5) 31 C. 561.

than was necessary on the facts of the case. In the case of *Musammat Roopnath Kunwar* v. *Maharaja Jugganath Sahee Deo* (6), a *jaigir* was granted *nussalun bad nassulin* in lieu of services and a custom that the *zemindar* should resume the grant on the death of the *jagirdar* without lineal descendants was recognised. The limits of the custom are not, however, prescribed, and the custom there acted on is not that which is now set up.

The result is that we see nothing in the cases to modify the general rule laid down by the Privy Council, in its application to the present case.

Under these circumstances we hold that the original grantee took an absolute, heritable and alienable estate, and that all his heirs are capable of inheriting it.

The result is that the appeal is allowed; the judgment and decree of the lower Court is set aside, and the suit is dismissed with costs here and in the lower Court.

Appeal allowed.

(6) 6 Sel. Rep. 158; 7 Ind. Dec. (o. s.) 785.

MADRAS HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL No. 24 OF 1913.

February 18, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

R. S. RAMANUJULU NAIDU AND OTHERS PLAINTIFFS—APPELLANTS

versus

V. PARTHASARATHY AIYENGAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Election—Triplicane temple scheme—General bribery—General personation—Illiterate voters, signature by—Invalidity of election.

Per *Sadasiva Aiyar, J.*—The presence of a large number of illiterate voters would make it easy to secure votes by bribes: but a Court cannot take any account of surmises of this kind. [p. 614, col. 2.]

The fact that certain voters have been carried to the voting booth at the expense of the candidate cannot by itself vitiate the election. [p. 614, col. 2.]

Where it is proved that a certain voter was dead and a certain other person voted in his name, the whole election is not invalid. That voting card alone should be discarded. [p. 615, col. 1.]

The Common Law principles relating to parliamentary elections cannot govern the decision in a case which relate to the election of a temple trustee, though wherever the rules of that law are in conformity with justice, equity and good conscience, they might be referred to for the mental satisfaction of a Judge in India. [p. 615, col. 1.]

Because the agent of a candidate acting in his interests asked somebody to personate a dead voter whose name by mistake continued to be in the list of voters, it is not just or right to disqualify the candidate without proof that he authorised or raitfied the agent's act. It is right and just to treat that vote as invalid and not to go further. [p. 615, col. 2.]

The election of a trustee of the Triplicane temple under the scheme of 1895 cannot be set aside on the sole ground that an agent of the successful candidate without authority from the candidate abetted a false personation which could have had no effect upon the result of the election. [p. 615, col. 2.]

Where the election appears to have been fairly and honestly conducted it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the Courts are disposed to give effect to elections when possible. Gross irregularities not amounting to fraud do not vitiate an election. No election would be avoided at Common Law for general personation. [p. 616, col. 1.]

The intention of the scheme decree of 1895 is that it is not open to question, the validity of a vote passed by the trustees without objection having been raised at the time of their receiving it, and that it is not open to question the decisions given honestly on the objections raised by the surviving trustees by any proceedings in Court. The requirement that they should state the objection and their decisions in writing can only have been intended for the purpose of its evidentiary value in case their decision is attacked as dishonest in a subsequent suit. The omission to record the objections and decisions where objections were disallowed, though it amounts to a serious irregularity, does not invalidate the election. [p. 617, col. 1.]

If an illiterate voter's name is written with his consent in the presence of the polling officers, it is in the eye of the law of the same effect as a literate voter himself signing. Where the voting paper is required to be signed or marked by the voter, the signature put in by his authorised agent in his presence satisfies the requirements of the clause of the scheme. [p. 617, col. 2.]

It is a substantial compliance with the clause in the Triplicane temple scheme if the voter hands the voting paper to somebody in the presence of the *darmakarthas* and if that person at once hands it in to the presiding *dharmakartha*. [p. 617, col. 2.]

The Courts cannot disqualify a man merely because he was anxious to become a trustee of a temple, trusteeship being now a coveted and honourable civil office which gives influence and power in the com

munity, though according to the true Hindu religion a Hindu ought not at all to be anxious for a *darmakartha's* place. [p. 618, col. 1.]

As regards the scheme itself, the extreme democratic view that education and character should have no weight, that the vote of the most ignorant or the least honest should have the same effect as the vote of the most highly cultured or the most saintly person, is repugnant to the Hindu Shastras which are based upon a heirarchical system in which the character and learning of the persons giving opinions should be given much more weight than the numerical strength of such persons. [p. 618, col. 1.]

Per *Napier, J.*—The Triplicane temple scheme as settled by the Court did not create the right to vote. It only limited the exercise of that right to a certain number of such persons. Clause 17 of the scheme is not an ouster of the jurisdiction of an ordinary Court. The Court has got power to review such decisions. [p. 620, col. 1.]

Where a judicial tribunal comprised of two persons performs its functions by one only, its decision is a nullity. [p. 620, col. 2.]

Personation by itself does not invalidate an election. The proper course is to strike off the number of votes proved to have been given by personation. Where in spite of such striking off, the result will not be affected, the election need not be set aside. [p. 620, col. 2.]

Where the facts proved do not establish that the majority have been prevented from electing the candidate they preferred, the election need not be set aside. [p. 621, col. 1.]

Rules of equity and good conscience do not require that an election should be declared void because the agent of a candidate has been guilty of one or two acts of bribery. No agency can be imputed in the case of a crime; nor should it be presumed unless the bribery by the agent is very extensive or other circumstances bring it home clearly to the authority of the candidate. [p. 622, col. 1.]

Appeal from the decree of the Hon'ble Mr. Justice Wallis, dated the 16th January 1913, in the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 233 of 1913.

Mr. *T. R. Ramachandra Iyer*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. They brought this suit for the following reliefs:—

(*a*) For a declaration that the 1st defendant has not been duly elected to the office of trustee in the Triplicane Parthasaradhi Swami Temple;

(*b*) for an injunction directed to the 1st defendant prohibiting him from doing the duties of the office;

(*c*) for an injunction to the two other trustees of the temple (defendants Nos. 2 and 3) prohibiting them from associating the 1st defendant with themselves in performing the duties of the trustee and;

(*d*) for certain supplementary reliefs.

The election for the vacancy in the trustee's office was held within the temple precincts on the 13th August 1911 (a Sunday) in accordance with the scheme settled by Mr. Justice Best in May 1895, in Civil Suit No. 161 of 1891. The portions of that scheme material for the decision of the present suit might be thus set out:

Paragraph 4:—All persons shall be entitled to vote who shall be of the Tengalai sect of the male sex of the age of 21 years and upwards resident in Triplicane within certain boundaries.

Paragraph 12:—When a trustee's vacancy occurs, the election shall be held by the surviving trustees or trustee at the said temple from 6 A. M. to 7 P. M.

Paragraph 13:—Every voter shall receive at the polling station and hand in to the said surviving trustees or trustee a voting paper with the name of the candidate voted for. Such paper shall be signed or marked by the voter.

Paragraph 15:—The surviving trustees or trustee shall receive and count all votes at the close of the election in the presence of such headmen as may choose to be present at such receipt and counting. The President (that is, the senior of the surviving *dharmakarthas*) shall immediately declare the name of the person who shall have received the largest number of votes and shall publish the result of such election by affixing a notice signed by himself to each of the two gates of the said temple, and thereupon the person so declared shall be deemed to be duly appointed and to be a *dharmakartha*.

Paragraph 16:—Any person whose name is in the voters' list shall also be entitled to bring instances of personation to the notice of the surviving *dharmakarthas*, provided that no such objection shall be taken after the voting paper has been once accepted and passed by the surviving *dharmakarthas*.

Paragraph 17.—On any objection being taken as to false personation, the surviving *dharmakarthas* shall mark such voting paper

and shall inquire into the matter and shall either allow or disallow such votes at their discretion and shall state and sign each such objection with their decision thereon.

The objections pressed before us to the election of the 1st defendant are:—(1) The voting of the 13th August 1911 began after 6. A. M. and ended before 7 P. M.

(2) At the counting of the votes, the 2nd defendant (one of the two surviving trustees) was not present.

(3) The 1st defendant's agents bribed a large number of voters who voted for the 1st defendant.

(4) The 1st defendant and his agents abetted false personation of dead persons as voters.

(5) The 1st defendant and his agents abetted personation of absentee voters.

(6) False personation votes were so numerous that but for it the 1st defendant could not have won the majority.

(7) Many persons entitled to vote were deprived of their franchise by being told that their names had already been ticked off and that they should be deemed to have voted.

(8) The defendants Nos. 2 and 3 (surviving trustees), of whom the 3rd defendant was the President, neglected to take note of the objections regarding indentity and to give decisions.

(9) In the case of numerous illiterate voters the voting papers were not marked by the voters.

(10) The temple *amin*, Ramanujachari (1st defendant's cousin) put into the voting box a large bundle of voting cards supposed to contain names of voters. None of those voters came to the polling station or signed those cards in the presence of the polling officers. The number of cards, so thrown in, was about 50 or 60 in favour of the 1st defendant.

I might at once state that I respectfully agree with the learned trial Judge in most of his conclusions on these ten points.

On the first point, I find on the evidence that the surviving trustees were ready at 6 A. M. to begin the election and that no voter was prevented from voting at 6 A. M., though the first vote was recorded at about 6.15 A. M., as the President and the representatives of the various candidates were making arrangements to secure the due conduct of the election. As regards the closing hour, I am satisfied that the doors were not closed before 7 P. M.

As regards the 2nd objection I am satisfied on the evidence that the 2nd defendant, who is now dead and who was a partisan of the unsuccessful candidate, Veeraraghavachary (the rival of the 1st defendant) left the place after 7 P. M. and after the counting began, because he knew even before the counting that his candidate was in a minority and because he (the 2nd defendant) was an old and infirm man who was tired through a long sitting during an excited, hotly contested election. To make the presence of an unwilling trustee at the final counting an indispensable mandatory condition to the validity of an election would stultify the whole scheme, and I am clear that it is only a directory provision.

As regards the third objection I am unable to believe any of the witnesses who speak either about the bribery of particular voters or about the prevalence of general bribery. As the learned trial Judge has remarked, it is so easy to manufacture evidence of this kind. No doubt, Prasanna Raghava Chary (an old election war horse as Mr. T. Rangachari styled him) must have taken a great deal of interest in canvassing for votes on behalf of the 1st defendant. No doubt also, the presence of a large number of illiterate voters would make it easy to secure votes by bribes. If, on account of this latter fact, oral evidence, of however weak a kind, about bribery having taken place should be believed, then in every election under the scheme, it must be found that bribery has taken place, as evidence not less weak than that given in this suit is almost sure to be available to the defeated candidate and his friends. I agree, therefore, with the trial Judge that the Court cannot take any account of surmises of this kind. That many voters got free rides in *jutkas* to the voting place at the expense of the 1st defendant is not denied. No case has been cited to us in which the fact of certain voters having been carried to the voting booth at the expense of a candidate has been by itself held to vitiate the election.

Krishnaswami Ayyangar v. *Sivaswami Udayar* (1) turned upon the construction of

(1) 29 M. 166; 15 M. L. J. 449.

rule 19 of the rules framed by the Local Government for the conduct of elections under section 7 of the Religious Endowments Act, XX of 1863. That rule 19 provides that a candidate was disqualified to be a member of the committee if he had given "consideration" in return for a vote. As the candidate in that case admitted that he spent money in paying his voter's train fare, cart hire, *et cetera*, the learned Judges held it proved that he had given some other consideration to the voters besides the expenses of cart hire and train fare and that he was, therefore, disqualified. I must state that I not only agree with the trial Judge that the plaintiffs have failed to prove bribery, but I go further and hold that, in my opinion, the evidence tendered by the plaintiffs on this matter is false.

Coming to the fourth question there is no reliable evidence that any dead voter was personated except one Nagappa Maistry, who is proved to have died in April 1911 three and a half months before the election took place. The 1st defendant's younger brother and agent, Bashyam Iyengar, says that there was another living voter, Nagappa Maistry, whose whereabouts are now not known. I am unable to believe him. I have little doubt that somebody who cannot be now identified personated the dead Nagappa Maistry and voted at the election. There is no proof, however, that the 1st defendant's brother had induced that unknown person to personate the dead Nagappa Maistry. Even if the 1st defendant's brother had done so, there is absolutely no proof that 1st defendant did so or had authorised his brother to do so. The only legal result is that the voting card alleged to be signed by Nagappa Maistry should be discarded and I do not think that the whole election becomes invalid on that account. The scheme of 1895 does not state that if false personations are proved at an election, the election should be deemed void on that ground alone.

As a good deal of argument was directed to the point, I shall say a few further words about it. I am clear that the Common Law of England relating to parliamentary elections cannot govern the decision in this case which relates to the election of a temple trustee though, of course, wherever the rules of that law are in comformity with "justice, equity and good conscience" they might be referred to for the mental satisfaction of the Judge in India, who finds that his decision based on justice, equity and good conscience happens to be also in accordance with those Parliamentary Common Law rules. Section 18 of the Charter Act of 1862 and section 19 of the Charter Act of 1865 ordain that the High Court in the exercise of its ordinary original jurisdiction shall apply such law or equity which would have been applied by the Supreme Court at Madras whose powers became vested in the High Court. The Charter Act of the Supreme Court, clause 26, provided that judgment should be given according to "justice and right." It was contended by Mr. T. R. Ramachandra Aiyar, Vakil for the appellants, that according to the English Parliamentary Common Law, any act of fraud or corruption brought home to a candidate or his agent invalidates a Parliamentary election. I shall assume without deciding that it is "just and right", so far as the candidate himself is concerned, to disqualify him if at a temple election he had himself been directly guilty of fraud or corruption. But I am not prepared to hold that, because the 1st defendant's brother acting in the 1st defendant's interests asked somebody to personate a dead voter whose name by mistake continued to be in the list of voters, it is just or right to disqualify the 1st defendant without proof that he authorized or ratified his brother's act. I think that while it is "right and just" to treat that vote as not to be counted in the 1st defendant's favour, it is not right and just to go further. Attainment of substantial justice is stated to be the end which the Supreme Court ought to have in view (see section 22 of the Supreme Court's Charter of 1800). I am clear that the speedy attainment of substantial justice would not be promoted if the election of a temple trustee under the scheme of 1895 was to be set aside, on the sole ground that an agent of the successful candidate without authority from the candidate abetted a false personation which could have had no effect upon the result of the election. In this view, I think it will only lead to confusion if I refer in detail to the numerous cases quoted before us or to the provisions of the

numerous Corrupt Practices Acts passed in England.

I shall make only one or two quotations as regards the English and American practice:—"Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the Courts are disposed to give effect to elections when possible. And it has even been held that gross irregularities not amounting to fraud do not vitiate an election.....The power to throw out an entire division is one which ought to be exercised with the greatest care and only under circumstances which demonstrate beyond all reasonable doubt that the disregard of the law has been so fundamental or so persistent and continuous that it is impossible to distinguish what votes are lawful and what are unlawful, or to arrive at any certain result whatever, or where the great body of the voters have been prevented by violence, intimidation, and threats from exercising their franchise." Cyclopedia of Law and Procedure, Volume XV, pages 372 and 373.

"In *Balfast Borough Western Division* case (2) thirteen cases of personation were proved, but the Court refused to avoid the election, because none of them were brought home to the respondent or his agents, and intimated that there was no authority that an election would be avoided at Common Law for general personation." Rogers on Elections, Volume II, page 374.

In the present case the 1st defendant got 654 votes out of 1354 voting cards placed in the poll box, while Veeraraghava Chari got only 532 votes. Rejecting the voting card alleged to be Nagappa Maistry's voting card, the 1st defendant had still a majority of over 120 over Veeraraghava Chari. (It is unnecessary to refer to votes cast for the two other candidates as the two together got less than 200 votes).

Coming to the fifth objection I hold on the evidence that it is not proved that any absentee voter was personated or that the 1st defendant's agent abetted any such false personation. The trial Judge seems to have held that the personation of one Bashyam Iyangar by another Bashyam Iyangar was proved by the evidence. I find myself unable to agree that that personation has been proved. I see no sufficient reason not to accept the evidence of D. W. No. 5, who states that his son-in-law Bashyam was not a voter as he had gone to Oudh about a year before the election and that the Bashyam Iyangar who did vote was residing in his house then and was a voter then.

As I have found that there was only one case of personation of a dead voter, the sixth contention, namely that the false personation votes were so numerous that but for it the 1st defendant could not have won the majority, falls to the ground.

We come to the seventh objection which is that many persons entitled to vote were deprived of their franchise by being told that their names had already been ticked off. Under the scheme (paragraph 16) after the voting paper has been once "accepted and passed" by the surriving *dharmakarthas* no objection could be taken that a voting paper is signed by a person other than the voter mentioned in it. I think that that is the reasonable meaning of clause 16. The judgment in pursuance of which that scheme was drafted is that of Collins, C. J., and Parker, J., in Appeal No. 5 of 1895 and it contains the following passages: "It may be safely left to the *dharmakartas* to decide who are members of the Tengalai sect entitled to vote." "The headman will be useful in identifying voters." That judgment further deprecates "delay and expense in the conduct of the election" and hence disapproved of the suggestion that some independent person appointed by the Court should be present at the election. The learned Judges then say "the scheme should be *self-working*, if possible" and "it is better .....to trust to the good sense and right feeling of the *dharmakarta* and headman to show it a fair working trial."

Having also in view the 17th paragraph of the scheme which provides that the surviving *dharmakarthas* are at their "discretion" to decide whether there had been false personation (I take this to mean that their decision to the best of their judgment after honestly and summarily inquiring into the matter shall be final) and having further regard to section 15 of the scheme which provides for the presence of the caste

(2) (1886) 4 O'M. & H. 105 at p. 108.

headmen when the *dharmakarthas* receive each vote before accepting and passing it (or before rejecting it on objections), I agree with the learned trial Judge that the intention of the scheme decree was that it is not open to question the validity of a vote passed by the trustees without objection having been raised at the time of their receiving it and that it is not open to question the decisions given (honestly on the objections raised) by the surviving trustees by any proceedings in Court. This conclusion is supported, in my opinion, by the final words of paragraph 15 of the scheme, which states that the person declared at the end of the voting day to have been elected should be "deemed to be" a *dharmakartha* of the temple. Even if I am wrong in the above opinion and even if the persons, who afterwards wanted to vote and who were told that their names had been ticked off, would have given their votes to Veeraraghavachary and had really not voted before (it will be seen I am making here two large presumptions in favour of Veeraraghavachary) it has not been shown that it would have affected the result which was in favour of the 1st defendant.

Coming to the 8th objection there was no doubt a serious irregularity committed by the defendants Nos. 2 and 3 in not taking notes of the objections made at the time of their receiving the votes, but most of the objections are proved to have been at once withdrawn. However, clause 17 of the scheme does require the surviving *dharmakarthas* to state and sign each objection with their decision. As I have already held that their decision is final if come to honestly, the requirement that they should state the objection and their decision in writing can only have been intended for the purpose of its evidentiary value in case their decision is attacked as *dishonest* in a subsequent suit. I ageee with the trial Judge that the 3rd defendant was thoroughly impartial in his conduct of the election and that his decisions, on the objections raised (which decisions, according to my construction of the pleadings in this case, were concurred in by the 2nd defendant) were honestly come to after summay inquiry on the spot, which is all that, in my opinion, is provided for in the scheme and that the omission (though it is a serious irregularity) to record the objections and decisions where the objections were disallowed, did not invalidate the election. I would, however, give a warning to the trustees for their guidance in subsequent elections that in cases of objections which are pressed. they would consult their own interests and the interests of the *devasthanam* by noting the objections and the decisions at once as they ought to do according to the scheme. A book containing four columns for entering the name and number of the voter whose alleged vote is objected to, the nature of the objection, the person or persons objecting and the decision signed by surviving *dharmakarthas* can be easily opened.

The ninth objection as to the voting papers not having been marked by the voters as provided for in paragraph 13 of the scheme does not require serious notice. If an illiterate voter's name is written with his consent in the presence of the polling officers, it is in the eye of the law of the same effect as a literate voter himself signing and as the paper should only be "signed or marked" by the voter, the signature put in by his authorized agent in his presence satisfies the requirements of the clause.

The tenth and the last objection as to a large number of voting cards having been placed in the voting box in the absence of the voters is not proved by any evidence worth the name; what happend was that nine *archakas* of the temple who were also voters were allowed to remain just outside the polling enclosure but within the sight of the polling officers and fill up their voting cards from there and to hand them in to the temple peon (or as one witness says, to one of themselves) who brought and handed them to the President. There was no doubt a slight irregularity here, as the 13th clause of the scheme provides for every voter handing in his voting paper directly to the *dharmakarthas*. Of course, if there are two surviving *dharmakarthas*, one voting paper cannot be handed in to both the *dharmakarthas* simultaneously. I think that if the voter hands it in to somebody in the presence of the *dharmakarthas* and if that person at once hands it in to the presiding *dharmakartha*, it substantially complies with the clause 13 of the scheme. Having disposed of all the objections I shall make a few general

remarks with reference to the observations made during the course of the arguments by the learned Vakils.

Mr. T. R. Ramachandra Aiyar expressed surprise that any Hindu should canvas for votes to obtain the office of trustee of a temple. It is true that according to archaic Hindu notions a Hindu ought not at all to be anxious for a *dharmakartha's* place. The Uttra Kanda of the Ramayana contains several chapters which are not to be found in many editions and are believed by learned scholars (from their style and the character of the stories) to be later mythological additions to the original work of Valmiki Rishi. In one of these chapters (Chapter 69) there is a story of a man having been born in the canine species because he as a patriarch (*kulapathi*) had had in his former life to do the duties of a temple trustee. The man in the animal body was wantonly struck and injured in that body by a *bikshu*. The animal took its revenge by persuading Sri Ramachandra to appoint his enemy as a *kulapathi* and the reason the animal (which remembered its past birth) gave was that his enemy was sure to suffer future torments in hell, it being impossible for the manager of temple properties, however honest he may be, to escape from grievous sin as a superhuman standard of diligence is required of a temple trustee. But in these days, those archaic, notions owing (it may be as Mr. T. R. Ramachandra Aiyar said) to the decay of true religion in the minds of modern Hindus do not prevail and Courts cannot disqualify a man merely because he was anxious to become the trustee of a temple, trusteeship being now a coveted and honourable civil office, which gives influence and power in the community.

As regards the scheme itself, the extreme democratic view that education and character should have no weight, that the vote of the most ignorant or the least honest should have the same effect as the vote of the most highly cultured or the most saintly person is, no doubt, repugnant to the Hindu Shastras. The Hindu society from the second stage has been based upon a hierarchical system in which the character and learning of the persons giving opinions were to be given much more weight than the numerical strength of such persons. In the system of Government also, according to Hindu notions, there was a hierarchical gradation, the headman of 20 villages was placed over the headman of 10 villages, who was placed over the headman of 5 villages who, in his turn, was placed over the headman of one village. (See 7th Chapter of Manu, Slokas 115 to 117). I might, therefore, be permitted to suggest that bribery and charges of bribery at elections might be considerably minimised if Tangalais who cannot sign their names be debarred from voting at the elections for a *dharmakartha's* place. In *Athan Sadagapala Chariar* v. *Eliaralli Srinivasa Chariar* (3), I have mentioned that there are thirty-two sins which should not be committed in a temple and I was, therefore, at first inclined to suggest that as the holding of elections within the temple premises is certain to lead to the commission of several of these sins, the scheme might be modified by providing for the holding of elections in some other place. But as the sins committed during the heat of the elections are not more heinous than what are being committed in these modern days almost daily within most temples and as convenience requires that the election should be held within the temple precincts, I shall drop that suggestion.

Mr. T. R. Ramachandra Aiyar in the course of his arguments rather jestingly referred to an appeal at once in the temple to the presiding deity from the decision of the trustees on the question of the irregularities in the election proceedings. Assuming that the deity has not left the precincts of modern temples (which the deity ought to have done long ago according to the Thanthra Shastras owing to the traffickings and the sins of commission and omission now going on in most temples), the holding of the election in the temple precincts where some of the voters at least would be afraid of committing glaring sins may lead to a less number of malpractices than if the elections were held in some other place.

In the result I would dismiss the appeal. The 3rd defendant will take his costs out

(3) 19 Ind. Cas. 257; (1913) M. W. N. 289 at p. 301; 13 M. L. T. 340.

of the temple funds. The 1st defendant will get his costs from the plaintiffs, who will bear their own costs.

NAPIER, J.—This is an appeal from the judgment of the Chief Justice (then Mr. Justice Wallis) dismissing a suit to declare that a certain election for the vacant office of *dharmakartha* of the Sri Parthasarathi Swami Temple, Triplicane, was null and void. The plaintiffs are worshippers and voters. The first defendant is the person elected. The 2nd and 3rd defendants are the surviving *dharmakarthas*; and the 4th defendant is a *dharmakartha* elected to fill a subsequent vacancy. The allegations on which the suit is founded are to be found in paragraph 15 of the plaint and fall under eleven heads. The first two relate to the time when the polling commenced and was concluded. The 7th complains that the illiterate voters did not affix their marks to their voting papers with their own hand. The 8th charge is that the acting *amin* brought a large number of voting cards and threw them into the voting box to swell the votes in favour of the 1st defendant. The 9th charge is that cards forged by the 1st defendant were used instead of the proper voting cards . The 10th alleges that persons who desired to vote for other candidates were kept away by the intimidation of the partisans and agents of the 1st defendant, and the last that the 3rd defendant conspired with the first defendant to bring about false personation. The learned trial Judge has dealt with these various allegations, and found that such of them as impute improper conduct to the 1st and 3rd defendants are false and that the others which relate to the procedure of the election are either false or immaterial. I entirely agree with the view taken by the Judge and have nothing to add to the reasons given by him.

The remaining allegations charge bribery, shutting out of votes, refusal to note objections and personation, and a further complaint is made in this Court that the learned Judge refused to allow the plaintiffs to call witnesses to establish this last charge and prove that other persons had voted in their names.

Dealing with the last point first, the learned Judge held that, after proper inquiry had been made by the *dharmakarthas* and a vote accepted in the name of a particular person, that vote could not be removed and that, therefore, it was useless to offer evidence that the person really entitled to vote did not vote. This decision is based on the language of rules 16 and 17 of the scheme, which provide that a voter shall also be entitled to bring instances of personation to the notice of the surviving *dharmakarthas*, that on any objection being taken they shall mark such voting paper, enquire into the matter and either allow or disallow such vote at their discretion and shall state and sign each such objection with their decision thereon, but that no such objection shall be taken after the voting paper has been once accepted and passed by the surviving *dharmakarthas*. It is contended by the respondents that the view of the learned Judge is correct and that the surviving *dharmakarthas* were a judicial tribunal created by the Court, whose decision in the absence of fraud could not be reviewed. The appellants contend that the careful provisions point to the conclusion that the evidence should be recorded for the purpose of being considered by the Court.

The respondents rely on two cases in this Court, *Secretary of State for India* v. *Venkatesalu Naidu* (4) and *Nataraja Mudaliar* v. *Municipal Council of Mayavaram* (5), and a decision of the Bombay High Court in *Bhaishankar* v. *Municipal Corporation of Bombay* (6). In my view these cases do not support their contention. The case of *Secretary of State for India* v. *Venkatesalu Naidu* (4) decides that, where by Statute a person is disqualified from being a Municipal Councillor when he has been guilty of an offence which in the opinion of the Governor in Council unfits him for the post, he cannot hold it. The words "in the opinion of the Governor in Council" are conclusive and the Courts have always refused to substitute their opinion for that provided in the Statute. The case of *Nataraja Mudaliar* v. *Municipal Council of Mayavaram* (5) decides that the status of a Municipal Councillor is the creation of Statute and that creation is subject *inter alia* to the condition imposed by the election rules, that when an order is properly passed by the Collector under the rules, it cannot be questioned in the Courts. The position here

(4) 30 M. 113; 1 M. L. T. 435.
(5) 12 Ind. Cas. 311; (1911) 2 M. W. N. 233; 10 M. L. T. 219; 21 M. L. J. 878.
(6) 31 B. 604; 9 Bom. L. R. 417.

is entirely different. The persons who sought to vote and to be allowed to give evidence that the votes purporting to be in their names were not their votes, were persons who were worshippers of the temple and as such *prima facie* entitled to elect the *dharmakartha*. The scheme settled by the Court did not create their right.

All that the scheme purported to do was to *limit* the exercise of that right to a certain number of such persons: so that not only was their status not created by Statute, but it was not created by the decree. The case of *Bhaishankar* v. *Municipal Corporation of Bombay* (6) was one under the Bombay Municipal Act of 1888, which provided by section 33 that the Chief Judge of the Small Cause Court should exercise jurisdiction to determine the validity of a contested election and provided also that his order should be conclusive and that every election not challenged before him should be deemed to have been to all intents and purposes a good and valid election. Here again is a statutory body created and sole jurisdiction conferred upon a particular Court, and nothing could be clearer than the language of section 33. I entirely agree, if I may say so with respect, with the language of the learned Chief Justice on page 609: "In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change of the old order of things; a new order is brought into being." Applying this test to the present case, it is clear how different the conditions are; for here the Court which passed a decree is being asked to decide whether a person whose rights have been declared by that decree has suffered a violation of those rights, and it is sought to oust its jurisdiction by the language of the decree. It was not contended that the Court could not interfere if the President settled a list in violation of rule 10, or on an alleged violation of rule 15, but reliance was placed on the words "at their discretion" in rule 17. I pointed out in the course of the argument that the words were meaningless and Mr. Rangachari suggested that they meant, to the best of their judgment. If that is to be accepted, the case for finality on the words goes for Courts that do not interfere with discretion and are not so limited in cases of error.

Further, in my view the respondents have advanced an argument which is fatal to their case. Admittedly the jurisdiction was to have been exercised by the surviving *dharmakarthas*. It is clear on the evidence that it was exercised by the President alone. Where a judicial tribunal comprised of two persons performs its functions by one only, it seems clear that its decision is a nullity, and in that view the decision would have to be ignored. But I agree with the contention of the appellants that the *dharmarkarthas* were not created a tribunal by the decree, but as it was necessary that some one should give a decision on questions of this sort, they were invested with that duty, but the Court had power to review their decision. Admittedly the president did not conform to the regulations laid down in rule 17 in that he did not state and sign the objection in respect of objections disallowed. In my opinion the double illegality of the procedure is fatal to the decision of the President, and also in my opinion the learned Judge should have admitted the evidence sought to be adduced.

I think, however, that this illegality does not invalidate the election. For reasons which will be given later I find no authority for the proposition that personation by itself has this effect and it is certainly not so provided in the scheme. The proper course in my view is to strike off the number of votes proved to have been given by personation. In this case the learned Judge having declined to admit the evidence, it is impossible to say how many cases of personation there were. But on the allegations of the plaintiffs there were not more than fifty. At the highest, therefore, they will be entitled to have fifty votes struck off from the successful candidate's votes; and as he had a majority of more than one hundred, the doing of this will not affect the result. This objection, therefore, fails.

The next allegation is that of general bribery. I am not satisfied that general bribery has been proved; and even if it had been established to a certain extent, but had not been brought home to an agent of the candidate, I should hold that it would not invalidate the election. The point

was considered by the Court of Common Pleas in *Woodward* v. *Sarsons* (7). It was a case stated under the Corrupt Practices Municipal Elections Act of 1872, 35 and 36 Vic., C. 60, section 15. The judgment of the Court was given by Lord Coleridge, Chief Justice, and on page 743 the following proposition is stated: "What is the true statement of the rule under which an election may be avoided by the Common Law of Parliament?" and they answer it as follows :—" if the election was so conducted that the tribunal, which is asked to avoid it, is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, *i.e.*, that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer, and this would be so if a majority of the electors were proved to have been prevented, from recording their votes effectively according to their own preference, by general corruption" and by other means which the Court indicates. The learned Judges state that this is the result of comparing the judgments of certain Judges appointed by Statute to hear election petitions with judgments which express the grounds of the decisions in Parliament in older cases. One thing is clear from the observations of the Court, that prior to the statutory provisions this was the general rule adopted by the House of Commons. It is this rule which is called "the Common Law of Parliament," a phrase the utility of which must not conceal the fact that Parliament acted in the exercise of an unfettered discretion and that no Court had any jurisdiction to adjudicate on the question. It is urged that the rule adopted by Parliament is one which this Court can safely follow in applying the principles of equity and good conscience. I think that there is force in this contention. The difficulty is, however, to define the limits of so elastic a rule. Dealing with the present case, I am clearly of opinion that the facts proved do not establish that the majority have been prevented from electing the candidate they preferred and I think it unnecessary to go into the finer distinctions referred to by the eminent Judges in that case. It is contended by the appellants that some cases of bribery have been brought home to agents. The cases have been very carefully examined and I need say no more than that the great majority of them are not proved. I am inclined to think however, that two of them are established. I do not think it necessary to deal with them specifically, because in my view that is not enough. Mr. T. R. Ramchandra Aiyar sought to establish that one case of bribery brought home to an agent would invalidate the election. His junior, who first appeared, endeavoured to base that argument on present Parliamentary Election Law. It is only necessary to observe that that law is the creature of Statute. Mr. Ramachandra Aiyar relies on older authority. He has invited our attention to a passage in Blackstone's "Commentaries on the Laws of England" (6th Edition, 1774) Vol. 1, page 179. The passage is as follows: "The first instance that occurs of election bribery was so early as 13 Elizabeth, when one Thomas Long being a simple man and of small capacity to serve in Parliament acknowledged that he had given the returning officer and others of the borough for which he was chosen four pounds to be returned member and was for that premium elected. For this offence the borough was amerced, the member removed and the officer fined and imprisoned." It is not clear from the language used just above this passage whether this case was one under a statutory provision or not. I am inclined to think that it was not, and that it was a case in which the House of Commons exercised its right to keep that body pure. The case was, however, a very bad one. The member had given the returning officer and the persons who controlled the election a sum of money and he was for that premium elected. That phrase can only mean that the election was the direct result of the payment; and bearing in mind that up to 1832 seats in the House were largely in the gift of certain persons of position, it is clear that in this case the member bought practically the whole constituency. This case is, therefore, no authority for the proposition

(7) 10 C. P. 733; 44 L. J. C. P. 293; 32 L. T. 867.

that a single case of bribery will invalidate an election. I do not think that the language of the learned Editor of the title on Elections in Volume XII, Halsbury's Laws of England, puts the case any higher than that.

Nor do I think the rules of equity and good conscience make it necessary for us to declare an election void because the agent of a candidate has been guilty of one or two acts of bribery. Bribery is stated to be an indictable offence at Common Law ; and it is suggested that within the original criminal jurisdiction of the High Court it may still be an offence. But even if that were so, agency cannot be imputed in the case of a crime, nor should it be presumed, unless the bribery by the agent is very extensive or other circumstances bring it home clearly to the authority of the candidate. For these reasons I am of opinion that this objection fails.

The last objection is that instigation to personation is proved against one of the agents. There is one strong case of personation, namely, that of Nagappa Maistry. But in spite of the arguments addressed to us by appellants' Vakil, I am not satisfied that direct fraud is brought home to the candidate's agent in this case. He did not bring the voter to the polling booth. What he did was to identify him there. It is argued that he has himself admitted that he knew the voters personally. That is so ; but that does not eliminate the possibility of a mistake. Even if it were established, I am not prepared to hold the candidate responsible. Reliance is placed on the language used by the Editor of the title "Elections" in Volume XII of Halsbury's Laws of England, page 293, where the decision in the *Gloucestor* case (8) is relied on as establishing the proposition that, if it is once shown that a candidate has employed an agent who is capable of doing such a thing as persuading another fraudulently to personate and obtain a vote, that candidate must suffer the penalty for having trusted such a person. The proposition is certainly very broad. The case was one after the passing of the Ballot Act of 1872 which defined and punished personation, and in the absence of the reported case I am not prepared to accept that doctrine as being conformable to equity and good conscience. I have now disposed of all the objections and on the facts found the appeal fails. If the voting had been closer the result might have been otherwise and I am constrained to observe after going through the whole of the evidence, in this case that the scheme does not seem to have realized the hopes of the Court that passed it. Each election has been followed by a suit and general bribery and personation is freely alleged. Such allegations are hard to establish and may on the other hand be invented. But the fact that they can be so freely made is due to the fact that a large percentage of the electorate is illiterate, ignorant and easily imposed upon. I have grave doubts whether a body of that sort is best suited to elect the *dharmakartha* of a temple.

The appeal will be dismissed with costs as ordered by my learned brother.

Appeal dismissed.

(8) (1873) 2 O'M. & H. 59 at p. 63.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 40 OF 1914.

January 16, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BACHCHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHIAM LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Tazia *placed at a place by mutual consent —No absolute right acquired.*

Where a *tazia* was placed on a particular land for many years by mutual consent of both the Hindu and the Muhammadan population of the locality, no absolute right was thereby created to put the *tazia* on that land. [p. 623, col. 1.]

Mamman v. *Kuar Sen*, 16 A. 178; A. W. N. (1894) 12, distinguished.

Letters Patent Appeal from the decision of Mr. Justice Chamier confirming a decree of the Additional Subordinate Judge of Allahabad, confirming that of the Munsif.

Mr. *Rama Kant Malaviya*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed that they were the Muhammadan residents of a hamlet known as Rasulabad and that they had a right to place their *tazias* on a

particular platform in front of the house once owned by one Mohan. It appears that for many years the Mussulman population and the Hindus had a perfectly friendly arrangement as to where the *tazias* should be placed and that by mutual consent the *tazias* were placed on the platform referred to in the plaint. This land has now become the land of the Government. Close by a Hindu temple has been built. There is nothing whatever to show that the building of this temple was in any way a hostile act on the part of the Hindus. A new place was agreed to by the majority of the residents as to where the *tazias* should be placed. But the change seems to have been objected to by a few persons. They seem to have called to their assistance the Mussulman residents of other neighbouring villages, who had nothing to do with the hamlet. Both the Courts below have found that the arrangement about the *tazias* was an arrangement come to by mutual consent. In our opinion an arrangement of this kind founded on mutual consent could never become an absolute right and that the case, therefore, is not governed by the ruling in *Mamman* v. *Kuar Sen* (1). We are bound in second appeal by all findings of fact. Abdul Samad, appellant, who has appeared and argued the case on the point says that the Munsif made a mistake in thinking that he had ever stated in his deposition that he had got the permission from Mohan. It may be that Abdul Samad did not ask the permission of Mohan, but it is nevertheless a finding of the Court that what was done was done by mutual consent of all parties. The plaintiffs, therefore, have no legal right which they are entitled to enforce. We think it a very great pity that the inhabitants of this village should not live amicably together as they used to do in the past. We think that if there had been a little good temper displayed, therewould be no quarrel between the residents. We hope also that in future the good relations which previously existed may be restored. We see no reason to differ from the view taken by the learned Judge of this Court and we dismiss the appeal. This now finally decides the question between the parties, and we direct that each party to pay their own costs of this appeal.

Appeal dismissed.

(1) 16 A. 178; A. W. N. (1894) 12.

CALCUTTA HIGH COURT.

CIVIL SUIT NO. 1 OF 1914. *

July 20, 1914.

Present:—Mr. Justice Chaudhuri.

In re BALCHAND SURANA—INSOLVENT—PETITIONER.

Insolvents Act (11 & 12 *Vict. C.* 21), *s.* 86—*Insolvent absent—Judgment entered up under the above section.*

After due notice being served by the Official Assignee, an insolvent failed to appear at the hearing. Judgment was thereupon entered up against the insolvent under section 86 of the Indian Insolvents Act.

FACTS.—One Balchand Surana was carrying on a business in piecegoods in the Pagayputty in Calcutta in co-partnership with one Hazarimull Surana under the name and style of Messrs. Balchand Surana. On 21st August 1900, Balchand filed his petition in insolvency and filed his schedule on 5th February 1901. The other partner Hazarimull filed his petition in insolvency on 21st February 1901, when the usual vesting order was made, and the two matters were amalgamated under the direction of the Court. These matters came on for hearing on 11th February 1905, when Hazarimull got his discharge, but Balchald did not appear to get his discharge.

The matter rested at that stage for a long time, when one Koramull Boocha brought a suit against Balchand in the High Court, being Suit No. 409 of 1914, and it was discovered from the affidavit of the said insolvent Balchand filed in that suit that "he had been acting as a broker of many respectable firms for a long time and was paying a license of Rs. 50 a year and that besides acting as such broker he had started a business of commission agents and as such agent he had to deal annually with goods wihin about 8 to 10 lacs and that he had properties in Bikanir worth many times over

*Taken from 19 C.W.N. 433 with permission.—*Ed.*

the alleged claims of the plaintiff and it was wholly unfounded that he should not be in a position to meet any claim of the plaintiff, if he would be able to substantiate any." All this time Balchand and Koramull were working as brokers in co-partnership and Balchand had filed a suit in the Small Cause Court of Calcutta being Suit No. 4061 of 1914, for the recovery of Rs. 561-4 due to him for brokerage against one Harnekchand.

A creditor in collusion with Balchand filed a petition before Chitty, J., to dismiss the insolvency matter so that Balchand might get the amount from the Small Cause Court, when the decree would be made. The petition was withdrawn on the opposition of one of the creditors.

A similar petition was made by another creditor Matichand Tatkamull in collusion with Balchand, before Chaudhuri, J., on the 24th June 1914, and it was pointed out that it was not in order, as no notice of the application was given to the creditors and none but the insolvent had the right to make such application.

The matter was adjourned to 7th July, and it was directed that notices should be given to the creditors in the meantime. When the matter came up on the 7th July, it was urged on behalf of one of the creditors that the petition should not be dismissed at that stage, but a decree should be passed against the insolvent, as according to his own statement in the affidavit mentioned above, he had sufficient assets in his hands to pay his debts in full. The Court was of opinion that the Official Assignee was the proper party to move the Court for a decree, and accordingly an application was made by the Official Assignee.

Mr. S. R. Dass appeared on behalf of the Official Assignee and submitted that the insolvent persistently refused to appear in spite of the notice of the Official Assignee sent to him by registered post. Then he cited the cases *In re C. R. English* (1) and *In the matter of Manual Grant Costello* (2) and asked for the order to enter up judgment against the insolvent under section 86 of the Indian Insolvents Act.

JUDGMENT.—Let the judgment be entered up against the insolvent Balchand Surana in this Court in its original jurisdiction in the name of the Official Assignee for the amount of the debts mentioned in the schedule filed herein and costs of this application be paid out of the assets of the estate.

Order accordingly.

Messrs. Newgie & De, Attorneys for the Official Assignee.

(1) 7 C. L. R. 378.
(2) 8 B. L. R. App. 57.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 203 OF 1908.
February 10, 1915.

Present: Sir John Edward Power Wallis, Kt. Chief Justice and Mr. Justice, Hannay.

MAHAMAD JALLALDEEN MARAKAYAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

VIJAYASWAMI *alias* MUTHU VIJAYA RAGHUNATHA ANNASWAMI THEVAR, DECEASED, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Civil Courts Act (III of 1873), s. 14—Suits Valuation Act (VII of 1887), s. 8—Court Fees Act (VII of 1870), s. 7 (4)—Suit to redeem mortgage—Amount due under mortgage determines jurisdiction—Lower Court erroneously putting higher value—High Court, power of, to revise.

In a suit to redeem a mortgage, it is the amount of the principal debt that should be taken into account in determining the jurisdiction under the Civil Courts Act. [p. 625, col. 1.]

The fact that the lower Court has fixed a particular valuation and levied Court-fee on it, does not prevent the High Court from revising it and fixing the proper valuation. [p. 625, col. 1]

Zamorin of Calicut v. *Surya Narayana Bhatta*, 5 M. 284; *Ijjatulla Bhuyan* v. *Chandra Mohan Bannerjee*, 34 C. 954; 6 C. L. J. 255; 11 C. W. N. 1133, distinguished.

Vasudeva v. *Madhava*, 16 M. 326, followed.

Appeal against the decree of the Court of the Subordinate Judge of Madura East, in Original Suit No. 18 of 1900.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Messrs. *S. Srinivasa Iyengar* and *S. Desikachariar*, for the Respondents.

JUDGMENT.—A preliminary objection is taken that the appeal lay to the District Court and not to this Court. The suit was to redeem a mortgage, and the amount of the principal debt was Rs 3,899-4-0. Prior to the enactment of the Suits Valuation

Act, 1887, it was held in *Zamorin of Calicut* v. *Surya Narayana Bhatta* (1) by a Full Bench of this Court following earlier decisions that under the provisions of the Madras Civil Courts Act, the method of valuation prescribed by the Court Fees Act for suits of this description ought to be followed in ascertaining the valuation of the suit for purposes of jurisdiction. The Suits Valuation Act has not fixed any method of valuing such suits, nor has it apparently enabled such a method to be prescribed by rule. Consequently the authority of the decision in *Zamorin of Calicut* v. *Surya Narayana Bhatta* (1) is in effectual, and the amount of the principal debt must be taken as determining the jurisdiction under the Civil Courts Act. The suit, therefore, lay in the Subordinate Court and the appeal lay to the District Court. The Subordinate Judge erroneously insisted on the payment of a Court-fee on Rs. 7,218 6-11, the total amount payable on redemption, and the plaintiff paid the deficiency. The question then is whether this has deprived the District Court of jurisdiction to hear the appeal and conferred it on the High Court. Following the decision in *Vasudeva* v. *Madhava* (2), I think it has not. A reference to the printed papers shows that in that case the District Munsif erroneously returned a plaint in a redemption suit as beyond his jurisdiction, although it was properly valued on the principles laid down in *Zamorin of Calicut* v. *Surya Narayana Bhatta*(1). The plaintiff accepted the valuation and filed the suit in the Subordinate Court and the Subordinate Court entertained it, no doubt, on payment of the appropriate Court-fee. It was held by this Court that the appeal lay nonetheless to the District Court, although the suit had been valued by the Subordinate Court at over Rs. 5,000. This appears to be a direct authority in support of the objection. The decision in *Ijjatulla Bhuiyan* v. *Chandra Mohan Bannerjee* (3) related to a case in which the plaintiff was authorised to make a tentative valution under section 50 of the Code of Civil Procedure and Mookerjee, J., expressly confined his decision to such cases, and abstained from expressing any opinion on a case like the present. The objection is allowed with costs and the appeal will be returned for presentation to the proper Court.

Appeal returned.

(1) 5 M. 284.
(2) 16 M. 326.
(3) 34 C. 954; 6 C. L. J. 255; 11 C. W. N. 1133.

MADRAS HIGH COURT.

APPEAL No. 119 OF 1912.
February 15, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

POTHI NAICKEN, MINOR, THROUGH HIS NEXT FRIEND K. N. P. R. NARAYANASAMI NAICKER—PLAINTIFF—APPELLANT

versus

R. NAGANNA NAICKER AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Document effecting severance in status, if requires registration—Declaration by member to live separate, if enough to create a severance—Power of mother to enter into partition on behalf of her minor son.

Per *Sankaran Nair, J.*, (*Oldfield, J.* contra.)—A document merely creating a severance in status among the members of a joint Hindu family does not fall within the provisions of the Registration Act requiring registration. It does not in itself create an interest in property and if any is created, it is by operation of rules of Hindu Law and not by virtue of the instrument. [p. 630, col. 1.]

Jiwan Ali Beg v. *Basa Mal*, 9 A. 108 (F. B.); A. W. N. (1886) 309; *Ramaswamy Iyer* v. *Thirupathi Naik*, 27 M. 43; 13 M. L. J. 356; *Thandavan* v. *Valliamma*, 15 M. 336; 2 M. L. J. 130; *Narayanan Chetty* v. *Muthiah Servai*, 8 Ind. Cas. 520; 21 M. L. J. 44; 9 M. L. T. 142; 35 M. 63; *Upendra Nath Banerjee* v. *Umesh Chandar Banerjee*, 6 Ind. Cas. 346; 15 C. W. N. 375; 12 C. L. J. 25, referred to.

Per *Oldfield, J.*—A document which effects a severance in status is not admissible to establish partition as regards immoveable property without registration, though it may be operative as regards moveables. [p. 631, cols. 1 & 2.]

Per *Sankaran Nair, J.*—It is open to a member of an undivided family governed by the *Mitakshara* Law to effect a separation between himself and the other members of the family by a declaration to that effect made to other members, but the declaration must be clear and in such a form that it is not open to him afterwards to say that he still continues to be a member. [p. 628, col. 2.]

Suraj Narain v. *Iqbal Narain*, 18 Ind. Cas. 30; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40, followed.

Bulakee Lal v. *Musammat Indurputtee Kowar*, 3 W. R. 41; *Musammat Vato Koer* v *Rowshun Singh*, 8 W. R. 82; *Ram Dhyan Koonwar* v. *Musammat Phoolbas Kooer*, 14 W. R. 340; *Raghubanund Doss* v. *Sadhu Churn Doss*, 4 C. 425; 3 C. L. R. 534; 2 Shome L. R. 113; *Radha Churn Doss* v. *Kripa Sindhu Doss*, 5 C. 474; 4 C. L. R. 428, referred to.

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Sudarsanam Maistri v. *Narasimhulu Maistri*, 25 M. 149 at p. 156; 11 M. L. J. 353, *Thandayuthapani Kangiar* v. *Raghunatha Kangiar*, 10 Ind. Cas. 660; 21 M. L. J. 240; 9 M. L. T. 421; (1911) 1 M. W. N. 223; 35 M. 239, not followed.

The differences between the joint tenancy of English Law and the joint Hindu family as known to *Mitakshara* Law pointed out [p. 629, col. 2.]

Per *Sankaran Nair* and *Oldfield*, *JJ.*—Where an uncle and his minor nephew formed members of an undivided Hindu family, the mother of the minor is competent to consent to a partition on his behalf with his uncle. The fact that the uncle was at the time of consent very ill and about to die will not vitiate the consent, and the law will not recognise the contingency or probability of a person's death as a reason for not consenting to a demand for partition which a person is entitled to claim. [p. 628, col 1, p. 630, col. 2.]

Appeal against the decree of the District Court of Madura in Original Suit No. 12 of 1910.

Messrs. *K. Srinivasa Iyengar* and *A. Krishnasami Iyer*, for the Appellant.

Messrs. *S. Srinivasa Iyengar* and *G. S. Ramachandra Iyer*, for the Respondents.

JUDGMENT.

SANKARAN NAIR, J.—This is an appeal by the plaintiff from a decree passed by the Subordinate Judge of Madura, dismissing his suit for a declaration that a partition-deed alleged to have been executed between the deceased Subba Naicker, his paternal uncle, and Nagammal, the mother of the minor, plaintiff acting on his behalf, on the 8th December 1907, and a Will alleged to have been executed by Subba Naicken on the 9th December 1907 are not genuine; and in the alternative, that they are invalid and ineffective to affect the plaintiff's right of survivorship to the joint family properties. Ramasami Naick, the plaintiff's father, and Subba Naicken, his brother, were undivided brothers. Ramasami Naick died on 27th December 1906 leaving his widow, Nagammal, and a minor son the plaintiff. She continued to live in the family house with Subba Naicken. On the 7th December 1907 she executed a power-of-attorney in favour of her *sambandhi*, Ramasami Naicken, who is defendants' 2nd witness. The power-of-attorney was executed in order to effect a division of her son's share of the joint family property with Subba Naicken. The partition, however, was not carried out. Subba Naick was ill for some time and he went to Mallankinar, the village of his brother-in-law, Kuppusami Naicken, in December 1907. A telegram was sent to the Sub-Magistrate of Aruppukottai by one Vyravan Asari, P. W. No. 5, to the effect that Kuppusami Naicken had carried away the properties of Subba Naicken which were deposited for safe custody at Aruppukottai. The Station House Officer went to Mallankinar and took a statement from Subba Naicken on the 4th December. Subsequently the Magistrate also came to the village and took another statement on the 7th. Subba Naicken went back to his village, Ramanujapuram, and died there either on the night of the 9th or on the 10th. The partition-deed is dated 8th. It consists of two parts Exhibit III and Exhibit III (*a*). Exhibit III recites that as the family properties valued at Rs 80,000 had been divided in the presence of *Panchayatdars* into two equal moieties, "Our connection shall hereafter be only by relationship, but we shall have no monetary concern in respect of these properties." It purports to have been signed by Subba Naicken and by Nagammal by affixing her mark. It is attested by 12 witnesses and by the writer. Attached to that Exhibit III are certain sheets of paper which contain the schedules of properties. They are admittedly not signed either by Subba Naicken or Nagammal. They are attested by about fifteen witnesses. The District Judge has held that Exhibit III was signed by Subba Naicken and Nagammal, that Exhibit III (*a*) was not written in Subba Naicken's life-time and, therefore, no effect can be given to it: and he finds, therefore, that Exhibit III effects only a division in status. He finds the Will is genuine. but it is inoperative because there was no partition of properties before the death. He accordingly dismissed. the suit. After Subba Naicken's death the Will was presented for registration and though the Registrar found that Exhibit III was genuine, he was of opinion that under the provisions of the Registration Act the document could not be registered as it did not contain any particulars of properties. A suit was then filed (Original Suit 26 of 1909, Subordinate Court of Madura) to get the document registered. The Subordinate Judge and in appeal the High Court held that Subba Naicken's widow was not competent to present the document for registration, the Registrar was right in refusing to register the document. The first question that arises

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for determination is whether Exhibit III is genuine. The evidence adduced on behalf of the defence shows that about ten days before Subba Naick's death he went to Aruppukottai where he had kept some property in an iron safe and his cash box in charge of one Sankara Kumara Pillai. He was accompanied by the plaintiff's mother, Nagammal, P. W. No. 1 his own wife, Seethammal, D. W. No. 1, plaintiff, Nagammal's brother, P. W. 6, and Kuppusami Naicken who is Seethammal's brother. He went to Mallankinar for treatment taking the safe with him. There the Station House Officer and Sub-Magistrate came to him and took certain statements from him. After they left he told his friends and relatives that even during his life-time his enemies were creating trouble and, therefore, it was in the interests of all parties that there should be a partition. Nagammal had in the meantime left for Ramanujapuram. She came back to Mallankinar. According to Ramasami Naick, Subba Naick had sent for her and told her that there would be trouble about her son's property after his death and she had better effect a partition. Nagammal agreed to this. Certain persons were sent for and the partition-deed, Exhibit III, was drawn up. Subba Naick signed it and Nagammal touched the pen, the writer writing her name. After that the lists, Exhibit III (*a*), were prepared but Subba Naick and Nagammal did not sign, as the former said as it was *panchayatdars* that divided the property, it was enough if they signed and they alone accordingly signed. There is considerable body of evidence in support of this case. Seethammal, the widow of Subba Naick, D. W. No 1, Ramasami Naicken, D.W. No. 2 whose son is married to plaintiff's sister and who evidently enjoyed the confidence of the plaintiff's mother as it was in his favour that she executed power-of-attorney to demand partition from Subba Naick and who is alleged to be worth 2 or 3 lacs of rupees, defendants' 7th witness, the Village Munsif of Mallankinar who attested Exhibit III (*a*) and the Will, Exhibit IV, 9th witness who is the *karnam* of Kovilangulam and has also attested Exhibit III (*a*), and many other witnesses, who are *panchayatdars*, support this case. The plaintiff's mother no doubt denies her signature. She says she does not know whether Subba Naicken went to Aruppukottai at all, and she denies that she went to Mallankinar herself. This is directly contradicted by the statement of Subba Naicken made before his death when he had no motive for uttering any falsehood. See Exhibit II. The evidence of the 2nd witness is no doubt in her favour. He says that the plaintiff's mother remained in Ramanujapuram all the time and that it was he himself who took Subba Naicken and his wife and children to Mallankinar. The plaintiff's 3rd witness is the writer of Exhibit III. His evidence strongly supports the defence case so far as Exhibit III is concerned. He is a writer of documents. He says he gets 8 annas or one rupee for writing a document and at the request of one of the defence witnesses D. W. No. 8, he wrote Exhibit III in the presence of a good number of people from Mallanginar, Kovilangulam and Ramanujapuram. He says that the plaintiff's mother, her brother, Narayana Naick, were present; they had the deed written. Subba Naick signed it and the plaintiff's mother affixed her mark. Narayana Naick, plaintiff's maternal uncle, also attested it. Exhibit III (*a*) was signed by the witness only two or three days after Subba Naick's death. The next two witnesses, plaintiff's witnesses Nos. 4 and 5, are examined to show that the telegram to the Sub-Magistrate that Kuppusami Naick had removed his iron safe, was sent at the instance of Subba Naick. This is opposed to the evidence of Subba Naicken himself and does not directly bear on the genuineness of Exhibit III. The last witness, P. W. No. 6, is the brother of P. W. No. 1, who is alleged by the defence witnesses to have attested Exhibit III. He says that the signature in Exhibit III looks like his, but denies that he signed it. He was not examined before the District Registrar who commented strongly on the omission, and there is no doubt it was on that account that he has now been examined. This oral evidence of the plaintiff is not sufficient to rebut the evidence given on behalf of the defendants. The probabilities are in favour of the genuineness of Exhibit III. The plaintiff's mother had been demanding partition. Subba Naicken had stated before the Station House Officer, Exhibit II, that the bulk of the property belonged to himself and did not form family property There is little doubt that it was in the

interests of the plaintiff himself that the matter should be settled during Subba Naick's life-time in the way she wanted it herself. There is nothing, therefore, improbable in the evidence of the defendants that when Subba Naicken suggested to her the desirability of a partition she agreed to it. The Judge has believed the defence evidence and I see no reason to differ from him. I, therefore, hold that Exhibit III is genuine.

It is next argued that the plaintiff's mother was not justified in consenting to a division of properties on that date. It is not denied that under ordinary circumstances she would be entitled on behalf of her minor son to enter into an agreement of partition. If a partition cannot take place among the members of a Hindu family when there is a minor, then a partition would, in many cases, be impossible. In this family there can be no doubt that his mother was his proper representative. But it is said that Subba Naicken died within a few days after the partition and that she must have known of his impending death, and, therefore, she was wrong in consenting to this partition, which had the effect of defeating the right of the minor to take by survivorship the entire property of Subba Naick who has no sons. I am not able to accept this contention. The law will not recognise the contingency or probability of a person's death as a reason for not consenting to a demand for partition which a person is entitled to claim.

It was argued before us that as she was not entitled to give her assent to the partition, a declaration by Subba Naick alone of severance of interest would not be of any avail. This question does not arise, as I have found that the minor's mother was a consenting party to the partition. But as the question is fully argued and I do not feel any doubt on the question I proceed to give my opinion.

I think the question is really concluded by the decision of the Judicial Committee in *Suraj Narain* v. *Iqbal Narain* (1). Their Lordships say in that case that a definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation, but to have that effect the intention must be unequivocal and clearly expressed. In my opinion it clearly means that it is open to a member of an undivided family governed by the *Mitakshara* Law to effect a separation between himself and the other members of the family by a declaration to that effect made to the other members. Of course, the declaration must be clear and in such a form that it is not open to him afterwards to say that he still continues to be a member. It is said that their Lordships must not be taken to have decided this question as their statement of law itself is not clear and it is opposed to their own prior decisions and to the accepted principles of the Hindu Law of coparcenary. Before that decision in a series of cases, *Bulakee Lal* v. *Mussamat Indurputtee Kowar* (2), *Mussamat Vato Koer* v. *Rowshun Singh* (3), *Ram Dhyan Koonwar* v. *Musammat Phoolbas Kooer* (4), *Raghubanund Doss* v. *Sadhu Churn Doss* (5), *Radha Churn Doss* v. *Kripa Sindhu Doss* (6), the Calcutta High Court had taken this view. The Madras High Court in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (7) and in *Thandayuthapani Kangiar* v. *Raghunatha Kangiar* (8) had taken the contrary view. Both these views were placed before their Lordships. The opinion of one at least of the commentators of Hindu Law is clear on the point. In Vyavahara Mayuka—Mandlik on Hindu Law, page 38—it is said that "even where there is a total absence of any property, a partition is effected by the mere declaration, 'I am separate from thee.' For partition is a particular condition of the mind and this declaration is indicative of the same." In these circumstances I cannot disregard the expression of opinion by their Lordships of the Privy Council. I am, therefore, of opinion that this contention cannot be allowed. The next question that is argued before us is that Exhibit III requires registration and is, therefore, not admissible in evidence to prove even a division in

(1) 18 Ind. Cas. 30; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40.

(2) 3 W. R. 41.
(3) 8 W. R. 82.
(4) 14 W. R. 340.
(5) 4 C. 425; 3 C. L. R. 534; 2 Shome L. R. 113.
(6) 5 C. 474; 4 C. L. R. 428.
(7) 25 M. 149 at p. 156; 11 M. L. J. 353.
(8) 10 Ind. Cas. 660; 35 M. 239; 11 M. L. J. 240; 9 M. L. T. 421; (1911) 1 M. W. N. 223.

status. This objection was not raised in the lower Courts. Subba Naick's widow, Seethammal, presented the document for registration and on the Sub-Registrar's refusal she appealed to the District Registrar before whom the plaintiff contended that the document should not be registered. After hearing both sides the District Registrar refused her application on the ground that neither Exhibit III nor Exhibit III (*a*) can be registered, though he found that Exhibit III was genuine. She then filed a suit for an order to direct registration, the plaintiff contested the suit. It was decided in appeal by the High Court that she was not entitled to present the document for registration or to get it registered. It would be unjust to allow the plaintiff now, after defeating all her attempts to get her documents registered both before the Registration officers and before the Civil Courts, to contend that for want of registration the document is invalid. The decision that she could not get the document registered is binding on him and he is estopped from raising the plea. Moreover the Registrar has decided that Exhibit III cannot be registered under the provisions of the Registration Act. Assuming that decision is not binding on the parties, it is not shown to be wrong and that the document could be registered. In that case the objection is not of any force. It was while the litigation was pending that the present suit was filed and I have no doubt that the objection was not raised in the lower Court, because it was then thought that the question of registration would depend upon the result of that decision. For these reasons I am of opinion that the appellant should not be allowed to raise this question in appeal. But as my learned brother disagrees with me, I proceed to give my opinion on the main question whether a Will effecting a division in status requires registration.

For the decision of this question a division in status may be taken to be a severance of co-parcenary between some or all of the members of an undivided family, although the property is unapportioned and left in joint enjoyment as before. The act may be unilateral as we have already decided. A definite and unambiguous declaration by a member is sufficient to constitute him a divided member though this, in my opinion, makes no difference in principle. The only changes effected by a division in status are that the share is fixed without liability to increase or diminution by deaths or births and that on the death of a member without sons, his share so fixed devolves on his widow or the other heirs who take according to the rule of Hindu Law of succession in the absence of sons. A document declaring such division in status may be taken for this purpose to have no reference to property at all. It effects only a change in status. On principle such a document does not require registration, as a person's power of dealing with any specific property is not affected thereby.

It is argued that the joint tenancy has been converted into tenancy-in-common. The differences between the joint tenancy of a Hindu family and as it is understood in English Law must be borne in mind. In the former the joint tenancy has its origin in birth and not by conveyance. There is no unity of possession, the managing member being alone entitled to it against the others. There is no unity of title, as the members do not derive their interest at the same time. There is no unity of time, as they do not hold for the same time and from the same time. There is no unity of interest, as some may be entitled to larger shares than others. The chief characteristic of survivorship does not exist, as a co-parcener's interest devolves not on all the others but only on his sons if any. A co-parcener's interest is again liable to diminution unlike the interest of a joint tenant in English Law. The notion that a document effecting a severance in status requires registration is due apparently to the notion derived from English Law that the member thereby takes a specific part of the whole as his exclusive property. But a division in status only fixes the share without liability to fluctuation and introduces a new rule of devolution of property in the absence of sons. The rights of the co-sharers are not otherwise varied. The entire property remains common stock, the co-sharers continue interested in every part of it. Whatever increment is made to the common stock becomes part of it as before severance, no matter by whose exertions it may have been made. The expressive words of Apararka that partition does not create any new right

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but has only the effect of rendering visible the right already existing, applies strictly to this kind of partition. I am of opinion that a document merely creating a separation in status does not fall within the provisions of the Registration Act requiring registration. It does not in itself create any interest and if any is created it is by operation of rules of Hindu Law, not by virtue of the instrument.

Exhibit III itself does not in terms divide any specific property. Neither Subba Naick nor the plaintiff derives any title to any specific property under it. It is only documents which on their face show that they come within the terms of the sections of the Registration Act that require registration. *Cf. Jiwan Ali Beg* v. *Basa Mal* (9). This is also the view taken by this High Court. Mere possibility or probability is not enough. For the same reason if it is a custom or a rule of Hindu Law that in conjunction with the deed operates to create a title to immoveable property, registration is not compulsory. Grant of waste lands or *dharkhast* in *zemindaris* and certain estates carries with it according to custom a right of occupancy. But if the document itself does not confer the right no registration is necessary. *Ramaswamy Iyer* v. *Thirupathi Naik* (10). Similarly a deed of adoption does not require registration, though adoption confers on the adopted son an interest in the immoveable property of the family of the adoptive father. Reliance is placed on *Lakshmamma* v. *Kameswara* (11). In that case, it was decided that an unregistered partitio-ndeed cannot be received in evidence to affect even the moveable property referred to therein. It proceeds on the view that the partition therein effected was an indivisible transaction and if therefore it cannot be received to affect immoveable property, it cannot be received to affect moveable property either. Here the question is not whether the transaction is one and indivisible. A transaction effecting a division in status is very different from one effecting a division of properties. Further the authority of *Lakshmamma* v. *Kameswara* (11) is greatly shaken by the decision of *Thandavan* v. *Valliamma* (12), in which it was laid down that a document which is inadmissible to effect a transaction, in so far as it affects immoveable property, may be received in evidence so far as the other properties are concerned. See also *Narayanan Chetty* v. *Muthiah Servai* (13). In *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (14) it is distinctly stated that the unregistered document there in question was not produced to prove any collateral transaction. The cases deciding that a lease or a sale cannot be received in evidence in order to prove the nature of the possession of the party who held under that document, have no application. They proceed on the principle that as the possession of the land in such cases can only be proved by proof of the transaction directly and in terms affecting immoveable property, the documents are not thereby admissible. I, therefore, disallow this contention.

But as my learned brother disagrees with me, the appeal is dismissed with costs under section 98 (2), Civil Procedure Code.

OLDFIELD, J.—I have had the advantage of reading my learned brother's judgment and I can add nothing in support of his finding, in which I concur, as to the execution of Exhibit III and the validity of, and necessity for, the plaintiff's mother's consent to the partition. I regret that I differ from his conclusion that the partition can be established as regards the immoveable property in suit notwithstanding that Exhibit III is unregistered.

The facts are that the deceased Subba Naick could dispose of his property by Will in 2nd defendant's favour, only if he possessed a separate interest in it, that is, if he was at the date of his death divided in estate from the plaintiff, his minor nephew. Exhibit III is alleged to have effected such a division. Its terms include statements that "the cash, moveables and immoveables, Court decrees, etc., of which these two co-parceners are possessed, valued at Rs. 80,000," have been divided into equal moieties, that their connection shall hereafter be only by relationship and that they will get the *pattas* relating to the lands allotted to their respective shares transferred to their names separately. There is no further specification of the properties dealt with or which fell

(9) 9 A. 108 (F. B.); A. W. N. (1886) 309.
(10) 27 M. 43; 13 M. L. J. 356.
(11) 13 M. 281.
(12) 15 M. 336; 2 M. L. J. 130.
(13) 8 Ind. Cas. 520; 21 M. L. J. 44; 9 M. L. T. 142; 35 M. 63.
(14) 6 Ind. Cas. 346; 15 C. W. N. 375; 12 C. L. J. 25.

to each share. Such specification is wanting also in the Will, Exhibit IV, and is given only in the lists, Exhibit III (*a*). But they are useless because, we agree with the lower Court, they were not part of Exhibit III and were not executed by or part of the act of the deceased.

The objection that Exhibit III is unregistered was first taken in this Court; and the arguments for and against it have mainly followed those relied on by Sadasiva Aiyar, J., on the one side in *Ayyakutti Mankondan* v. *Periasami Koundan* (15) and on the other by Spencer, J., in that case and my learned brother Sankaran Nair, J., in *Subramania Aiyar* v. *Savitri Ammal* (16). I am unable to regard the question as concluded by the authority of the latter decision because I understand Pinhey, J., who also took part in it, to have proceeded, not only on the unregistered documents then in question, but also on the other evidence that a partition had occurred and on the defendants' admissions and to have dissented as regards some items, in respect of which such evidence or admissions were not available.

An attempt has indeed been made in the present case to support the partition by reference not merely to Exhibit III, but also to the parties' conduct. It is, however, unnecessary to decide whether a decision could be founded on the evidence of the latter with or without reference to the former, because in fact no such evidence has been referred to. The deceased died on the day after the execution of Exhibit III; and though there is nothing definite as to the entry of the defendants on the immoveable properties, there is nothing to show that those in charge of the plaintiff's interests acquiesced in their possession, the evidence being that they contested their right without delay in registration and guardianship proceedings. The defendants, therefore, must succeed, if at all, with direct reference to Exhibit III alone.

Exhibit III, alone and unregistered, effected, I concede, a division in status and might perhaps have entitled the defendants to claim a division of the moveables. But as regards immoveables the greatest direct effect that can be claimed for it is that it converted the joint holding into one in common. That is, it gave each member of the family a vested title to his share, as it then existed, instead of a right merely contingent on his surviving till a partition might take place.

It is not, in my opinion, possible to hold that this change did not extinguish one kind of right in the property and create another within the meaning of section 17 of the Registration Act and affect it within the meaning of section 48. For I see no escape from the dilemma that Exhibit III either does affect the property and should be registered or does not affect it and cannot support a claim to it.

The alternative view, supported by my learned brother in *Subramania Aiyar* v. *Savitri Ammal* (16), is that "it is not the written instrument, which makes the alteration" in the nature of the tenancy, because, "when by virtue of it the members of the family become divided in interest, then the rule of the Hindu Law converts their relation into one similar to a tenancy-in-common." But with all due deference I cannot follow him. For it does not seem to me possible to treat the rule of law as operating independently of the instrument, when it is the clear effect of the one to invoke the operation of the other. The reference to a rule of law can mean only that the meaning of the document is determined with regard to it by necessary implication; and there is still no reason why such determination should be recognised, as conferring substantive rights, and neglected, when the necessity for registration is considered.

We have been pressed with two alleged instances of titles to immoveable property, originating in unregistered documents, but alleged to be completed by operation of law. Deeds of adoption, no doubt, do not require registration. But it is doubtful whether even in the case of *Sudras* the adoption and creation of rights under it are not effected by the giving and taking of the son and not by the deed which merely evidences it: *Mahashoya Shosinath* v. *Siramati Krishna Soondari Dasi* (17); and in any case an adoption must be regarded as equivalent to the birth of a son, whose right may, therefore, be considered as arising by operation of law. The authorityas to leases is *Ramaswamy Iyer* v. *Thirupathi Naik* (10)and it decides

(15) 24 Ind. Cas. 771; 1 L. W. 31; 15 M. L. T 163
(16) 3 Ind. Cas. 321; 4 M. L. T. 354; 19 M. L. J. 228.
(17) 6 C. 381; 7 I. A. 250; 7 C. L. R. 3 3; 3 Shome L. R. 231; 4 Sar. P. C. J. 191; 3 Suth. P. C. J. 812; 4 Ind. Jur. 519.

only that when they are operative to transfer possession as they stated and only the right to possession is in question, you are not to read into them an additional term in order to attract the provisions of the Registration Act, not that they or any other document, relied on as operative on property, is exempt from registration, because such operation is merely implicit.

It is observed in *Subramania Aiyar* v. *Savitri Ammal*(16) with regard to the general policy of the Act that with reference to the object of sections 17 and 48, the protection of intruding alienees, it can make little difference in the investigating of title whether the property is being held by a Hindu joint family as joint tenants or tenants-in-common. But it is clear that the alienee of a share takes it as it stood on the date of his transfer and that he may be prejudiced if the fact that it has been ascertained already, possibly before the death of some co-parcener, which he would naturally assume has increased it, is withheld from his knowledge.

Lastly with reference to the policy of sections 21 and 32 in particular and the facts that Exhibit III could not have been registered, because (1) it did not contain the detailed description of the property required by the former and (2) was not, as this Court had held, presented for registration by a competent person in conformity with the latter. As regards (1) the argument adopted by Spencer, J., in *Ayyakutti Mankondan* v. *Periasami Koundan* (15) is relied on as entailing that a document, which cannot be registered with reference to immoveable property for defects in the description, must on that account be treated as operative with reference to it and for other purposes. With great respect this seems to me to confuse an objection to registration on formal grounds with the argument on a distinct point, the necessity for registration with reference to the subject matter of the document, and to involve the anomaly that, whilst a document may be operative in spite of the omission of all the particulars, which section 21 requires, it might be refused registration and be useless on account of the absence of one only. And as regards (2), the presentation by an incompetent person, the suggestion that the plaintiff's successful opposition to the registration on that account debars him from objecting here to the document as unregistered seems to me unsustainable. For there is no inconsistency between his contentions that Exhibit III should have been registered and that no one concerned to register it did so; and the defendants' argument amounts to no more than this, that the document should be admitted because two objections to it, instead of one, are available. It may be matter for regret in the circumstances of the case that defendants' expectations have been disappointed and the deceased's intention rendered abortive. But that is the result of the latter's postponement of his dispositions, until he had no time to make them in a legal way; and the fact that he chose to risk postponement cannot entitle the Court to dispense with the requirements of the law for the advantage of his beneficiaries.

The question of registration was first raised in this Court. It is possible that the disposition of moveables contained in Exhibit III may be separable from that of immoveables and the document may be operative as regards the former. But as my learned brother's decision prevails, I do not consider further whether the defendants are entitled to an inquiry on this point. I would in any case allow the appeal, as regards the immoveable properties, but without costs. In the circumstances the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 148 OF 1913.

February 19, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Trotter.

CHIT REDDI SUBAMMA, MINOR, BY GUARDIAN *ad litem*, NEELAMMA, AND ANOTHER—DEFENDANTS Nos. 2 AND 3—APPELLANTS

versus

CHIT REDDY MADI REDDY AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 4 AND 5—RESPONDENTS.

Hindu Law—Adoption, remote reversioner's suit to set aside—Nearest reversioner's knowledge of adoption more than six years before suit, whether bar.

BALASUNDARAM CHETTIAR *v.* KRISHNA AIYAR.

A suit to set aside an adoption, instituted by a remote reversioner more than six years after the knowledge of the same on the part of the nearest reversioners, is barred by limitation.

Ayyadorai Pillai v. *Solai Ammal*, 24 M. 405, and *Chiruvolu Punnamma* v. *Chiruvolu Perrazu*, 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307 (F. B.), followed.

Quære.—If the same rule applies when the conduct of the immediate reversioners is tainted with fraud?

Appeal against the decree of the District Court of Kurnool, in Original Suit No. 6 of 1912.

FACTS.—This suit was to set aside an adoption. The plaintiff was the remote reversioner of the last male owner, at whose death plaintiff's father and his brother were the nearest reversioners. The plea of the defendants was that the next reversioners knew of the adoption of the 3rd defendant more than six years before suit and that in consequence the suit was barred. The District Judge of Kurnool decreed the suit. This appeal is against that decree of the District Court.

Dr. *S. Swaminathan*, for the Appellants:—The father of the present plaintiff and his brother, who were the nearest reversioners at the date of the death of the last male owner, having had knowledge of the adoption of the 3rd defendant more than six years before this suit, this is barred by limitation. *Ayyadorai Pillai* v. *Solai Ammal* (1) and *Chiruvolu Ponnamma* v. *Chiruvolu Perrazu* (2).

Mr. *K. Ramanatha Shenai*, for Messrs. *T. Prakasam* and *P. Chenchiah*, for the Respondents:—The decisions cited only apply if the conduct of the next reversioners is free from fraud. In this case the 4th and 5th defendants had been guilty of fraud. The decision appealed against is, therefore, correct.

JUDGMENT.—It is abundantly proved and cannot be denied that the plaintiff's father and his brother, who at the death of the last male owner were his next reversioners, knew more than six years before the institution of the present suit of the alleged adoption of the 3rd defendant and in these circumstances, the suit is barred under the decision *Ayyadorai Pillai* v. *Solai Ammal* (1), which was approved by the Full Bench in *Chiruvolu Ponnamma* v. *Chiruvolu Perrazu* (2). The respondent, however, contends that this only applies where the conduct of the immediate reversioners is free from fraud, and relies upon the fraud on the part of the 4th and 5th defendants set up by him in the plaint for the purpose of answering the plea of *res judicata*. We find on examining the evidence that no such fraud is proved. The plaintiff's father, the 4th defendant, now chooses to say that he accepted a payment of Rs. 3,000 from the arbitrator in consideration of not further opposing the adoption, but this statement of his own turpitude is not supported by any satisfactory evidence and is denied by the arbitrator, against whom nothing is shown. We are not prepared to act upon the evidence and the further point, therefore, does not arise. The appeal is allowed, the decree is reversed, and the suit dismissed with costs throughout.

Appeal allowed.

(1) 24 M. 405.
(2) 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307 (F.B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2095 OF 1912.

January 11, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

T. A. BALASUNDARAM CHETTIAR AND ANOTHER—DEFENDANTS Nos. 1 AND 2—APPELLANTS

versus

V. KRISHNA AIYAR AND OTHERS—PLAINTIFF AND DEFENDANT No. 3—RESPONDENTS.

Hire-purchase agreement—Property in goods sold, when passes—Contract Act (IX of 1872), ss. 35, 74, 78, 108, 178, applicability of—Alienation by purchaser contrary to stipulations—Attachment and Court sale of article—Purchaser, how far protected—Right of vendor under hire-purchase agreement to return of article or its value—Penalty, relief against.

Property in goods purchased under the hire-purchase system does not pass to the vendee immediately on the execution of the hire-purchase agreement and the 3rd paragraph of section 78 of the Indian Contract Act does not apply to such a case. [p. 634, col 2.]

Lee v. *Butler*, (1893) 2 Q. B. 318; 62 L. J. Q. B. 591; 4 R. 563; 69 L. T. 370; 42 W. R. 88, followed.

Where an article purchased under a hire-purchase agreement is, before the payment in full of the

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several instalments, pledged contrary to the terms and stipulations of the agreement, and a promissory note is also executed to secure the loan and where the creditor, relinquishing the pledge, sues upon the promissory note, and in execution of the decree obtained therein attaches and sells the property purchased under the hire-purchase agreement and the article is purchased by a third party, the latter cannot claim the benefit of section 178, Indian Contract Act. [p. 634, col. 2.]

The provisions of Exception 1 to section 108, Indian Contract Act, do not extend to cases of Court sales of properties attached in execution of money decrees. [p. 635, col. 1.]

A clause in a hire-purchase agreement, providing, in case of breach of stipulations contained therein, either for a return of the article or for payment of its full value, is penal in character and Courts will be justified in relieving parties against the same. [p. 635, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 319 of 1911, preferred against that of the Court of the District Munsif of Kumbakonam, in Original Suit No. 149 of 1910.

FACTS.—The 1st defendant purchased a bicycle from the plaintiff, a dealer in bicycles, under the hire-purchase system. Under the agreement the 1st defendant was to pay a certain sum monthly for a period fixed, after which the 1st defendant was to be the owner. Until then the ownership was to be in the plaintiff and the 1st defendant was not to sell, pledge or in any way dispose of the bicycle. The 1st defendant pledged the bicycle to the 2nd defendant and also executed a promissory note for the sum thereby borrowed. The 2nd defendant sued on the promissory note, obtained a decree, attached the bicycle and sold it in Court auction and the 3rd defendant became the purchaser. The plaintiff, preferred a claim which was rejected. He, thereupon, brought the present suit for wrongful conversion, claiming the return of the bicycle or its value. The Courts below gave the plaintiff a decree for the value of the bicycle less the amount paid by the 1st defendant. Against that decree the 2nd and 3rd defendants appealed, and the plaintiff preferred a memorandum of cross-objections.

Mr. *K. R. Narayanaswami Iyer*, for Mr. *T. Narasimha Iyengar*, for the Appellants :—Under the agreement, though styled "hire-purchase agreement," the 1st defendant became the owner, the plaintiff being only entitled to a lien for the amount due to him. See *Lee* v. *Butler* (1).

[AYLING, J.—That merely says that the agreement is a contract for purchase, not an out-and-out sale].

Even otherwise, under section 108, Exception 1, of the Indian Contract Act, the appellant being a *bona fide* purchaser for value from a person in lawful possession of the goods. the plaintiff cannot have any right against the appellants or to the bicycle in the hands of the appellants. See also section 178, Indian Contract Act.

Mr. *K. Ramachandra Iyer*, for the Respondents :—Section 178 can have no application, for the appellants are not enforcing the pledge, the finding being that the appellants relinquished the pledge. Exception 1 to section 108 does not apply to Court sales. In private sales there may be representations giving rise to an estoppel or some other right. A sale in Court auction of property belonging to *B* in execution of a decree against *C* confers no right to the purchaser and the decree-holder is liable in conversion for the value of the goods. See *Kanaye Pershad Bose* v. *Hur Chand Manoo*(2), *Mohanund Holdar* v. *Akial Mehaldar* (3), *Greenwood* v. *Holquette* (4), *Naganda Davay* v. *Bappu Chettiar* (5).

JUDGMENT.—We are clearly of opinion that no title in bicycle passed under Exhibit A. Appellants' Vakil relies on *Lee* v. *Butler* (1), but this is merely authority for treating an agreement like Exhibit A as an agreement for purchase. Neither party contemplated the immediate passage of title on the execution of the document, and the 3rd paragraph of section 78 of the Contract Act has no application.

It is suggested that appellants may avail themselves of section 108, Exception 1, or section 178 of the Contract Act. Section 178 is inapplicable in face of the Subordinate Judge's finding (which we can see no ground for questioning) that the pledge was relinquished. As regards section 108 there

(1) (1893) 2 Q. B. 318; 62 L. J. Q. B. 591; 4 R. 568 69 L. T. 370; 42 W. R. 88.
(2) 14 W. R. 120; 5 B. L. R. App. 71.
(3) 9 W. R. 118.
(4) 12 B. L. R. 42; 20 W. R. 467.
(5) 27 M. 424; 14 M. L. J. 69.

was no private sale by 3rd defendant and no authority has been quoted to us for holding that the provisions of Exception 1 thereto extend to cases where the property is attached and brought to sale in execution of a simple money decree against the person in possession.

We dismiss the second appeal with costs.

The only point argued out of the memorandum of objections is that the clause for return of the bicycle or payment of its full value should have been enforced. We consider that the Subordinate Judge was justified in treating this as a penal clause and relieving against it. The memorandum of objections is also dismissed with costs.

Both appeals and memorandum of objections dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 350 OF 1914.

February 4, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

S. T. RANGASAMY AIYAR—PLAINTIFF—PETITIONER

versus

S. VENKATARAMA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 73, 212, ill. (a)—Breach of contract—Damages—Agreement to realise money and pay debt due out of it Failure to pay—Suit by creditor against debtor—Debt recovered with costs—Costs paid, whether recoverable as damages—Plaintiff, duty of, to mitigate damages.

A person who undertakes for another to collect certain debts due to him and pay certain other debts due by him out of such collections, is bound to obey the instructions of the person whose debts he undertakes to collect and if he fails to discharge the debts from the collections, he will be liable for the loss caused thereby. [p. 636, col. 2.]

Dorasinga Tevar v. *Arunachalam Chetti*, 23 M. 441, followed.

There is nothing in the Indian Contract Act which renders the principles of English Law regarding the liability of a party for the consequences of a breach of contract inapplicable to India. [p. 637, col. 1.]

Illustration (*a*) to section 212, Indian Contract Act, is traceable to the distinction between collateral damages arising from the retention of money and from failure to perform other contracts. [p. 637, col. 1.]

The defendant undertook to collect some moneys due to the plaintiff and out of such collections to pay a debt due by the plaintiff to the defendant and a third person, but after collecting the moneys the defendant failed to pay the debt. The third person demanded an acknowledgment of the debt from the plaintiff as the claim was about to be barred by limitation. The plaintiff refused to do so, therefore upon the third person sued him and recovered the debt with costs. The plaintiff then sued to recover from the defendant the amount of the debt and costs which he had had to pay:

Held, that the defendant was not liable for the costs as the law does not regard consequential damages arising from delay in payment of money. [p. 637, col. .]

Girish Chandra Das v. *Kunja Behari Malo*, 12 C. W. N. 628; 35 C. 683; *Hadley* v. *Baxendale*, 23 L. J. Ex. 179; 18 Jur. 358; 2 W. R. 302; 9 Ex. 341; 2 Com. L. R. 517, *Sanders* v. *Stuart*, (1876) 1 C. P. D. 326; 45 L. J. C. P. 682; 35 L. T. 870; 24 W. R. 949; *British Columbia Saw Mill Co.* v *Nettleship*, (1868) 3 C. P. 499; 37 L. J. C. P. 235; 18 L. T. 604; 16 W. R. 1046, *Thol* v. *Henderson*, (1888) 8 Q B. D. 457; 46 L. T. 483; 46 J. P. 422, *Marshall* v *Berridge*, 51 L. J. Ch. 329; 45 L. T. 599; 30 W. R. 93; 46 J. P. 279; 19 Ch. D. 233; and *Graham* v. *Campbell*, 7 Ch. D. 490; 42 L. J. Ch. 593; 38 L T 195; 26 W. R. 336, referred to.

Held, further, that the basis of the claim for compensation was that the plaintiff did not act wilfully and obstinately in refusing to avail himself of his opportunities to remedy the inconvenience caused to him, and as the plaintiff in the present case could have avoided incurring the costs by giving the acknowledgment asked of him and as he could not be said to have acted prudently in refusing to do so, the plaintiff was debarred from recovering the costs from the defendant under the Explanation to section 73. Indian Contract Act, which is an equitable provision against the rigour of the law. [p. 637, cols. 1 & 2.]

Le Blanche v. *L. & N. W. R. Co.*, (1876) 1 C. P. D. 286; 45 L. J. C. P. 521; 34 L. T. 667; 24 W. R. 808, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Mayâvaram, in Small Cause Suit No. 537 of 1913.

FACTS of the case appear sufficiently from the judgment.

Mr. *T. R. Venkatrama Sastriar* for Mr. *V. Purushottoma Aiyar*, for the Petitioner:—The failure to discharge the debt rendered the defendant liable to make good all losses incurred by the plaintiff owing to the breach. *Dorasinga Tevar* v. *Arunachalam Chetti* (1). The defendant is, therefore, liable not only to pay the money but also the costs recovered from the plaintiff by the creditor, as such costs had to be paid as a necessary consequence of the breach. See section 73, Indian Contract Act, *Agius* v. *G. W. Colliery Co.* (2) and *Hammond* v. *Bussey* (3).

Mr. *C. V. Anantakrishna Iyer*, for the Respondents:—The plaintiff is not entitled

(1) 23 M. 441.

(2) (1899) 1 Q. B. 413; 68 L. J. Q. B. 312; 80 L. T. 140; 47 W. R. 403.

(3) 20 Q. B. D. 79; 57 L. J. Q. B. 58.

to the costs of litigation. See *Girish Chandra Das* v. *Kunja Behari Malo* (4), *Hadley* v. *Baxendale* (5), *Sanders* v. *Stuart* (6), *British Columbia Saw Mill Co.* v. *Nettleship* (7), *Thol* v. *Henderson* (8), *Marshall* v. *Berridge* (9) and *Graham* v. *Campbell* (10). The cases quoted by the other side do not relate to detention of money. The plaintiff not having avoided the costs by giving the acknowledgment, he is not entitled to recover it from the defendants. See Indian Contract Act, section 73, Explanation; Sedgwick on Damages, 8th Edition, Volume I, page 286, and *Le Blanche* v. *L. & N. W. R. Co.* (11).

JUDGMENT.—The facts of the case are practically admitted. The plaintiff stood surety for the payment of a debt by a relation. For the purposes of this case, it may be taken that the defendant and one Gopalier advanced the loan. Plaintiff was entitled to the money from a third person. He asked the defendant to collect that money and to pay himself and Gopalier. The money was admittedly collected by the defendant before December 1906; but he did not apply it towards the discharge of the debt due to him and Gopalier. The latter intimated to the plaintiff that as the claim against plaintiff was about to be barred by limitation, he intended instituting a suit for its recovery unless an acknowledgment of liability was given. The plaintiff refused to give any such acknowledgment. A suit was institued and a decree was obtained against the plaintiff. The plaintiff sues for the recovery of the amount collected by the defendant and for damages. The damages represent the amount of Court costs, which the plaintiff had to pay in the suit by Gopalier. There is no question in this Court regarding the claim for the unremitted collections. It was partly decreed to him in the Court below; but the Subordinate Judge dismissed the claim for damages. Hence this revision petition.

There are two questions to be considered: (*a*) whether the claim for the costs paid by plaintiff in the former suit "arose in the usual course of things" from the breach of contract by the defendant; and (*b*) whether the plaintiff failed to avail himself of "the means which existed of remedying the inconvenience caused by the non-performance of the contract" by the defendant. As pointed out in *Dorasinga Tevar* v. *Arunachalam Chetti* (1) the failure to discharge the debt from the collections within a reasonable time entitled the plaintiff to sue at once for the recovery of the money. It was the duty of the defendant to have obeyed the instructions given by the plaintiff as soon as the moneys came into his hands. He was, therefore, liable for the loss caused thereby. Is the award of costs against plaintiff in the suit by Gopalier the natural result of defendant's breach of contract? If the defendant is regarded as plaintiff's agent, illustration (*b*) to section 212 would seem to suggest that the liability of the defendant is only to pay interest upon the moneys withheld and not for any other resulting loss. It is doubtful whether defendant can be regarded as the agent of the plaintiff. In *Girish Chandra Das* v. *Kunja Behari Malo* (4), Sir Francis Maclean inclines to the view that if any act of the person to whom a duty was owing was also responsible for the subsequent damage, such a person is not entitled to damages from the defaulter. The learned Chief Justice would apparently import the theory of contributory cause, which largely guides the award of damages in actions on tort. That decision rests upon other grounds as well. The rule of English Law, as established in *Hadley* v. *Baxendale* (5) and *Sanders* v. *Stuart* (6), is that if the defaulting party is not cognisant of the consequences of the breach, he is not liable for the loss sustained by the plaintiff; but if he knew that the plaintiff would suffer loss and still failed to perform his part of the contract, he can be sued for compensation for the special damage suffered. See *British Columbia Saw Mill Co.* v. *Nettleship* (7). This is subject to a further qualification that a general knowledge that the plaintiff may sustain loss will not be sufficient, but that

(4) 35 C. 683; 12 C. W. N. 628.

(5) 9 Ex. 341; 2 Com. L. R. 517; 23 L. J. Ex. 179; 18 Jur. 358; 2 W. R. 302.

(6) (1876) 1 C. P. D. 326; 45 L. J. C. P. 682; 35 L. T. 870; 24 W. R. 949.

(7) (1868) 3 C. P. 499; 37 L. J. C. P. 235; 18 L. T. 604; 16 W. R. 1046.

(8) (1881) 8 Q. B. D. 457; 46 L. T. 483; 46 J. P. 422.

(9) 19 Ch. D. 233; 51 L. J. Ch. 329; 45 L. T. 599; 30 W. R. 93; 46 J. P. 279.

(10) 7 Ch. D. 490; 47 L. J. Ch. 593; 38 L. T. 195; 26 W. R. 336.

(11) (1876) 1 C. P. D. 286; 45 L. J. C. P. 521; 34 L. T. 667; 24 W. R. 808.

he should have special notice of the consequences that might result from the breach. *Thol* v. *Henderson* (8) and *Marshall* v. *Berridge* (9). I see no reason why these principles should not be applied in India. There is nothing in the Contract Act which renders them inapplicable. But Lord Justice James, in delivering the judgment of the Court in *Graham* v. *Campbell* (10), says "that the law does not regard consequential damages arising from delay in the receipt of money." Sir Frederick Pollock points out that this is anomalous, but well-settled. *Girish Chandra Das* v. *Kunja Behari Malo* (4) may have been based on this rule. It also looks as if illustration (*a*) to section 212 is traceable to this distinction between collateral damages arising from the retention of money and from the failure to perform other contracts. On the whole, though not without hesitation, I have arrived at the conclusion that the plaintiff is not entitled to recover the costs which he was obliged to pay in the former suit. In *Agius* v. *G. W. Colliery Co.* (2) and in *Hammond* v. *Bussey* (3), the costs of a former litigation were held recoverable as damages; but they did not relate to the detention of money, but to delay in the performance of other contracts.

I also agree with Mr. Anantakrishna Aiyar that the Explanation to the section furnishes a complete answer to the claim. It is an equitable provision against the rigour of the law. The person who has been offended against by a breach of contract is not entitled to stand upon his strict legal rights. The claim for compensation not being the outcome of contractual obligations, the party whose contract has been broken has to lay the foundation for it by showing that he has acted fairly and justly towards the defaulter, before he can claim to be recompensed. The principle is thus stated in Sedgwick on Damages: "If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach, at a trifling expense or with reasonable exertions, he fails in social duty if he omits to do so." The basis of the claim for compensation must be that the plaintiff has not acted wilfully and obstinately in refusing to avail himself of opportunities to remedy the inconveniences caused to him. The reason of the rule is not that there is any obligation on the plaintiff to reduce the damages to any extent, but that he should avoid incurring damages. It was pointed out in *Le Blanche* v. *London and North Western Railway Company* (11) that the question for consideration in such cases is "what a prudent man not having a claim for compensation would do under the circumstances." In the present case, the plaintiff could have avoided incurring the costs by giving the letter of acknowledgment asked of him. He cannot be said to have acted prudently in refusing to give such a letter. He has chosen to stand upon his strict legal rights. However reprehensible the conduct of the defendant may be in allowing Gopalier to institute the suit, he is not liable for damages which could have been avoided by the plaintiff. The Subordinate Judge is, therefore, right, and this petition must be dismissed with costs.

Petition dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 919 OF 1913.

January 28, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

SHANMUGA OTHUVAR—PETITIONER

versus

S. VEERAVAGHU PILLAI—RESPONDENT.

Religious Endowments Act (XX of 1863), s. 18—Sanction to institute suit—Discretion, extent of—Revision, interference in, if justifiable—Costs of applicant, when to be disallowed—Civil Procedure Code (Act V of 1908), s. 115—Mere failure to exercise judicial discretion, if can be interfered with in revision.

Section 18 of the Religious Endowments Act gives a very wide discretion to the District Judge in regard to matters coming under the section and the mere fact that some serious allegations contained in the petition for sanction had not been considered by the Judge and the possibility of the Judge sitting in revision coming to a different conclusion, are not sufficient reasons for interfering with the order of the District Judge in revision. [p. 638, col. 1.]

In the absence of anything to show that the charges were unfounded and the petitioner acted negligently or inconsiderately, with a view to annoy or harass, and not prudently and *bona fide*, in applying for the sanction, the petitioner will be entitled to be paid his costs out of the trust property. [p. 638, col. 2.]

A mere failure to exercise a judicial discretion will not justify interference under section 115, Civil Procedure Code [p. 638, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the

order of the District Court of Tinnevelly in Original Petition No. 155 of 1913, dated 18th October 1913.

FACTS.—The petitioner applied under section 18 of the Religious Endowments Act to the District Judge of Tinnevelly for sanction to institute a suit against a certain trustee against whom he brought forward various charges, some of them being serious. The District Judge issued notice to the trustee, and after hearing him considered that his explanation as regards some of the charges was satisfactory. He, thereupon, dismissed the petition and ordered the petitioner to pay his costs. Against this order the petitioner preferred this civil revision petition.

Mr. *C. S. Venkatachariar*, for the Petitioner:—The District Judge erred in not considering many serious allegations made against the trustee, and consequently the order dismissing the petition cannot be supported. In any event the order as to payment of costs is illegal. The petitioner acted prudently and *bona fide* in applying for sanction and he ought to have been awarded his costs, instead of being made to pay the costs of the trustee.

Mr. *S. V. Padmanabha Iyengar*, for the Respondent:—Section 18 of the Religious Endowments Act gives a very wide discretion to the District Judge and the exercise of that discretion should not be interfered with by the High Court. The Judge having found that the explanation of the trustee was satisfactory, his order awarding the trustee's costs is quite correct. Costs also being in the discretion of Court, mere failure to exercise judicial discretion can never be a ground of interference in revision.

JUDGMENT Mr. Venkatachariar complains that many serious allegations contained in his client's application for sanction have not been considered by the District Judge. I cannot say that that is a ground which would entitle me to set aside the order of the District Judge. Section 18 of the Religious Endowments Act gives him wide discretion in regard to such matters and although if I had been hearing the petition myself, I may not have come to the same conclusion, that is not a reason for my setting aside the order passed by the District Judge.

On the question of costs, which the District Judge has directed the petitioner to pay to the trustee complained against, I find that at least there are two grounds which would have justified the petitioner in moving the District Judge, and although the explanation in respect of items (*c*) and (*f*) was regarded by him as satisfactory to the extent of refusing sanction he failed to note that they were not unfounded and that the petitioner did not act negligently or inconsiderately in praying for a sanction. It would discourage honest men from coming forward to move on behalf of a trust if, when they have done all that is necessary to bring certain matters before the Court, and it is apparent that they acted prudently and *bone fide* and not with a view to harass or annoy, they should be compelled to pay the costs of the trustee who has given cause for complaint. I am of opinion that the District Judge's order as to costs is wrong. However, I do not think that under section 115 of the Code, I can interfere with a bare failure to exercise a judicial discretion. I must, therefore, dismiss the petition, but under the circumstances mentioned by me, each party will bear his own costs in this Court.

Petition dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 68 OF 1914.

March 2, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

CHINNASAWMI CHETTIAR—APPELLANT

versus

PONNA AMMAL—PETITIONER.

Succession Certificate Act (VII of 1889), s. 9—Application for certificate by Hindu widow—Opposition by husband's divided brother—Security, if should be furnished.

Under section 9 of the Succession Certificate Act, VII of 1889, it is not obligatory on Courts to demand security whenever a Hindu widow applies for the grant of a certificate to her. [p. 639, col. 1.]

Sundrammal v. *Kullapa Chetti*, 5 M. L. J. 36, distinguished.

Appeal against an order of the District Court of Coimbatore, in Original Petition No. 296 of 1913.

FACTS.—An application for a succession certificate put in by a Hindu widow was opposed by her husband's brother. The District Judge found that the brother was divided and ordered the issue of a certificate to her without any security. The brother then preferred this civil miscellaneous appeal.

Mr. *S. T. Srinivasagopalachariar*, for the Appellant:—As the grant of the certificate was opposed by the appellant, the nearest reversioner, the District Judge ought to have called upon the respondent to furnish security before getting the certificate. *Sundrammal* v. *Kullapa Chetti* (1).

Mr. *C. V. Anantakrishna Iyer*, for the Respondent:—In the *Sundrammal* v. *Kullapa Chetti* (1) the Judge was unable to decide which of the rival applicants was entitled to succeed. In the present case he has distinctly found that the appellant was a divided brother. The order of the Judge is, therefore, correct.

JUDGMENT.—The District Judge is right in holding that the brother was divided. Mr. Srinivasagopalachariar argues that as his client is the nearest reversioner, the District Judge should have called upon the widow to furnish security before granting her the certificate. He relies upon *Sundrammal* v. *Kullapa Chetti* (1). In that case the District Judge was unable to decide which of the rival applicants was entitled to succeed to the estate: and the learned Judge held that under the circumstances security should have been demanded. To accede to the appellant's contention will amount to holding that wherever a widow applies for a certificate, she is bound to give security. This is not the law and no authority has been quoted in support of it.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 5 M. L. J. 36.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 73 OF 1913.

February 23, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice and Mr. Justice Trotter.

T. R. M. T. SUBRAMANIAM CHETTIAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR OF RAMNAD—DEFENDANT—RESPONDENT.

Madras Regulation (XXV of 1802), *s.* 4—*Service* inam—Lakhiraj *grant—Right of Government to impose assessment—Limitation Madras Regulation (XXXI of* 1802) *s.* 2.

Lakhiraj grants made before the Permanent Settlement and not confirmed under Regulation XXXI of 1802 are liable to full assessment at the option of the Government and there is no period of limitation for the exercise by the Government of its right to impose such assessment. [p. 640, col. 1]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 87 of 1912.

FACTS.—The suit village, which was situated in Ramnad, was *lakhiraj* at the time of the Permanent Settlement. It was excluded from Settlement under section 4 of Regulation XXV of 1802 and it was admitted that section 2 of Regulation XXXI of 1802, which confirmed grants of a similar kind, did not apply to Ramnad. In 1864 the Inam Commissioner recommended that the village should be fully assessed. The matter was in abeyance till February 1910, when the Government assessed the suit village. The plaintiffs then filed a suit for a declaration that the order imposing assessment was not valid and for an injunction and being unsuccessful in the Court of the Temporary Subordinate Judge of Sivagang, preferred this appeal to the High Court.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellant:—The order of the Government is *ultra vires* and illegal. The right to assess, if any, was barred by limitation. The recommendation of the Inam Commissioner was in 1864. Till 1910 nothing was done. That conduct on the part of the Government clearly shows that it had no right to impose assessment.

Dr. *S. Swaminathan*, for the Government Pleader for the Respondent:—The village was excluded from section 4 of Regulation XXV of 1802. Section 2 of Regulation XXXI of 1802 did not apply to Ramnad and so

the grant has not been confirmed. The right to impose assessment, therefore, survived in the Government, and there is no period within which the law requires such a right to be exercised by the Government. Vide *Boddupalli Jagannadham v. Secretary of State for India in Council* (1).

JUDGMENT.—This is an appeal from a decree of the Subordinate Judge's Court of Ramnad, dismissing a suit brought by the plaintiffs against the Secretary of State in Council for a declaration that the Government order of 10th February 1910 directing the suit village to be fully assessed was not valid and for an injunction. The evidence clearly shows that the suit village was *lakhiraj* or exempt from the payment of revenue at the date of the Permanent Settlement and that it was excluded from the Settlement under section 4 of Regulation XXV of 1802. Further it is now admitted that section 2 of Regulation XXXI of 1802, which confirmed certain grants of this kind, did not apply to Ramnad where the suit village is situated. The Inam Commissioner in 1864 recommended that the village should be fully assessed, but it was not until February 1910 that effect was given to his recommendation by Exhibit A.

The case is clearly governed by the decision in *Boddupalli Jagannadham v. Secretary of State for India in Council* (1), but there is no period of limitation for the exercise by Government of its right to impose assessment on land liable thereto. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 27 M. 16.

MADRAS HIGH COURT.
FULL BENCH.

LETTERS PATENT APPEAL No. 118 OF 1911.
September 20, 1912.

Present:—Sir Ralph Benson, KT., Offg. Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Sundara Aiyar.

SUBBA NAIDU *alias* SUBBARAYULU NAIDU—APPELLANT

versus

ETHIRAJAMMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appellate Court, powers of, to admit additional evidence—Evidence on record otherwise unintelligible—Mutual, open and current account—Barred items—Guardian, power of, to accept.

Under Order XLI, rule 27, of the Civil Procedure Code, 1908, an Appellate Court is entitled to admit additional evidence when the evidence already on record is unintelligible without it.

A guardian of a minor can accept accounts on the footing that they are mutual, open and current accounts even if some of the items may be barred by limitation.

Appeal, under section 15 of the Letters Patent, against the judgment of this Court, in Second Appeal No. 1461 of 1906, reported in 12 Ind. Cas. 673, presented against that of the District Court of Madura, in Appeal Suit No. 161 of 1909 (Original Suit No. 35 of 1908) on the file of the Additional District Munsif of Madura.

FACTS of the case appear from the judgments of Abdul Rahim and Phillips, JJ., reported in 12 Ind. Cas. 673.

Mr. *K. Jagannada Aiyar*, for the Appellant.

Mr. *P. K. Narayanasamy Aiyar*, for the Respondents.

JUDGMENT.—On the facts which are correctly stated in the judgment of Phillips, J., we agree with him that the District Judge was justified in admitting the additional evidence in order to enable him to dispose of the appeal to his own satisfaction. We also agree with him that there was a mutual, open and current account between the parties and that the guardians were justified in taking all the items into account.

We dismiss the appeal with costs of the 1st respondent and we modify the order as to costs in the second appeal, by allowing costs only to the 1st respondent.

We extend the time for redemption to three months from this date.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 96 OF 1914.

January 13, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

RAMAVA CHENNAPPA—ACCUSED.

Penal Code (Act XLV of 1860), ss. 302, 304A – Administering poison as a love potion—Rash and negligent act—Criminal Procedure Code (Act V of 1898), ss. 236, 237, 307—Trial for murder—Charge under s. 304A not framed – Conviction under s. 304A.

Where arsenic oxide was deliberately administered to a man as a love potion by his wife with the connivance of her mother who had procured the stuff in some way and given it to her daughter:

Held, that as to deal in this way as a love potion with a most deadly form of poison is to act both rashly and negligently in whatever walk of life the person so doing may be, an offence under section 304A of the Indian Penal Code was clearly made out against the wife, and the mother was guilty of abetment [p. 642, cols. 1 & 2.]

Held, further, that although no charge under section 304A is framed at the trial for murder, on reference under section 307 of the Criminal Procedure Code the High Court is competent under sections 236, 237 of the Code to record conviction under section 304A. [p. 642, col. 2.]

Criminal reference from the decision of the Additional Sessions Judge of Belgaum.

Mr. *V. R. Sirur*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

HEATON, J.—In this case there is no doubt whatever about certain facts. One Chenappa died shortly after eating food prepared by his wife. It was found that he had died of arsenic poisoning. Then there is really no substantial doubt about these further circumstances: that the poison was given to Chenappa's wife by her mother and that she mixed it with the food she gave to her husband. The wife was charged with the murder of her husband and her mother was charged with abetting the murder.

The case was tried by a Jury in Belgaum. In the course of his charge to the Jury, the Judge pointed out that although there was no separate charge under section 304A of the Indian Penal Code, it was open to the Jury to find a verdict of 'guilty' of an offence under section 304A and an acquittal under the charge of murder. With that direction in their minds the Jury came to the conclusion by a majority of three to two that the women were not guilty of any offence whatever. The Judge found himself unable to accept this verdict and has referred the case to us.

It is unnecessary to go into the evidence in detail, because it really is quite conclusive as to the circumstances I have mentioned. But at a very early stage in the case, that is to say, in their first statements to the Magistrate, the women maintained that the stuff which had been administered to Chenappa was a kind of medicine used as a love potion. If this is so, admittedly there is no case of murder, though there may be a case under section 304A. The Judge has come to the conclusion that it is a case of murder. One of the principal reasons which influenced his decision was that the day after the death of the man, the wife had made a statement to various of the witnesses, which they regarded as an admission, that she had intended to kill her husband, and the Judge came to the conclusion that these witnesses were not only telling the truth to the best of their ability, but also had retained a correct impression of the purport of what the woman said. I do not doubt that the witnesses, according to their lights, were deposing truly. But I do gravely doubt whether they had retained a correct impression of what the woman actually said. The recollection of a conversation, when it is not corrected by some notes or account written down at the time or shortly afterwards, is a very tricky thing; and in the case of witnesses of the class of those with whom we are dealing, the recollection or supposed recollection is almost inevitably largely coloured by what transpired between the occurrence of the conversation and the recital of the conversation by the witnesses. In this case, for instance, I can quite readily conceive that what the woman said was that she had given medicine to her husband without either implying or suggesting that she knew that it was poison. Yet in the light of the events which subsequently came to knowledge, the witnesses may have quite honestly believed that what the woman really had implied, perhaps even said, was that she had intended to poison her husband. I think, therefore,

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that that particular which was relied on by the Judge does not really exist in the form in which he supposes.

Then he finds that the proved facts are more compatible with the theory that the woman wished to get rid of her husband than that she wished to stimulate his affection for her. Here again I do not agree. The facts which are indicated by the evidence are considerable disagreement and friction between the husband and wife which may have been due, at least in part, to the impotence of the husband. Of course, we can have only a fragmentary and a very imperfect knowledge of what the relations between husband and wife really were. We never learn anything approaching the whole truth in these cases. But the suggestions in this particular case do not seem to me to point at all definitely to any wish on the part of the wife to get rid of the husband. These are the principal circumstances which are believed to tell against the wife on the charge of murder.

A third important circumstance is that she was in possession of very nearly 250 grains of arsenious oxide and it was from arsenic poisoning that her husband died. Five grains of this stuff is, roughly speaking, enough to kill any ordinary man. How this woman came to be in possession of enough of this deadly stuff to kill about fifty people is quite unintelligible, and, looked at as a matter of pure conjecture, it seems to me almost as unintelligible on the theory that she wished to poison her husband as it is on the theory that she wished to stimulate his affections. On the other hand, the fact—and it is a fact—that the wife gave the remnants of the food to their cow which also died of arsenic poison, suggests that she did not know the deadly effects of the stuff she had used.

Therefore, it seems to me that there is no good reason for disturbing the verdict of the majority of the Jury in so far as it is a verdict on the charge of murder. But, as I have said, there can be no doubt in this case that this deadly stuff was deliberately administered to the man by his wife with the connivance of her mother who had procured the stuff in some way and given it to her daughter, and it seems to me, that to deal in this way as a love potion with a most deadly form of poison, is to act both rashly and negligently in whatever walk of life the person so doing may be. I think that an offence under section 304A of the Indian Penal Code is quite clearly made out by the facts proved.

We have had a somewhat lengthy and not an uninteresting argument as to whether section 307 of the Criminal Procedure Code permits us to convict these persons under section 304A of the Indian Penal Code because of the fact that there was no charge under that section at the trial. It is contended on behalf of the prosecution that the terms of sections 236 and 237 of the Criminal Procedure Code enable us to record this conviction. Whatever may be said about section 238 of the Code, I do not feel any doubt that under sections 236 and 237 we are empowered to record such a conviction. It was beyond question a doubtful matter in this case from the very beginning whether the facts, which the prosecution would be able to prove, would establish more than the administering of the poison in the way I have mentioned. It was doubtful whether they would go so far as to prove that poison was administered with the intention of killing. It would, therefore, it seems to me, quite clearly have been open to the prosecution to bring these persons to trial on charges both of murder and under section 304A of the Indian Penal Code. If that were so, it follows from the provisions of section 237 of the Criminal Procedure Code that although the charge under section 304A of the Indian Penal Code was not formally made it was open to the Court to convict under that section.

We do convict these women, the first Ramavakom Chenappa under section 304 A of the Indian Penal Code and the second Balavakom Shivbasappa under the same section read with section 109 of the Indian Penal Code, that is of abetment, and we direct that they do suffer rigorous imprisonment for two years.

SHAH, J.—I entirely argee.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 374 OF 1914.

CRIMINAL REVISION PETITION No. 306 OF 1914.

February 18, 1915.

Present:—Mr. Justice Tyabji.

NARASAPPAYYA—COMPLAINANT—PETITIONER

versus

NARASAYYA SHANBHOGUE AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Precedure Code (Act V of 1898), Ch. XVIII—Inquiry—Power of trying Magistrate to discharge accused—Scope of his inquiry in a charge triable by Court of Session—Penal Code (Act XLV of 1860), s. 463, 464.

In the case of offences which are triable solely by a Court of Session, a Magistrate cannot be considered to have the power to proceed to the trial of the accused in those inquiries, and the chief business of the Magistrate is to see whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible in regard to every ingredient of the offence that is charged. [p. 643, col. 2; 644, col. 1.]

Where in a charge under sections 463 and 464 of the Penal Code, the fact of the alteration of the promissory note was proved, but no evidence was adduced to prove that either of the accused altered the document in question:

Held, that the trying Magistrate had power to discharge the accused. [p. 644, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Stationary Magistrate, Kasargod, in Register Case No. 8 of 1913, (Criminal Revision Case No. 14 of 1914, on the file of the Court of the District Magistrate of South Canara).

Mr. *J. L. Rosario*, for the Petitioner.

Mr. *S. Swaminadhan*, for the Respondents.

ORDER.—This is a revision petition in which I am asked to revise the order of the District Magistrate of South Canara in which in the exercise of his powers under section 436 of the Criminal Procedure Code, he held that the accused person had not been improperly discharged by the inquiring Magistrate. The order of discharge, which was thus upheld by the District Magistrate, was passed by the third Class Stationary Sub-Magistrate of Kasaragod on a complaint that the 1st and 2nd accused, who are now before me, had been guilty of the offences referred to in sections 467, 468, and 471 of the Indian Penal Code, that is, of the forgery of a valuable security. The Stationary Sub-Magistrate discharged the accused, being of opinion under section 209 of the Criminal Procedure Code that there were not sufficient grounds for committing the accused for trial; and I have now in effect to decide whether the order of discharge was within the powers of the Magistrate or whether he encroached upon the prerogative of the Sessions Court, which alone has jurisdiction to try the offences under the sections to which I have referred. The words of the sections are very wide and they empower or rather require the Magistrate in the first instance to discharge the accused if he is of opinion that there are not sufficient grounds for committing him for trial. These words of the section have, however, been judicially interpreted in decisions, which are binding upon me, to mean that in the case of offences which are triable solely by a Court of Session, the Magistrate cannot be considered to have the power to proceed to the trial of the accused in these inquiries. It seems to me that I would not be justified in travelling beyond the judicial interpretation of the section, which restricts its scope so as to prevent a Magistrate in the course of the inquiry from encroaching upon the prerogative of the Sessions Court. I take, therefore, as a guide for the meaning of the section the terms in which Bakewell, J., interpreted in *National Bank of India, Ltd.* v. *Kothandarama Chetti* (1). In that case there was a difference of opinion between Benson, J., and Sundara Aiyar, J., and the question was referred to Bakewell, J., who says: "His (the Magistrate's) duty is to determine whether the accused should be put upon his trial, and he ought to commit if he is satisfied that there are credible witnesses to facts which, if believed by a Jury, would justify the conviction of the accused of the offence complained of. If he proceeds to weigh the evidence, to accept some statements and reject others, to deal with probabilities or to draw inferences as to knowledge or intention, he is in reality dealing with the question of the guilt or innocence of the accused and is usurping the functions of the trial Court. The Magistrate has undoubtedly to exercise his

(1) 21 Ind. Cas. 129; (1913) M. W. N. 725; 12 M. L. T. 200; 14 Cr. L. J. 529.

discretion in the matter; for instance, he may examine the varying statements of the witnesses for the prosecution and come to the conclusion that they are not credible witnesses, or he may find that there is incontestab'e evidence that conditions which are shown to have existed at one time had passed away prior to the date of the alleged offence. Possibly he may say that the facts alleged are not sufficient to warrant any inference as to the knowledge or intention of the accused; this, however, is to go very near the line, and I am inclined to agree with the observations of Geidt, J., at pages 838 and 839 of the report *i. e.* 9 C. W. N." (1913) M. W. N. 728 at 750). Taking, therefore, this exposition of the section as my guide, I have to see whether the Magistrate—I shall refer only to the order of the Stationary Sub-Magistrate, because the District Magistrate has upheld and agreed with the decision of the Magistrate of the first instance I shall consider—whether the Magistrate put to himself a question different from that which Bakewell, J., requires that he should put to himself. For this purpose I must, in the first instance, refer to the elements of the offence with which the accused are charged; for it is beyond dispute that the chief business of the Magistrate is to see whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible in regard to every ingredient of the offence that is charged. There are no doubt decisions which give to the Magistrate far larger powers. But taking the narrowest view of his functions, it must include the function to which I have just referred.

The offence of forgery is dealt with in sections 463 and 464 of the Indian Penal Code, but the portion that is directly applicable to the present case is contained in the second part of section 464, where it is laid down that a person is said to make a false document who without lawful authority alters dishonestly or fraudulently a document in any material part thereof after it has been made or executed either by himself or by any other person. The offences alleged in this case are that there was a promissory note in favour of the 1st accused dated the 6th October 1910 and that the promissory note was altered by the addition of the figure (2) so as to make it appear to bear the date 26th October 1910 in order to save the bar of limitation against the suit instituted on the 27th October 1913, the Court having been closed on the 26th. The conclusions of facts at which both the Magistrates have arrived have been much canvassed by the learned Pleader and Counsel who appeared before me and I think it unnecessary, therefore, to go into them again in any great detail. After having given the careful arguments that were addressed to me, my best consideration it seems to me that, though the decisions of the Magistrate are not worded exactly in the way in which they might have been worded had they had the benefit of the arguments which have been placed before me, yet they in effect come to the conclusion that accepting the evidence of the prosecution witnesses in so far as they are not manifestly incredible and assuming that that evidence will carry weight with a Jury and be believed by them, still the prosecution failed in one material element of the offence charged. The prosecution failed to adduce any evidence to prove that either the 1st or the 2nd accused altered the document in question. Both the Magistrates were evidently of opinion that, from the evidence adduced by the prosecution itself, what appeared was that the 1st and 2nd accused were not in actual possession or control of the promissory note, that the prosecution witnesses do not bring home to these accused even the knowledge of any alteration in the document. That fact, or rather the absence of any evidence to prove that fact, seems to me to be fatal to the case for the prosecution. It seems to me, therefore, that the Magistrates were right in coming to the conclusion that there were not sufficient grounds for committing the accused for trial.

The petition must, therefore, be dismissed.

Petition dismissed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 87 OF 1914.

February 4, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

RAJAPPA RAMAPPA KALAL—ACCUSED.

Penal Code (Act XLV of 1860), s. 199—False declaration before Mamlatdar *to obtain certificate of solvency for purposes of Abkari license—Offence.*

A false declaration made to a *Mamlatdar* in the hope of obtaining a certificate of solvency for the purpose of securing a license from the Abkari officials, is not such a declaration as a Court of Justice or any public servant or any person is bound by law or authorised by law to receive, and hence does not come within the purview of section 199 of the Penal Code.

Criminal reference made by the Sessions Judge of Bijapur against conviction and sentence passed by the first Class Magistrate of Bijapur.

Mr. *H. B. Gumâste*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—This is a curious case. A person was accused of an offence on the following facts: for the purpose of securing a license or something of that sort from the Abkari officials he made a false declaration to a *Mamlatdar* in the hope that he would obtain from the *Mamlatdar* what is called a certificate of solvency, a certificate which would enable him more easily to obtain the license or whatever it was that he wanted from the Abkari authorities. He was charged with an offence under section 199 of the Indian Penal Code in consequence of making this false declaration and he pleaded guilty to the charge. We can only take this plea of guilty as a plea that the facts alleged against him were correct, because we think, as does the Sessions Judge who referred this case to us, that the facts alleged and admitted do not amount to an offence under section 199 of the Indian Penal Code. That section is very strict in its terms and deals with a false declaration only when the declaration is one which a Court of Justice or a public servant or other person is bound or authorised by law to receive as evidence. It has not been pointed out to us that any Court of Justice or any public servant or any o her person is either bound by law or authorised by law to receive such a declaration, as we have in this case, in evidence and, therefore, in law no offence under section 199 of the Indian Penal Code has been committed. The Sessions Judge held that as there was a plea of guilty, he could not deal with the case in appeal and, therefore, he referred it to us. What I have said shows that the offence of which the accused was convicted has not been committed and, therefore, the conviction must be set aside and the fine, if paid, refunded. I only wish to add that I have spoken exclusively with reference to section 199 of the Indian Penal Code. Bail bonds in this case may be cancelled.

SHAH, J.—I agree.

Conviction and sentence set aside.

CALCUTTA HIGH COURT.

CRIMINAL RULES NOS. 809 AND 810 OF 1914.

June 17, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

ASRABUDDIN SARKAR AND OTHERS—PETITIONERS

versus

KALI DOYAL MULLICK AND ANOTHER—OPPOSITE PARTIES.

Penal Code (Act XLV of 1860), ss. 471, 474—User, meaning of—Offence—Sanction, if required—Criminal Procedure Code (Act V of 1898), ss. 195, 476.

Prosecution under section 474, Indian Penal Code, requires no sanction. [p. 646, col. 1.]

In a rent suit filed by the petitioners the complainant was summoned to produce a *kabuliyat* and an *amalnamah*. The documents were produced not by the complainants but by the petitioners themselves as coming from the custody of the complainant:

Held, that the facts constitute a user within the meaning of section 471, Indian Penal Code, and for prosecution for this offence sanction under section 195 or an order under section 476, Criminal Procedure Code, is necessary. [p. 646, col. 2.]

Ambika Prasad Singh v. *Emperor*, 8 Cr. L. J. 398; 35 C. 820; *Rati Jha* v. *Emperor*, 14 Ind. Cas. 201; 39 C. 463; 15 C. L. J. 509; 13 Cr. L. J. 201; 16 C. W. N. 623; *Mobarak Ali* v. *Emperor*, 15 Ind. Cas. 81; 17 C. W. N. 94; 13 Cr. L. J. 449 and *Krishna Proshad Mandal* v. *Rabindra Nath Dinda*, 13 Ind. Cas. 99; 13 Cr. L. J. 6, referred to.

ZAHIR SINGH v. EMPEROR.

IN No. 809 OF 1914.

Babu *Brojendra Nath Chatterjee*, for the Petitioners.

Mr. *S. P. Sinha*, Counsel, and Babu *Surendra Nath Guha*, for the Opposite Party.

IN No. 810 OF 1914.

Babu *Brojendra Nath Chatterjee*, for the Petitioners.

Mr. *Pugh*, Counsel, and Babu *Surendra Nath Guha*, for the Opposite Party.

JUDGMENT.—In these two Rules it appears that two prosecutions under sections 474, Indian Penal Code, have been instituted against the petitioners in respect of certain documents, namely, in each case a *kabuliyat* and an *amalnamah*. It further appears that the petitioners instituted a rent suit (No. 324 of 1913) and that in that suit summoned the complainants in the criminal proceedings to produce the documents in question, each a *kabuliyat* and an *amalnamah*. The production of the documents followed. The case for the complainants is that the documents are not genuine and were in fact produced not by the complainants, but by the plaintiffs, the petitioners before us. The contentions of the petitioners before us are that a sanction under section 195 or an order under section 476 of the Code of Criminal Procedure is necessary before they can be prosecuted, and that in any case pending the decision of the rent suit the prosecution should be stayed.

On behalf of the complainants-opposite parties it is contended, *first*, that the documents having been merely filed there has been no user, and, *secondly*, that the prosecution under section 474 requires no sanction. The second contention cannot be disputed, and in support of the first reference is made to the case of *Ambika Prasad Singh* v. *Emperor* (1). But in at least three subsequent cases, *Rati Jha* v. *Emperor* (2), *Mobarak Ali* v. *Emperor* (3) and *Krishna Proshad Mandal* v. *Rabindra Nath Dinda* (4), it has been held that at least in certain circumstances the filing of a document may constitute a user. On the case for the prosecution, in the present instance, the documents were produced by the petitioners as documents coming from the custody of the complainants. We are of opinion that this, if established, constitutes a user within the meaning of section 471, Indian Penal Code. It follows that the offences, if any, committed, are offences under section 471 of the Code and in respect of those offences sanction under section 195 or an order under section 476, Criminal Procedure Code, is necessary.

Apart from this, it is not disputed that the decision of the issues in the rent suit depends largely on the question whether the documents in question are or are not genuine. That being so, we are of opinion that it is expedient that the criminal proceedings should be deferred pending the final disposal of the rent suit. After that suit is disposed of, it will be open to the Courts and to the complainant to take further appropriate action. These Rules are, therefore, made absolute and the present criminal proceedings quashed.

The petitioners will now be discharged from their bails.

Petitioners discharged.

(1) 35 C. 820; 8 Cr. L. J. 398.

(2) 14 Ind. Cas. 201; 39 C. 463; 15 C. L. J. 509; 13 Cr. L. J. 201; 16 C. W. N. 623.

(3) 15 Ind. Cas. 81; 17 C. W. N. 94; 13 Cr. L. J. 449.

(4) 13 Ind. Cas. 99; 13 Cr. L. J. 6.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 1228 OF 1914.

February 19, 1915.

Present:—Mr. Justice Tudball.

ZAHIR SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 537—Sanction to prosecute granted—First complaint dismissed—Second complaint without fresh sanction—Irregularity, objection as to, taken at the very first stage, effect of.

Section 537 of the Code of Criminal Procedure was never intended to allow a Magistrate to override the clear provisions of the Code. The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the trial. Where, therefore, the want of sanction for prosecution of a complaint is at once brought to the attention of the Court, it is the duty of the Magistrate to refuse to take cognizance of the complaint on the ground that he cannot do so by reason of the terms of section 195 of the Code. [p. 647, col. 2.]

ZAHIR SINGH *v.* EMPEROR.

Sanction to prosecute *Z* and some other persons was granted under section 195. On the basis of the sanction a complaint was filed but the accused were discharged as the complainant was not present on the date of hearing. A fresh complaint was filed against *Z* alone:

Held, that the second complaint was not in continuation of the first. [p. 647, col. 1.]

Criminal revision against an order of the Magistrate, first Class, of Farrukhabad.

Mr. *A. H. C. Hamilton*, for the the Appellant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This application in revision arises out of the following facts. One Tika Ram obtained a sanction on March 3rd, 1913, to prosecute Zahir Singh and certain others for offences under sections 467 and 471 of the Indian Penal Code. An appeal was filed against the order granting sanction, which was dismissed on June 10th, 1913. On July 5th, 1913, Tika Ram filed a complaint against those three persons. Proceedings in the case were suspended pending the decision of an application in revision to this Court. That application was rejected on January 21st, 1914. Tika Ram then waited practically for four months until May 15th, 1914, when he went into Court and asked that his complaint might be taken up and decided. His application was granted and the case came up for hearing at the end of a little over three months on August 20th, 1914. Tika Ram did not appear and the accused were discharged. After the order of discharge had been made, Tika Ram filed a fresh complaint as against Zahir Singh only. Zahir Singh on this fresh complaint at once took objection that it was a complaint filed out of time and that the Magistrate could not take cognizance of the offence. The Magistrate disallowed this objection in the following words: "The first application was within time and by the subsequent application the continuity is not broken." In other words, he took this fresh complaint as being a proceeding in continuation of the former proceeding. This, however, was clearly wrong. It was clearly a fresh complaint as against Zahir Singh alone. If Tika Ram wished to continue the former proceeding he could have gone to the District Magistrate or the Sessions Judge and have obtained an order for further enquiry, on his first complaint. Zahir Singh has been committed for trial. The present application is directed to have that committal order quashed. On behalf of the Crown it is urged that the defect in the section is one which is cured by section 537 of the Code of Criminal Procedure. That section lays down that subject to the provisions hereinbefore contained no order shall be reversed or altered in revision on account of want of any sanction. required by section 195, unless such want has in fact occasioned a failure of justice. The explanation attached to the section is that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether an objection could and should have been raised at an earlier stage of the proceeding. As has frequently been remarked in many cases, section 537 is not perhaps happily worded. But to my mind one thing is clear, and that is that section 537 was clearly never intended to allow a Magistrate to override the clear provisions of the Code. The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the proceeding. Where, however, as in the present case, the want of sanction was at once brought to the attention of the Court, it was clearly the duty of the Magistrate to refuse to take cognizance of the complaint on the ground that he could not do so by reason of the terms of section 195 of the Code. To allow the present applicant to proceed to trial in the Court of Session would be grossly unfair, seeing that the trial must in the end fail by reason of the want of sanction. I, therefore, allow the application and set aside the order of the Court below. The applicant, if on bail, need not surrender; if in confinement, he will be released at once.

Application allowed.

RAMDEO PANDEY *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL REVISION PETITION No. 96 OF 1912.
February 15, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
RAMDEO PANDEY—ACCUSED—PETITIONER
versus
EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—Security for good behaviour—Fresh proceedings after release—Circumstances after release to be considered.

Where fresh proceedings under section 110 of the Criminal Procedure Code are taken against an accused after his release from the last security, they must be confined to facts and circumstances alleged against him after his release.

Junab Ali v. *Emperor*, 31 C. 783; 8 C. W. N. 909; 1 Cr. L. J. 801, referred to.

Mr. *Huq*, Counsel, and Babu *Manmatha Nath Mukherji*, for the Petitioner.

Babu *Sris Chandra Chowdhury*, for the Crown.

JUDGMENT.—We think that this Rule must be made absolute on the first ground on which it was issued, namely, that the proceedings are premature. The Police report upon which they are based mentions 17 cases in which the accused has been suspected to have taken part, and eight of those cases, or nearly half, we are surprised to find, took place during the period when he was previously furnishing security. Then there are four cases in which the Police reported that he has been known to have taken part. All four of these cases took place during his previous terms of security, and it is upon these 12 cases with 9 other cases, which occurred in April, May and June and August 1911, that he is now being arraigned, and the proceedings state that this report makes it appear to the Magistrate that this man is by habit a thief and house-breaker by night and that he habitually commits extortion and offences involving a breach of the peace. As far as we can see there is no hint of extortion or any offence involving a breach of the peace in this list of cases, and the allegation that besides committing burglary and theft he satisfied his ends by force of *lathis* is extremely vague. Of course when he has had time to show that he has formed the habit of theft and house-breaking by night with extortion and offences involving a breach of the peace since the beginning of January, 1911, then on materials confined to the period after his release from his last security proceedings could, if necessary, be taken under section 110 against him. But these proceedings must be confined to facts and circumstances alleged against him after his release from his last security, and to import anything before, as evidence of habit, would be to lay down that having once been called upon to furnish security he could always on the same evidence be made to continue that security from one term to another. That certainly is not the law.

The principle on which these cases should be tried is laid down in *Junab Ali* v. *Emperor* (1). We do not mean to lay down in any particular case or in this case that 15 months is or is not a sufficient period to give a man a *locus pœnitentœ*. That is not the question. In the particular case there reported the Judges held that this man had not had a sufficient *locus pœnitentœ*. But this is probably due to the fact that during the 15 months since he came out of jail there was very little to show that he had continued in his evil courses. But what they did find was that the evil reputation which he had before his imprisonment had still followed him and permeated the evidence of many of the witnesses, and this is what must be avoided. No prejudice can accrue to the petitioner from anything which he is alleged to have done prior to the beginning of 1911, and, therefore, we think that these proceedings taken in October 1911 were premature.

If the District Magistrate is of opinion that there is evidence that this man has become a habitual thief and house-breaker since 1st January 1911 and is now a dangerous character from whom security is required, it will be open to him to take proceedings against him. But in that case we think the District Magistrate should himself have the matter enquired into at his own headquarters rather than at Siwan, as it is perfectly clear that the moving spirit in this and other cases are the local *zemindars* of the Siwan subdivision.

The Rule is made absolute and the proceedings of the 11th October 1911 are set aside.

Rule made absolute.

(1) 31 C. 783; 8 C. W. N. 909; 1 Cr. L. J. 801.

JANG RAI *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 903 OF 1911.
February 19, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
JANG RAI AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 148, 149, 395, 326—*Evidence judicially recorded—Judge's duty to believe or disbelieve witness before him—Finding, when irrelevant.*

It is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to statements made to the Police which are not judicially recorded. [p. 650, col. 1.]

It is the Judge's duty to make up his mind while the witness is before him whether he is a witness of truth or falsehood: and it is only when the Judge sees any reason to distrust his evidence that omissions in a Police record can become of any importance. [p. 650, col. 1.]

Such findings as this: "It is not clear whether the name of Mahabir appears in the Police papers or not," are wholly irrelevant. [p. 650, col. 1.]

Appeal from the judgment and sentence of the Sessions Judge of Shahabad.

Mr. *K. B. Dutt*, Counsel, and Babu *Surendra Nath Ghosal*, for the Appellants.

Mr. Orr (Deputy Legal Remembrancer, Bengal), for the Crown.

JUDGMENT.—This is an appeal from the judgment and sentence of the learned Sessions Judge of Shahabad who, differing with the assessors convicted four persons, Jang Rai, Keshwar, Singh or Rai, Ram Narain and Anjor Ahir under sections 148, 395 and 326 read with section 149 and sentenced the first to 10 years' rigorous imprisonment, the others to seven years each.

Originally eight persons were arraigned before him on these charges but four have been acquitted, though we confess we are unable to appreciate any difference between their cases and those of the present appellants.

It is alleged that 200 of the tenants of Barsingha, a village in the Ballia District, crossed the Ganges on the day of occurrence and looted the fields of the Suremanpur Burja tenants. It is also alleged that one Barhamdeo Rai (not in custody) pursued one Chegan and speared him, killing him instantaneously. Then it is said that Sheo Gobind, who has been tried and acquitted on his establishing a convincing *alibi*, pursued Bhola Rai and speared him so that he also died.

Harnarain or Harnandan Rai, P. W. No. 2, was grievously hurt with a spear so that his dying declaration had to be taken and then the mob disappeared as suddenly as they had come.

There had been already an apprehension of a breach of the peace between the men of Suremanpur Burja and Salempur and so bitter was this quarrel that a Police guard had to be posted on the *chur*. In the meantime, however, some of the Barsingha *ryots* had obtained settlement from the Collector of land in Salempur, which appears to be a *khas mahal*, and this annoyed both the Salempur people and the people of Suremanpur Burja who also wanted settlement of these lands.

The defence is that the boundary dispute between Salempur and Suremanpur culminated that day in a fight in which these persons were killed and wounded and that the two sets of villagers combined to implicate Barsingha men. It is found by the Judge that this boundary dispute had not been settled and there are points in this case which convince us that the defence story is true. All the witnesses swear in the clearest way that Sheo Gobind speared Bhola Rai. There is no room for doubt or escape from this statement and as it has been found to be totally false, this considerably discounts the other evidence as to identification on which the whole case against the appellants turns. It is not like a case where an offender has been given the benefit of the doubt on showing strong evidence of *alibi* as against a mere allegation of presence in the riot.

The identification made by nearly all the witnesses is discredited by their false charge against Sheo Gobind and Bechu Dhobe, P. W. No. 19, alone is left untouched by it and it is on his evidence principally that the learned Judge seems to have relied.

Now this Bechu Dhobe was the first person examined by the Police, and he stated that 200 men had come from Barsingha but gave no names whatever.

The first time any names are said to have been mentioned are by Harnarain at the Chekwara where he was lying wounded, and it seems reasonably open to doubt whether he made such a statement. If he

did, he clearly falsely implicated Sheo Gobind in the murder of Bhola Rai and that same night before the Deputy Magistrate at Lalganj he omitted to mention Jang Rai.

The other witnesses do not appear to have named any one till the 29th March, three days after the occurrence, though Nihora and Guli were with the Sub-Inspector from the first. It is remarkable that the Salempur witnesses admit that they ran away and hid themselves for two or three days. This clearly shows that they were afraid of being implicated in the riot.

The learned Judge nowhere gives his own finding on the truth or falsity of each witness's statement. He relies entirely on the differences in what they say in Court and what they said or are alleged not to have said before the Police. We must point out that it is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to alleged statements made to the Police which are not judicially recorded. It is the Judge's duty to make up his mind while the witness is before him whether he is a witness of truth or falsehood, and it is only when the Judge sees any reason to distrust his evidence that omissions in a Police record can become of any importance.

Such findings as this: "It is not clear whether the name of Mahabir appears in the Police papers or not" are wholly irrelevant.

For the prosecution it may be noted that there are two Mahabirs and twe Sheo Gobinds mentioned and that many of the identifications were not by name.

There seems to be a doubt thrown throughout the evidence and the judgment of the learned Judge both as to the place of occurrence and the parties engaged in the quarrel. The place pointed out to the Sub-Inspector by the witnesses and noted by him on his map does not agree with the evidence nor with the map and *khasras* prepared by the *patwari* long before this occurrence for a wholly independent purpose. The Judge raises a cloud of doubt on this, but does not tell us what his own finding is.

His final finding on page 52 contradicts the oral evidence. But he then starts off again throwing a cloud of doubt on his own finding.

The only finding necessary was that whatever the particular spot was where the crops were being cut, it was undoubtedly south of the lands settled with the Barsingha tenants. If, therefore, the Barsingha people looted those crops they are certainly guilty of dacoity.

But on the other hand the fact that they had no interest whatever in such an act and that they had admittedly come two days before with the Deputy Collector to take over the fields which had been settled with them goes strongly in favour of their defence, and the fact that the real place of occurrence was at some indefinite spot to the south largely supports the theory that the boundary dispute between Salempur and Suremanpur was the real cause of the fight and that the Barsingha people had nothing to do with it. There is no doubt that the boundary dispute was still going on and the witnesses have foresworn themselves in totally denying it in evidence. The defence say the occurrence was somewhat earlier in the day. If it was early enough for Sheo Gobind to have been present, a fact to which the prosecution witnesses have tied themselves, then there was ample time for concoction before the Police came.

It is most significant that Bechu Dhobe, a man of Salempur, states the story that 200 Barsingha men had come across and killed two Suremanpur men, and then disappears for two or three days. It is only when the Salempur people found that the Police had accepted this story that they came forward with evidence.

It is inexplicable how 200 persons came across the Ganges in boats and yet no trace of their coming or going appears in evidence. They must have had at least five large boats and those boats must have been seen. Yet the evidence in regard to the only boat spoken of in which Sheo Gobind and one other man are said to have started from the other side, has been disbelieved and in our opinion, rightly so. As regards the loot the Judge finds there was not much looting. But the only evidence is that some paddy was found cut and admittedly Harnarain and others were cutting their paddy that day. There is no suggestion that the paddy was irregularly cut and there was no mention of loot to the Police.

The witnesses who say that the loot was after the murders are disbelieved. A glance at the table of identifications prepared by the learned Judge shows that Sheo Gobind's false identification vitiates the identification of every one of the accused for we have shown that Bechu's evidence, coming so late as it does after his first information, cannot have any weight.

The argument that it is difficult to believe that a party who had had two men killed and one wounded would make a false charge against other people, is negatived in this case by the positive and detailed false accusation against Sheo Gobind made by Harnarain himself from the very first.

It is contended that the defence did not put forward the story of the boundary riot until they came to argue the case. but we find clear cross-examination to the point in the evidence of P. Ws. Nos. 1 and 2 and in the written statement, paragraph 20 to end. Reading the evidence as a whole we are clearly of opinion that the assessors were right and that the Barsingha people had nothing to do with this occurrence. We accordingly allow the appeals, set aside the convictions and sentences and direct the acquittal and release of the accused.

Appeals allowed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 1078 OF 1914.

January 30, 1915.

Present:—Mr. Justice Piggott.

NAURANG AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 498—Enticing away married woman from her husband's house for marriage—Offence.

A person enticed away a married woman from her husband's house with intent that he might dispose of her in marriage to some one else:

Held, that he committed an offence under section 498 of the Penal Code.

Criminal revision from an order of the Additional Sessions Judge of Meerut.

Mr. *A. H. C. Hamilton*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The point of law taken by this application is whether a person who entices away a married woman from her husband's house, with intent that he may dispose of her in marriage to some one else, has committed an offence under section 498 of the Indian Penal Code. I hold in the affirmative, on the ground that sexual intercourse between the woman and any other person to whom she has thus been given in marriage, during the life-time of her husband, would be illicit intercourse within the meaning of the section in question. An examination of the record in this case suggests some doubt as to whether a more serious offence, falling under the abduction sections of the Indian Penal Code, was not committed; but under the circumstances, and in view of the fact that the applicants Naurang and Tota were re-tried after having been once discharged and that the sentence passed upon them is a fairly substantial one, I am not disposed to direct further action to be taken against them. I dismiss this application.

Application dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 998 OF 1914.

August 11, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Richardson.

CHINTAMONI JENA AND OTHERS—PETITIONERS

versus

JAGANNATH RAMANUJA DAS AND ANOTHER—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—Record of Rights recently published, entries in—Presumption therefrom—*Factum *of possession.*

Whatever presumption may be raised by a recently published Record of Rights, it does not in itself establish the *factum* of possession; and if the Magistrate decides the *factum* of possession wrongly in a proceeding under section 145, Criminal Procedure Code, that is not a question with which the High Court can interfere under the Charter, it not being a question of jurisdiction. [p. 652, col. 1.]

EMPEROR v. ABDUL RAZZAK.

Babus *Girish Chandra Pal* and *Nalini Chandra Pal*, for the Petitioners.

Messrs. *Chakravarti* and *J. Chowdhury*, Counsel, and Babu *Suresh Chandra Chakravarti*, for the Opposite Party.

JUDGMENT.—The question which appears to be one of jurisdiction on the Rule really depends upon the second ground of the Rule, which is that effect has not been given to the presumption arising from the entries in a recently published Record of Rights. That certainly is not a question going to the jurisdiction and we, therefore, cannot interfere. We at first thought that the other ground that there should have been separate proceedings in respect of the several plots claimed by the several sets of tenants, was a separate point going to the jurisdiction. But we find that this is not so. The other sets of tenants have not come here at all, and the present applicants have only come upon the ground that they had obtained tenant rights and possession by a recently published Record of Rights. It is needless to say that whatever presumption may be raised by such a record, it does not in itself establish the *factum* of possession, and that if the Magistrate decides the *factum* of possession wrongly that is not a question with which the High Court can interfere under the Charter, it not being a question of jurisdiction.

The Rule is discharged.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 37 OF 1915.

February 19, 1915.

Present:—Justice Sir George Knox, Kt.

EMPEROR THROUGH SESSIONS JUDGE OF CAWNPORE—PROSECUTOR

versus

ABDUL RAZZAK AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 193 (2) —Power of Sessions Judge to transfer appeal to Assistant Sessions Judge—Jurisdiction—'Case', meaning of.

Section 193, clause 2 of the Code of Criminal Procedure, confers on the Sessions Judge no power to transfer appeals to the Assistant Sessions Judge. The word "case" in the section does not include an appeal. [p. 653, col. 2.]

Chattarpal Singh v. *Raja Ram*, 7 A. 661; A. W. N. (1885) 156; *In the petition of Musa Asmal*, 9 B. 164; *Allah Dei Begam* v. *Kesri Mal*, 2 A. L. J. 576; A. W. N. (1905) 199, referred to.

Criminal Miscellaneous reference made by the Sessions Judge of Cawnpore, as per his letter No. 67/111, dated 9th February 1915.

JUDGMENT.—By an order, dated the 3rd of February 1915, the Sessions Judge of Cawnpore transferred two Criminal Appeals Nos. 7 of 1915 and No. 14 of 1915 pending in his Court to the Court of the Assistant Sessions Judge for trial.

The section of the Code which he considered justified this procedure on his part was section 193, clause 2. This section provides that Assistant Sessions Judges shall try such cases only as the Sessions Judge of the division by general or special order may make over to them for trial. In the opinion of the learned Sessions Judge the word "case" as used in this clause is not defined, and he saw no reason why it should be confined to cases and not extend to appeals or other matters.

This Court has called for the records of the cases in question by the powers conferred upon it by section 435 of the Code of Criminal Procedure. So far as I know the word "case" has never been defined in any General Clauses Act or in the Code of Criminal Procedure, nor am I aware that this particular point has come up to this Court for decision.

In *Chattarpal Singh* v. *Raja Ram* (1), Mr. Justice Mahmud held that so far as the Code of Civil Procedure was concerned the word "case" should be understood in it broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision. With all due respect I think a safer rule is to consider the word in connection with the particular Code or law in which it is found. Under the present circumstances there is considerable difficulty in assigning to the word such a broad meaning. The first difficulty will be found in section 409 of the Code of Criminal Procedure. That section deals with appeals. The right of appeal is a creation of Statute. Without some particular provision authorizing an appeal no right of appeal is conferred. Even when a right of appeal has been conferred, the Court to which such appeal lies must also be specified. A right of appeal without any specification

(1) 7 A. 661; A. W. N. (1885) 156.

as to the Court to which such appeal should be preferred would be a useless right.

The appeals with which we are concerned in the present case are appeals created by section 408 of the Code of Criminal Procedure. That section provides for persons convicted on trials mentioned therein and wishing to appeal can appeal to the Court of Session. To find out what a Court of Session is, we have to turn to section 9 of the Code of Criminal Procedure and a liberal interpretation of section 9 might bring within the words "Court of Session" not only Sessions Judges but also the Additional Sessions Judge and the Assistant Sessions Judge, if there be any such within the Sessions division. If such an interpretation could be adopted it might, therefore, be argued that the words "Court of Session" in this section 408 were wide enough to include all these officers. I pass over the anomaly in such an interpretation of the Court of the Assistant Sessions Judge being a Court from which appeals lie to the Court of Session. Section 409 by providing that an appeal shall lie to the Court of Session or Sessions Judge and shall be heard by the Sessions Judge or by an Additional Sessions Judge, seems to make it clear that the Legislature intended that all appeals under the Code of Criminal Procedure lying to the Court of Session were to be heard only by the Sessions Judge or by an Additional Sessions Judge.

The Bombay High Court has had occasion to consider this question in more than one case. *In the petition of Musa Asmal* (2), they had to deal with a similar provision contained in sections 17 and 18 of Act X of 1872. Mr. Justice West held that section 18 clearly was not meant to give a *quasi*-revisional power over the Magistrates of the District and at the same time no appellate jurisdiction. In a reference made by the Sessions Judge of Surat the same High Court held that a joint Sessions Judge could not try applications under Chapter 32 of the then current Code of Criminal Procedure. They endorsed the view stated by the Sessions Judge that the joint Sessions Judge was absolutely precluded from taking action under Chapter 32 of the Criminal Procedure Code, which relates to reference and revision.

(2) 9 B. 164.

There is another section in the present Code of Criminal Procedure which bears upon the point and that is section 526. That section provides that the High Court can order "that any particular criminal case or appeal" be transferred from one Court to another. If the view taken by the learned Sessions Judge of Cawnpore be correct, the word "appeal" used in this section would be pure surplusage. But in section 526 this phrase is used four times over and is again repeated in section 527 of the Code of Criminal Procedure. It will be found that a view similar to this has been taken where the words "case" and "appeal" are to be found in other laws. I will mention only one, *Allah Dei Begam* v. *Kesri Mal* (3).

I entertain no doubt, therefore, that section 193, clause 2, confers on the Sessions Judge no power to transfer appeals to the Assistant Sessions Judge.

I set aside the order passed as being an illegal order, and direct that the case of Abdul Razzak and Abdul Shakur be returned to the Sessions Court of Cawnpore for trial by the learned Sessions Judge or by the Additional Sessions Judge of Cawnpore, if there be such a Judge in existence at the present time.

Order set aside.

(3) 2 A. L. J. 576; A. W. N. (1905) 199.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 3 OF 1914.

December 3, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Beachcroft.

CORPORATION OF CALCUTTA—COMPLAINANT

versus

MANMOTHA NATH SET AND BROTHERS—DEFENDANTS.

Criminal Procedure Code (Act V of 1898), s. 432—Reference by Municipal Magistrate of Calcutta under Calcutta Municipal Act (III B. C. of 1899), ss. 3 (32), 343, 442, applicability of—"Owner of land," meaning of—Chairman's duty - Service of notices on owner and occupier.

Per *Fletcher, J.*—The term "owner of land" as defined in section 3, sub-section (32) of the Calcutta Municipal Act includes the landlord. The duty of removing a building which comes within the terms of section 343 after notice has been served, falls clearly, amongst others, on the landlord. [p. 654, col. 1.]

Under section 343 of the Calcutta Municipal Act the person who is the owner of the land, having had a notice served upon him, is liable to comply with the terms thereof. [p. 654, col. 2.]

Section 442 of the Calcutta Municipal Act does not, in any manner, abridge the power that is conferred by section 343. [p. 654, col. 2.]

Per *Beachcroft, J.*—Section 442 of the Calcutta Municipal Act provides that if the Chairman considers a building to be in so dangerous a state as to render immediate steps necessary for the safety of the public, he is to take those steps and then to serve notices on the owner and occupier. This section contemplates a case of much greater urgency than section 343 does, and in no way limits the powers of the Chairman under the latter section. [p. 654, col. 2.]

Babu *Baranashibashi Mukerjee*, for the Complainant.

Babu *Hira Lal Sanyal*, for the Defendant.

JUDGMENT.

FLETCHER, J.—This case comes before us on a reference made by the Municipal Magistrate of Calcutta in his capacity as a Presidency Magistrate under section 432 of the Code of Criminal Procedure. The question referred by the learned Magistrate is not very clearly stated in the letter of reference: but the learned Magistrate has sent a supplemental letter and the question which has to be gathered from the two letters is, whether section 343 of the Calcutta Municipal Act is applicable when the hut and the land on which it is built belong to different individuals. The case that the Magistrate has before him is a case where the tenant on the land is the owner of the hut and the only question we have to consider is whether, under section 343 of the Calcutta Municipal Act, the notice can be served upon the person who is the owner of the land. The section says that it may be served upon the owner of the land. The definition of 'owner of land' obviously includes both the landlord and the tenant. "Owner of land" is defined in section 3, sub-section (32), and that obviously includes the landlord. The duty of removing a building which comes within the terms of section 343 after notice has been served falls clearly, amongst others, on the landlord. That seems to me to be without doubt.

Then the learned Magistrate seems to have got somewhat confused over section 442. He seems to have included that section in some manner in this letter of reference. Section 442 contemplates a different set of circumstances. What is contemplated by section 442 is that where in the opinion of the Chairman a building is so imminently dangerous that it is necessary to erect a boarding to prevent it from falling on passengers—I suppose, passengers in a public street—and for that another set of provisions is enacted. But section 442 does not, in any manner, abridge the power that is conferred by section 343. Under section 343 the person who is the owner of the land, having had a notice served upon him, is liable to comply with the terms thereof. That is the only point that arises on the reference. I think the learned Municipal Magistrate after this expression of opinion ought to have no difficulty in disposing of the case before him.

BEACHCROFT, J.—In regard to the first part of the question, it is quite clear that section 343 applies to the facts stated. The language of the section is clear and unambiguous.

The second part of the question is, "whether notice should have been issued in this case to the owner of the hut under section 442 of the Act." No doubt the Chairman could have issued a notice on the owner of the hut after taking the steps contemplated in the first part of the section, if he considered the building to be in such a runious state as to make these steps necessary. But that was a matter for the Chairman to decide. The section provides that, if he considers a building to be in so dangerous a state as to render immediate steps necessary for the safety of the public, he is to take those steps and then to serve notices on the owner and occupier. It contemplates a case of much greater urgency than section 343 does, and in no way limits the powers of the Chairman under the latter section.

Reference answered.

ISMAIL KHAN *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE NO. 73 OF 1915.

February 26, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ISMAIL KHAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Post Office Act (VI of 1898), *ss.* 19, 20, 61, 70—*Sending of cocaine by post, whether offence under Post Office Act.*

Cocaine not being an "explosive" or a dangerous, filthy, "noxious" or "deleterious substance" within the meaning of section 19 of the Post Office Act, the sending of it by post is not an offence under section 61 of the Post Office Act. [p. 655, col. 2.]

Criminal Reference made by the Sessions Judge of Kumaon.

Mr. *C. J. A. Hoskins*, for the Applicant.

Mr. *A. E. Ryves*, (Government Advocate), for the Crown.

JUGDMENT—Ismail Khan has been convicted under section 60A of the Excise Act and under section 61 read with section 70 of the Post Office Act; on conviction, on the first charge he was fined Rs. 200 and on the second one Rs. 100. The learned Sessions Judge to whom Ismail Khan appealed has affirmed the convictions but referred the matter to this Court for the purpose of having the sentences considered with a view to enhancement. Notice was duly served upon Ismail Khan and he has been represented by Mr. Hoskins as Counsel. Mr. Hoskins on his behalf urges, first, that both convictions were illegal, and that in any event the punishment was sufficient. In our opinion the Court below was justified in finding that the accused had been guilty of an offence under section 60A of the Excise Act and that he was rightly convicted. So far as the conviction under section 61 read with section 70 of the Post Office Act is concerned, we think that the conviction was not justified by law. Section 70 of the Post Office Act, VI of 1898, provides that any person, "who abets the commision of any offence punishable under the Act or attempts to commit any offence so punishable, shall be punishable with the punishment provided for that offence." We have now to see what offence Ismail Khan is alleged to have abetted. Section 61 is the only section referred to. That section provides that "whoever in contravention of the provisions of section 19 or section 20 sends or tenders or makes over in order to be sent by post any postal article or anything shall be punishable with imprisonment for a term which may extend to one year or with fine, or with both." We have now to see whether any person in contravention of the provisions of section 19 or section 20 sent any article by post. Section 19 is as follows:—"Except as otherwise provided by rule and subject to such conditions as may be prescribed thereby, no person shall send by post any explosive, dangerous, filthy, noxious, or deleterious substance, any sharp instrument not properly protected, or any living creature which is either noxious or likely to injure postal articles in course of transmission by post or any officer of the Post Office." Clause (2) "no person shall send by post any article or thing which is likely to injure postal articles in course of transmission by post or any officer of the Post Office." It is quite clear that the provisions of section 20 have no bearing on the case. It seems to us that the provisions of section 19 really deal with the sending of articles or animals by post which will be likely to injure any person occupied in the execution of the Post Office work, or which might be likely to cause injury to articles in the course of transmission through the post. It does not seem to aim at the restriction of any trade. It is very hard to say that cocaine could be considered to be an "explosive", or a dangerous, filthy, "noxious" or "deleterious substance" within the meaning of the section. No doubt the abuse of cocaine may be followed by very serious consequences but this, it seems to us, is not what the section was intended to provide against. It is said that rules have been made to prevent the sending of these articles by post. The sending of articles by post in contravention of the rules so made does not seem to be an offence under section 61, which only deals with the sending of articles in contravention of section 19 and section 20. We think, therefore, that the accused was wrongly convicted of an offence under the Post Office Act. We think, however, that the sentence under section 60A of the Excise Act was inadequate. We, therefore, set aside the

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conviction under section 70 read with section 61 of the Post Office Act and acquit the accused of that offence and remit the fine. We enhance the sentence under section 60A of the Excise Act to a sentence of three months' simple imprisonment in addition to the fine of Rs. 200. The fine of Rs. 100, if paid, will be refunded.

Order modified.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 145 OF 1914.

August 11, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

EMPEROR—PROSECUTOR

versus

RABBI RAUT AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 438—Reference—Interested party, report made by, order thereupon invalid—Sufficient inquiry—Accused, evidence of, to be taken by Court.

The petitioners presented a petition to a Sub-Divisional Magistrate complaining against certain persons, the servants of a factory, and prayed for proceedings against these persons under sections 144 and 107, Criminal Procedure Code. The Sub-Divisional Magistrate asked the Manager of the factory to report. On receipt of report the petitioners were called upon to show cause why they should not be prosecuted under section 182, Indian Penal Code:

Held, that this order was bad in law, for the Manager being an interested party ought not to have been asked to make a report in the judicial proceedings;

that an order, under section 476, Criminal Procedure Code, directing that action should be taken against the petitioners under section 182, Indian Penal Code, was also bad in law;

that sufficient inquiry had not been made into the complaint made by the petitioners and that a local inquiry was desirable;

that in such cases the accused petitioners should be examined if they choose to give evidence.

Reference made by the Sessions Judge of Darbhanga under section 438 of the Criminal Procedure Code.

Babus *Atulya Charan Bose* and *Baikuntha Nath Mitra*, for the Petitioners.

Mr. *Sultan Ahmed* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—This is a reference made by the Sessions Judge of Darbhanga under section 438, Criminal Procedure Code. It appears that on the 8th April 1914, the petitioners presented a petition to the Sub-Divisional Magistrate of Samastipur, complaining against nine persons who are servants of the Birauli Factory. In the concluding portion of their petition the petitioners prayed for proceedings against these nine persons under sections 144 and 107, Criminal Procedure Code. The substance of the petition was that these nine persons had criminally intimidated the petitioners, assaulted them and attempted to wrongfully confine them. On the filing of this petition the Sub-Divisional Magistrate passed the following order: "To Mr. Wylde of Birauli Factory. Please report on the circumstances of this petition. Put up on the 25th April 1914." This order is open to great objection. It was Birauli people who were the accused. Mr. Wylde, the Manager of the Birauli Factory, and, therefore, an interested party ought not to have been asked to make a report in these judicial proceedings. On the 20th of April a report was received and thereupon the petitioners were called upon to show cause why they should not be prosecuted under section 182, Indian Penal Code. On the 25th of May four witnesses were examined for the petitioners and two witnesses for the other side; then on the 26th of May an order under section 476, Criminal Procedure Code, was made directing that action should be taken against the petitioners under section 182, Indian Penal Code. We are of opinion that the order dated the 20th of April 1914 and that dated the 26th of May 1914 should be set aside. We are further of opinion that sufficient inquiry has not been made into the complaint made by the petitioners. There should be further inquiry into the truth of the statements made by them in their petition. We may herein suggest that a local inquiry is desirable in this case. It may be made by the Sub-Divisional Magistrate himself or he may depute a subordinate Magistrate for this purpose. It appears that the petitioners complain that although some witnesses on their side were examined, they themselves have not been examined. They should be examined if they choose to give evidence. We accept the reference, set aside the orders above referred to and send back the case for further inquiry.

Order set aside; Case sent back.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No. 96 OF 1914.
January 13, 1915.
Present:—Mr. Justice Heaton and Mr. Justice Shah.
EMPEROR—PROSECUTOR
versus
RAMAVA CHENNAPPA—ACCUSED.

Penal Code (Act XLV of 1860), ss. 302, 304A – Administering poison as a love potion—Rash and negligent act—Criminal Procedure Code (Act V of 1898), ss. 236, 237, 307—Trial for murder—Charge under s. 304A not framed – Conviction under s. 304A.

Where arsenic oxide was deliberately administered to a man as a love potion by his wife with the connivance of her mother who had procured the stuff in some way and given it to her daughter:

Held, that as to deal in this way as a love potion with a most deadly form of poison is to act both rashly and negligently in whatever walk of life the person so doing may be, an offence under section 304A of the Indian Penal Code was clearly made out against the wife, and the mother was guilty of abetment [p. 642, cols. 1 & 2.]

Held, further, that although no charge under section 304A is framed at the trial for murder, on reference under section 307 of the Criminal Procedure Code the High Court is competent under sections 236, 237 of the Code to record conviction under section 304A. [p. 642, col. 2.]

Criminal reference from the decision of the Additional Sessions Judge of Belgaum.

Mr. *V. R. Sirur*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

HEATON, J.—In this case there is no doubt whatever about certain facts. One Chenappa died shortly after eating food prepared by his wife. It was found that he had died of arsenic poisoning. Then there is really no substantial doubt about these further circumstances: that the poison was given to Chenappa's wife by her mother and that she mixed it with the food she gave to her husband. The wife was charged with the murder of her husband and her mother was charged with abetting the murder.

The case was tried by a Jury in Belgaum. In the course of his charge to the Jury, the Judge pointed out that although there was no separate charge under section 304A of the Indian Penal Code, it was open to the Jury to find a verdict of 'guilty' of an offence under section 304A and an acquittal under the charge of murder. With that direction in their minds the Jury came to the conclusion by a majority of three to two that the women were not guilty of any offence whatever. The Judge found himself unable to accept this verdict and has referred the case to us.

It is unnecessary to go into the evidence in detail, because it really is quite conclusive as to the circumstances I have mentioned. But at a very early stage in the case, that is to say, in their first statements to the Magistrate, the women maintained that the stuff which had been administered to Chenappa was a kind of medicine used as a love potion. If this is so, admittedly there is no case of murder, though there may be a case under section 304A. The Judge has come to the conclusion that it is a case of murder. One of the principal reasons which influenced his decision was that the day after the death of the man, the wife had made a statement to various of the witnesses, which they regarded as an admission, that she had intended to kill her husband, and the Judge came to the conclusion that these witnesses were not only telling the truth to the best of their ability, but also had retained a correct impression of the purport of what the woman said. I do not doubt that the witnesses, according to their lights, were deposing truly. But I do gravely doubt whether they had retained a correct impression of what the woman actually said. The recollection of a conversation, when it is not corrected by some notes or account written down at the time or shortly afterwards, is a very tricky thing; and in the case of witnesses of the class of those with whom we are dealing, the recollection or supposed recollection is almost inevitably largely coloured by what transpired between the occurrence of the conversation and the recital of the conversation by the witnesses. In this case, for instance, I can quite readily conceive that what the woman said was that she had given medicine to her husband without either implying or suggesting that she knew that it was poison. Yet in the light of the events which subsequently came to knowledge, the witnesses may have quite honestly believed that what the woman really had implied, perhaps even said, was that she had intended to poison her husband. I think, therefore,

that that particular which was relied on by the Judge does not really exist in the form in which he supposes.

Then he finds that the proved facts are more compatible with the theory that the woman wished to get rid of her husband than that she wished to stimulate his affection for her. Here again I do not agree. The facts which are indicated by the evidence are considerable disagreement and friction between the husband and wife which may have been due, at least in part, to the impotence of the husband. Of course, we can have only a fragmentary and a very imperfect knowledge of what the relations between husband and wife really were. We never learn anything approaching the whole truth in these cases. But the suggestions in this particular case do not seem to me to point at all definitely to any wish on the part of the wife to get rid of the husband. These are the principal circumstances which are believed to tell against the wife on the charge of murder.

A third important circumstance is that she was in possession of very nearly 250 grains of arsenious oxide and it was from arsenic poisoning that her husband died. Five grains of this stuff is, roughly speaking, enough to kill any ordinary man. How this woman came to be in possession of enough of this deadly stuff to kill about fifty people is quite unintelligible, and, looked at as a matter of pure conjecture, it seems to me almost as unintelligible on the theory that she wished to poison her husband as it is on the theory that she wished to stimulate his affections. On the other hand, the fact—and it is a fact—that the wife gave the remnants of the food to their cow which also died of arsenic poison, suggests that she did not know the deadly effects of the stuff she had used.

Therefore, it seems to me that there is no good reason for disturbing the verdict of the majority of the Jury in so far as it is a verdict on the charge of murder. But, as I have said, there can be no doubt in this case that this deadly stuff was deliberately administered to the man by his wife with the connivance of her mother who had procured the stuff in some way and given it to her daughter, and it seems to me, that to deal in this way as a love potion with a most deadly form of poison, is to act both rashly and negligently in whatever walk of life the person so doing may be. I think that an offence under section 304A of the Indian Penal Code is quite clearly made out by the facts proved.

We have had a somewhat lengthy and not an uninteresting argument as to whether section 307 of the Criminal Procedure Code permits us to convict these persons under section 304A of the Indian Penal Code because of the fact that there was no charge under that section at the trial. It is contended on behalf of the prosecution that the terms of sections 236 and 237 of the Criminal Procedure Code enable us to record this conviction. Whatever may be said about section 238 of the Code, I do not feel any doubt that under sections 236 and 237 we are empowered to record such a conviction. It was beyond question a doubtful matter in this case from the very beginning whether the facts, which the prosecution would be able to prove, would establish more than the administering of the poison in the way I have mentioned. It was doubtful whether they would go so far as to prove that poison was administered with the intention of killing. It would, therefore, it seems to me, quite clearly have been open to the prosecution to bring these persons to trial on charges both of murder and under section 304A of the Indian Penal Code. If that were so, it follows from the provisions of section 237 of the Criminal Procedure Code that although the charge under section 304A of the Indian Penal Code was not formally made it was open to the Court to convict under that section.

We do convict these women, the first Ramavakom Chenappa under section 304 A of the Indian Penal Code and the second Balavakom Shivbasappa under the same section read with section 109 of the Indian Penal Code, that is of abetment, and we direct that they do suffer rigorous imprisonment for two years.

SHAH, J.—I entirely argee.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 374 OF 1914.
CRIMINAL REVISION PETITION No. 306 OF 1914.
February 18, 1915.
Present:—Mr. Justice Tyabji.

NARASAPPAYYA—COMPLAINANT—PETITIONER

versus

NARASAYYA SHANBHOGUE AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Precedure Code (Act V of 1898), *Ch. XVIII—Inquiry—Power of trying Magistrate to discharge accused—Scope of his inquiry in a charge triable by Court of Session—Penal Code (Act XLV of* 1860), *s.* 463, 464.

In the case of offences which are triable solely by a Court of Session, a Magistrate cannot be considered to have the power to proceed to the trial of the accused in those inquiries, and the chief business of the Magistrate is to see whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible in regard to every ingredient of the offence that is charged. [p. 643, col. 2; 644, col. 1.]

Where in a charge under sections 463 and 464 of the Penal Code, the fact of the alteration of the promissory note was proved, but no evidence was adduced to prove that either of the accused altered the document in question:

Held, that the trying Magistrate had power to discharge the accused. [p. 644, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Stationary Magistrate, Kasargod, in Register Case No. 8 of 1913, (Criminal Revision Case No. 14 of 1914, on the file of the Court of the District Magistrate of South Canara).

Mr. *J. L. Rosario*, for the Petitioner.

Mr. *S. Swaminadhan*, for the Respondents.

ORDER.—This is a revision petition in which I am asked to revise the order of the District Magistrate of South Canara in which in the exercise of his powers under section 436 of the Criminal Procedure Code, he held that the accused person had not been improperly discharged by the inquiring Magistrate. The order of discharge, which was thus upheld by the District Magistrate, was passed by the third Class Stationary Sub-Magistrate of Kasaragod on a complaint that the 1st and 2nd accused, who are now before me, had been guilty of the offences referred to in sections 467, 468, and 471 of the Indian Penal Code, that is, of the forgery of a valuable security. The Stationary Sub-Magistrate discharged the accused, being of opinion under section 209 of the Criminal Procedure Code that there were not sufficient grounds for committing the accused for trial; and I have now in effect to decide whether the order of discharge was within the powers of the Magistrate or whether he encroached upon the prerogative of the Sessions Court, which alone has jurisdiction to try the offences under the sections to which I have referred. The words of the sections are very wide and they empower or rather require the Magistrate in the first instance to discharge the accused if he is of opinion that there are not sufficient grounds for committing him for trial. These words of the section have, however, been judicially interpreted in decisions, which are binding upon me, to mean that in the case of offences which are triable solely by a Court of Session, the Magistrate cannot be considered to have the power to proceed to the trial of the accused in these inquiries. It seems to me that I would not be justified in travelling beyond the judicial interpretation of the section, which restricts its scope so as to prevent a Magistrate in the course of the inquiry from encroaching upon the prerogative of the Sessions Court. I take, therefore, as a guide for the meaning of the section the terms in which Bakewell, J., interpreted in *National Bank of India, Ltd.* v. *Kothandarama Chetti* (1). In that case there was a difference of opinion between Benson, J., and Sundara Aiyar, J., and the question was referred to Bakewell, J., who says: "His (the Magistrate's) duty is to determine whether the accused should be put upon his trial, and he ought to commit if he is satisfied that there are credible witnesses to facts which, if believed by a Jury, would justify the conviction of the accused of the offence complained of. If he proceeds to weigh the evidence, to accept some statements and reject others, to deal with probabilities or to draw inferences as to knowledge or intention, he is in reality dealing with the question of the guilt or innocence of the accused and is usurping the functions of the trial Court. The Magistrate has undoubtedly to exercise his

(1) 21 Ind. Cas. 129; (1913) M. W. N. 728; 12 M. L. T. 200; 14 Cr. L. J. 529.

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discretion in the matter; for instance, he may examine the varying statements of the witnesses for the prosecution and come to the conclusion that they are not credible witnesses, or he may find that there is incontestable evidence that conditions which are shown to have existed at one time had passed away prior to the date of the alleged offence. Possibly he may say that the facts alleged are not sufficient to warrant any inference as to the knowledge or intention of the accused; this, however, is to go very near the line, and I am inclined to agree with the observations of Geidt, J., at pages 838 and 839 of the report *i. e.* 9 C. W. N." (1913) M. W. N. 728 at 750). Taking, therefore, this exposition of the section as my guide, I have to see whether the Magistrate—I shall refer only to the order of the Stationary Sub-Magistrate, because the District Magistrate has upheld and agreed with the decision of the Magistrate of the first instance I shall consider—whether the Magistrate put to himself a question different from that which Bakewell, J., requires that he should put to himself. For this purpose I must, in the first instance, refer to the elements of the offence with which the accused are charged; for it is beyond dispute that the chief business of the Magistrate is to see whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible in regard to every ingredient of the offence that is charged. There are no doubt decisions which give to the Magistrate far larger powers. But taking the narrowest view of his functions, it must include the function to which I have just referred.

The offence of forgery is dealt with in sections 463 and 464 of the Indian Penal Code, but the portion that is directly applicable to the present case is contained in the second part of section 464, where it is laid down that a person is said to make a false document who without lawful authority alters dishonestly or fraudulently a document in any material part thereof after it has been made or executed either by himself or by any other person. The offences alleged in this case are that there was a promissory note in favour of the 1st accused dated the 6th October 1910 and that the promissory note was altered by the addition of the figure (2) so as to make it appear to bear the date 26th October 1910 in order to save the bar of limitation against the suit instituted on the 27th October 1913, the Court having been closed on the 26th. The conclusions of facts at which both the Magistrates have arrived have been much canvassed by the learned Pleader and Counsel who appeared before me and I think it unnecessary, therefore, to go into them again in any great detail. After having given the careful arguments that were addressed to me, my best consideration it seems to me that, though the decisions of the Magistrate are not worded exactly in the way in which they might have been worded had they had the benefit of the arguments which have been placed before me, yet they in effect come to the conclusion that accepting the evidence of the prosecution witnesses in so far as they are not manifestly incredible and assuming that that evidence will carry weight with a Jury and be believed by them, still the prosecution failed in one material element of the offence charged. The prosecution failed to adduce any evidence to prove that either the 1st or the 2nd accused altered the document in question. Both the Magistrates were evidently of opinion that, from the evidence adduced by the prosecution itself, what appeared was that the 1st and 2nd accused were not in actual possession or control of the promissory note, that the prosecution witnesses do not bring home to these accused even the knowledge of any alteration in the document. That fact, or rather the absence of any evidence to prove that fact, seems to me to be fatal to the case for the prosecution. It seems to me, therefore, that the Magistrates were right in coming to the conclusion that there were not sufficient grounds for committing the accused for trial.

The petition must, therefore, be dismissed.

Petition dismissed.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No. 87 OF 1914.
February 4, 1915.
Present:—Mr. Justice Heaton and Mr. Justice Shah.
EMPEROR—PROSECUTOR
versus
RAJAPPA RAMAPPA KALAL—ACCUSED.

Penal Code (Act XLV of 1860), s. 199—False declaration before Mamlatdar *to obtain certificate of solvency for purposes of Abkari license—Offence.*

A false declaration made to a *Mamlatdar* in the hope of obtaining a certificate of solvency for the purpose of securing a license from the Abkari officials, is not such a declaration as a Court of Justice or any public servant or any person is bound by law or authorised by law to receive, and hence does not come within the purview of section 199 of the Penal Code.

Criminal reference made by the Sessions Judge of Bijapur against conviction and sentence passed by the first Class Magistrate of Bijapur.

Mr. *H. B. Gumaste*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—This is a curious case. A person was accused of an offence on the following facts: for the purpose of securing a license or something of that sort from the Abkari officials he made a false declaration to a *Mamlatdar* in the hope that he would obtain from the *Mamlatdar* what is called a certificate of solvency, a certificate which would enable him more easily to obtain the license or whatever it was that he wanted from the Abkari authorities. He was charged with an offence under section 199 of the Indian Penal Code in consequence of making this false declaration and he pleaded guilty to the charge. We can only take this plea of guilty as a plea that the facts alleged against him were correct, because we think, as does the Sessions Judge who referred this case to us, that the facts alleged and admitted do not amount to an offence under section 199 of the Indian Penal Code. That section is very strict in its terms and deals with a false declaration only when the declaration is one which a Court of Justice or a public servant or other person is bound or authorised by law to receive as evidence. It has not been pointed out to us that any

Court of Justice or any public servant or any other person is either bound by law or authorised by law to receive such a declaration, as we have in this case, in evidence and, therefore, in law no offence under section 199 of the Indian Penal Code has been committed. The Sessions Judge held that as there was a plea of guilty, he could not deal with the case in appeal and, therefore, he referred it to us. What I have said shows that the offence of which the accused was convicted has not been committed and, therefore, the conviction must be set aside and the fine, if paid, refunded. I only wish to add that I have spoken exclusively with reference to section 199 of the Indian Penal Code. Bail bonds in this case may be cancelled.

SHAH, J.—I agree.

Conviction and sentence set aside.

CALCUTTA HIGH COURT.
CRIMINAL RULES NOS. 809 AND 810 OF 1914.
June 17, 1914.
Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.
ASRABUDDIN SARKAR AND OTHERS—PETITIONERS
versus
KALI DOYAL MULLICK AND ANOTHER—OPPOSITE PARTIES.

Penal Code (Act XLV of 1860), ss. 471, 474—User, meaning of—Offence—Sanction, if required—Criminal Procedure Code (Act V of 1898), ss. 195, 476.

Prosecution under section 474, Indian Penal Code, requires no sanction. [p. 646, col. 1.]

In a rent suit filed by the petitioners the complainant was summoned to produce a *kabuliyat* and an *amalnamah*. The documents were produced not by the complainants but by the petitioners themselves as coming from the custody of the complainant:

Held, that the facts constitute a user within the meaning of section 471, Indian Penal Code, and for prosecution for this offence sanction under section 195 or an order under section 476, Criminal Procedure Code, is necessary. [p. 646, col. 2.]

Ambika Prasad Singh v. *Emperor*, 8 Cr. L. J. 398; 35 C. 820; *Rati Jha* v. *Emperor*, 14 Ind. Cas. 201; 39 C. 463; 15 C. L. J. 509; 13 Cr. L. J. 201; 16 C. W. N. 623; *Mobarak Ali* v. *Emperor*, 15 Ind. Cas. 81; 17 C. W. N. 94; 13 Cr. L. J. 449 and *Krishna Proshad Mandal* v. *Rabindra Nath Dinda*, 13 Ind. Cas. 99; 13 Cr. L. J. 6, referred to.

ZAHIR SINGH v. EMPEROR.

IN No. 809 OF 1914.

Babu *Brojendra Nath Chatterjee*, for the Petitioners.

Mr. *S. P. Sinha*, Counsel, and Babu *Surendra Nath Guha*, for the Opposite Party.

IN No. 810 OF 1914.

Babu *Brojendra Nath Chatterjee*, for the Petitioners.

Mr. *Pugh*, Counsel, and Babu *Surendra Nath Guha*, for the Opposite Party.

JUDGMENT.—In these two Rules it appears that two prosecutions under sections 474, Indian Penal Code, have been instituted against the petitioners in respect of certain documents, namely, in each case a *kabuliyat* and an *amalnamah*. It further appears that the petitioners instituted a rent suit (No. 324 of 1913) and that in that suit summoned the complainants in the criminal proceedings to produce the documents in question, each a *kabuliyat* and an *amalnamah*. The production of the documents followed. The case for the complainants is that the documents are not genuine and were in fact produced not by the complainants, but by the plaintiffs, the petitioners before us. The contentions of the petitioners before us are that a sanction under section 195 or an order under section 476 of the Code of Criminal Procedure is necessary before they can be prosecuted, and that in any case pending the decision of the rent suit the prosecution should be stayed.

On behalf of the complainants-opposite parties it is contended, *first*, that the documents having been merely filed there has been no user, and, *secondly*, that the prosecution under section 474 requires no sanction. The second contention cannot be disputed, and in support of the first reference is made to the case of *Ambika Prasad Singh* v. *Emperor* (1). But in at least three subsequent cases, *Rati Jha* v. *Emperor* (2), *Mobarak Ali* v. *Emperor* (3) and *Krishna Proshad Mandal* v. *Rabindra Nath Dinda* (4), it has been held that at least in certain circumstances the filing of a document may constitute a user. On the case for the prosecution, in the present instance, the documents were produced by the petitioners as documents coming from the custody of the complainants. We are of opinion that this, if established, constitutes a user within the meaning of section 471, Indian Penal Code. It follows that the offences, if any, committed, are offences under section 471 of the Code and in respect of those offences sanction under section 195 or an order under section 476, Criminal Procedure Code, is necessary.

Apart from this, it is not disputed that the decision of the issues in the rent suit depends largely on the question whether the documents in question are or are not genuine. That being so, we are of opinion that it is expedient that the criminal proceedings should be deferred pending the final disposal of the rent suit. After that suit is disposed of, it will be open to the Courts and to the complainant to take further appropriate action. These Rules are, therefore, made absolute and the present criminal proceedings quashed.

The petitioners will now be discharged from their bails.

Petitioners discharged.

(1) 35 C. 820; 8 Cr. L. J. 398.

(2) 14 Ind. Cas. 201; 39 C. 463; 15 C. L. J. 509; 13 Cr. L. J. 201; 16 C. W. N. 623.

(3) 15 Ind. Cas. 81; 17 C. W. N. 94; 13 Cr. L. J. 449.

(4) 13 Ind. Cas. 99; 13 Cr. L. J. 6.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 1228 OF 1914.

February 19, 1915.

Present:—Mr. Justice Tudball.

ZAHIR SINGH—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 537—Sanction to prosecute granted—First complaint dismissed—Second complaint without fresh sanction—Irregularity, objection as to, taken at the very first stage, effect of.

Section 537 of the Code of Criminal Procedure was never intended to allow a Magistrate to override the clear provisions of the Code. The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the trial. Where, therefore, the want of sanction for prosecution of a complaint is at once brought to the attention of the Court, it is the duty of the Magistrate to refuse to take cognizance of the complaint on the ground that he cannot do so by reason of the terms of section 195 of the Code. [p. 647, col. 2.]

ZAHIR SINGH *v.* EMPEROR.

Sanction to prosecute *Z* and some other persons was granted under section 195. On the basis of the sanction a complaint was filed but the accused were discharged as the complainant was not present on the date of hearing. A fresh complaint was filed against *Z* alone:

Held, that the second complaint was not in continuation of the first. [p. 647, col. 1.]

Criminal revision against an order of the Magistrate, first Class, of Farrukhabad.

Mr. *A. H. C. Hamilton*, for the the Appellant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This application in revision arises out of the following facts. One Tika Ram obtained a sanction on March 3rd, 1913, to prosecute Zahir Singh and certain others for offences under sections 467 and 471 of the Indian Penal Code. An appeal was filed against the order granting sanction, which was dismissed on June 10th, 1913. On July 5th, 1913, Tika Ram filed a complaint against those three persons. Proceedings in the case were suspended pending the decision of an application in revision to this Court. That application was rejected on January 21st, 1914. Tika Ram then waited practically for four months until May 15th, 1914, when he went into Court and asked that his complaint might be taken up and decided. His application was granted and the case came up for hearing at the end of a little over three months on August 20th, 1914. Tika Ram did not appear and the accused were discharged. After the order of discharge had been made, Tika Ram filed a fresh complaint as against Zahir Singh only. Zahir Singh on this fresh complaint at once took objection that it was a complaint filed out of time and that the Magistrate could not take cognizance of the offence. The Magistrate disallowed this objection in the following words: "The first application was within time and by the subsequent application the continuity is not broken." In other words, he took this fresh complaint as being a proceeding in continuation of the former proceeding. This, however, was clearly wrong. It was clearly a fresh complaint as against Zahir Singh alone. If Tika Ram wished to continue the former proceeding he could have gone to the District Magistrate or the Sessions Judge and have obtained an order for further enquiry, on his first complaint. Zahir Singh has been committed for trial. The present application is directed to have that committal order quashed. On behalf of the Crown it is urged that the defect in the section is one which is cured by section 537 of the Code of Criminal Procedure. That section lays down that subject to the provisions hereinbefore contained no order shall be reversed or altered in revision on account of want of any sanction required by section 195, unless such want has in fact occasioned a failure of justice. The explanation attached to the section is that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether an objection could and should have been raised at an earlier stage of the proceeding. As has frequently been remarked in many cases, section 537 is not perhaps happily worded. But to my mind one thing is clear, and that is that section 537 was clearly never intended to allow a Magistrate to override the clear provisions of the Code. The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the proceeding. Where, however, as in the present case, the want of sanction was at once brought to the attention of the Court, it was clearly the duty of the Magistrate to refuse to take cognizance of the complaint on the ground that he could not do so by reason of the terms of section 195 of the Code. To allow the present applicant to proceed to trial in the Court of Session would be grossly unfair, seeing that the trial must in the end fail by reason of the want of sanction. I, therefore, allow the application and set aside the order of the Court below. The applicant, if on bail, need not surrender; if in confinement, he will be released at once.

Application allowed.

RAMDEO PANDEY v. EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL REVISION PETITION No. 96 OF 1912.
February 15, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
RAMDEO PANDEY—ACCUSED—PETITIONER
versus
EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 10—Security for good behaviour—Fresh proceedings after release—Circumstances after release to be considered.

Where fresh proceedings under section 110 of the Criminal Procedure Code are taken against an accused after his release from the last security, they must be confined to facts and circumstances alleged against him after his release.

Junab Ali v. *Emperor*, 31 C. 783; 8 C. W. N. 909; 1 Cr. L. J. 801, referred to.

Mr. *Huq*, Counsel, and Babu *Manmatha Nath Mukherji*, for the Petitioner.

Babu *Sris Chandra Chowdhury*, for the Crown.

JUDGMENT.—We think that this Rule must be made absolute on the first ground on which it was issued, namely, that the proceedings are premature. The Police report upon which they are based mentions 17 cases in which the accused has been suspected to have taken part, and eight of those cases, or nearly half, we are surprised to find, took place during the period when he was previously furnishing security. Then there are four cases in which the Police reported that he has been known to have taken part. All four of these cases took place during his previous terms of security, and it is upon these 12 cases with 9 other cases, which occurred in April, May and June and August 1911, that he is now being arraigned, and the proceedings state that this report makes it appear to the Magistrate that this man is by habit a thief and house-breaker by night and that he habitually commits extortion and offences involving a breach of the peace. As far as we can see there is no hint of extortion or any offence involving a breach of the peace in this list of cases, and the allegation that besides committing burglary and theft he satisfied his ends by force of *lathis* is extremely vague. Of course when he has had time to show that he has formed the habit of theft and house-breaking by night with extortion and offences involving a breach of the peace since the beginning of January, 1911, then on materials confined to the period after his release from his last security proceedings could, if necessary, be taken under section 110 against him. But these proceedings must be confined to facts and circumstances alleged against him after his release from his last security, and to import anything before, as evidence of habit, would be to lay down that having once been called upon to furnish security he could always on the same evidence be made to continue that security from one term to another. That certainly is not the law.

The principle on which these cases should be tried is laid down in *Junab Ali* v. *Emperor* (1). We do not mean to lay down in any particular case or in this case that 15 months is or is not a sufficient period to give a man a *locus pœnitentœ*. That is not the question. In the particular case there reported the Judges held that this man had not had a sufficient *locus pœnitentœ*. But this is probably due to the fact that during the 15 months since he came out of jail there was very little to show that he had continued in his evil courses. But what they did find was that the evil reputation which he had before his imprisonment had still followed him and permeated the evidence of many of the witnesses, and this is what must be avoided. No prejudice can accrue to the petitioner from anything which he is alleged to have done prior to the beginning of 1911, and, therefore, we think that these proceedings taken in October 1911 were premature.

If the District Magistrate is of opinion that there is evidence that this man has become a habitual thief and house-breaker since 1st January 1911 and is now a dangerous character from whom security is required, it will be open to him to take proceedings against him. But in that case we think the District Magistrate should himself have the matter enquired into at his own headquarters rather than at Siwan, as it is perfectly clear that the moving spirit in this and other cases are the local *zemindars* of the Siwan subdivision.

The Rule is made absolute and the proceedings of the 11th October 1911 are set aside.

Rule made absolute.

(1) 31 C. 783; 8 C. W. N. 909; 1 Cr. L. J. 801.

JANG RAI *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 903 OF 1911.
February 19, 1912.
Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.
JANG RAI AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 148, 149, 395, 326—Evidence judicially recorded—Judge's duty to believe or disbelieve witness before him—Finding, when irrelevant.

It is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to statements made to the Police which are not judicially recorded. [p. 650, col. 1.]

It is the Judge's duty to make up his mind while the witness is before him whether he is a witness of truth or falsehood: and it is only when the Judge sees any reason to distrust his evidence that omissions in a Police record can become of any importance. [p. 650, col. 1.]

Such findings as this: "It is not clear whether the name of Mahabir appears in the Police papers or not," are wholly irrelevant. [p. 650, col. 1.]

Appeal from the judgment and sentence of the Sessions Judge of Shahabad.

Mr. *K. B. Dutt*, Counsel, and Babu *Surendra Nath Ghosal*, for the Appellants.

Mr. Orr (Deputy Legal Remembrancer, Bengal), for the Crown.

JUDGMENT.—This is an appeal from the judgment and sentence of the learned Sessions Judge of Shahabad who, differing with the assessors convicted four persons, Jang Rai, Keshwar, Singh or Rai, Ram Narain and Anjor Ahir under sections 148, 395 and 326 read with section 149 and sentenced the first to 10 years' rigorous imprisonment, the others to seven years each.

Originally eight persons were arraigned before him on these charges but four have been acquitted, though we confess we are unable to appreciate any difference between their cases and those of the present appellants.

It is alleged that 200 of the tenants of Barsingha, a village in the Ballia District, crossed the Ganges on the day of occurrence and looted the fields of the Suremanpur Burja tenants. It is also alleged that one Barhamdeo Rai (not in custody) pursued one Chegan and speared him, killing him instantaneously. Then it is said that Sheo Gobind, who has been tried and acquitted on his establishing a convincing *alibi*, pursued Bhola Rai and speared him so that he also died.

Harnarain or Harnandan Rai, P. W. No. 2, was grievously hurt with a spear so that his dying declaration had to be taken and then the mob disappeared as suddenly as they had come.

There had been already an apprehension of a breach of the peace between the men of Suremanpur Burja and Salempur and so bitter was this quarrel that a Police guard had to be posted on the *chur*. In the meantime, however, some of the Barsingha *ryots* had obtained settlement from the Collector of land in Salempur, which appears to be a *khas mahal*, and this annoyed both the Salempur people and the people of Suremanpur Burja who also wanted settlement of these lands.

The defence is that the boundary dispute between Salempur and Suremanpur culminated that day in a fight in which these persons were killed and wounded and that the two sets of villagers combined to implicate Barsingha men. It is found by the Judge that this boundary dispute had not been settled and there are points in this case which convince us that the defence story is true. All the witnesses swear in the clearest way that Sheo Gobind speared Bhola Rai. There is no room for doubt or escape from this statement and as it has been found to be totally false, this considerably discounts the other evidence as to identification on which the whole case against the appellants turns. It is not like a case where an offender has been given the benefit of the doubt on showing strong evidence of *alibi* as against a mere allegation of presence in the riot.

The identification made by nearly all the witnesses is discredited by their false charge against Sheo Gobind and Bechu Dhobe, P. W. No. 19, alone is left untouched by it and it is on his evidence principally that the learned Judge seems to have relied.

Now this Bechu Dhobe was the first person examined by the Police, and he stated that 200 men had come from Barsingha but gave no names whatever.

The first time any names are said to have been mentioned are by Harnarain at the Chekwara where he was lying wounded, and it seems reasonably open to doubt whether he made such a statement. If he

did, he clearly falsely implicated Sheo Gobind in the murder of Bhola Rai and that same night before the Deputy Magistrate at Lalganj he omitted to mention Jang Rai.

The other witnesses do not appear to have named any one till the 29th March, three days after the occurrence, though Nihora and Guli were with the Sub-Inspector from the first. It is remarkable that the Salempur witnesses admit that they ran away and hid themselves for two or three days. This clearly shows that they were afraid of being implicated in the riot.

The learned Judge nowhere gives his own finding on the truth or falsity of each witness's statement. He relies entirely on the differences in what they say in Court and what they said or are alleged not to have said before the Police. We must point out that it is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to alleged statements made to the Police which are not judicially recorded. It is the Judge's duty to make up his mind while the witness is before him whether he is a witness of truth or falsehood, and it is only when the Judge sees any reason to distrust his evidence that omissions in a Police record can become of any importance.

Such findings as this: "It is not clear whether the name of Mahabir appears in the Police papers or not" are wholly irrelevant.

For the prosecution it may be noted that there are two Mahabirs and twe Sheo Gobinds mentioned and that many of the identifications were not by name.

There seems to be a doubt thrown throughout the evidence and the judgment of the learned Judge both as to the place of occurrence and the parties engaged in the quarrel. The place pointed out to the Sub-Inspector by the witnesses and noted by him on his map does not agree with the evidence nor with the map and *khasras* prepared by the *patwari* long before this occurrence for a wholly independent purpose. The Judge raises a cloud of doubt on this, but does not tell us what his own finding is.

His final finding on page 52 contradicts the oral evidence. But he then starts off again throwing a cloud of doubt on his own finding.

The only finding necessary was that whatever the particular spot was where the crops were being cut, it was undoubtedly south of the lands settled with the Barsingha tenants. If, therefore, the Barsingha people looted those crops they are certainly guilty of dacoity.

But on the other hand the fact that they had no interest whatever in such an act and that they had admittedly come two days before with the Deputy Collector to take over the fields which had been settled with them goes strongly in favour of their defence, and the fact that the real place of occurrence was at some indefinite spot to the south largely supports the theory that the boundary dispute between Salempur and Suremanpur was the real cause of the fight and that the Barsingha people had nothing to do with it. There is no doubt that the boundary dispute was still going on and the witnesses have foresworn themselves in totally denying it in evidence. The defence say the occurrence was somewhat earlier in the day. If it was early enough for Sheo Gobind to have been present, a fact to which the prosecution witnesses have tied themselves, then there was ample time for concoction before the Police came.

It is most significant that Bechu Dhobe, a man of Salempur, states the story that 200 Barsingha men had come across and killed two Suremanpur men, and then disappears for two or three days. It is only when the Salempur people found that the Police had accepted this story that they came forward with evidence.

It is inexplicable how 200 persons came across the Ganges in boats and yet no trace of their coming or going appears in evidence. They must have had at least five large boats and those boats must have been seen. Yet the evidence in regard to the only boat spoken of in which Sheo Gobind and one other man are said to have started from the other side, has been disbelieved and in our opinion, rightly so. As regards the loot the Judge finds there was not much looting. But the only evidence is that some paddy was found cut and admittedly Harnarain and others were cutting their paddy that day. There is no suggestion that the paddy was irregularly cut and there was no mention of loot to the Police.

The witnesses who say that the loot was after the murders are disbelieved. A glance at the table of identifications prepared by the learned Judge shows that Sheo Gobind's false identification vitiates the identification of every one of the accused for we have shown that Bechu's evidence, coming so late as it does after his first information, cannot have any weight.

The argument that it is difficult to believe that a party who had had two men killed and one wounded would make a false charge against other people, is negatived in this case by the positive and detailed false accusation against Sheo Gobind made by Harnarain himself from the very first.

It is contended that the defence did not put forward the story of the boundary riot until they came to argue the case. but we find clear cross-examination to the point in the evidence of P. Ws. Nos. 1 and 2 and in the written statement, paragraph 20 to end. Reading the evidence as a whole we are clearly of opinion that the assessors were right and that the Barsingha people had nothing to do with this occurrence. We accordingly allow the appeals, set aside the convictions and sentences and direct the acquittal and release of the accused.

Appeals allowed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION PETITION No. 1078 OF 1914.
January 30, 1915.
Present:—Mr. Justice Piggott.
NAURANG AND ANOTHER—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 498—Enticing away married woman from her husband's house for marriage—Offence.

A person enticed away a married woman from her husband's house with intent that he might dispose of her in marriage to some one else:

Held, that he committed an offence under section 498 of the Penal Code.

Criminal revision from an order of the Additional Sessions Judge of Meerut.

Mr. *A. H. C. Hamilton*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The point of law taken by this application is whether a person who entices away a married woman from her husband's house, with intent that he may dispose of her in marriage to some one else, has committed an offence under section 498 of the Indian Penal Code. I hold in the affirmative, on the ground that sexual intercourse between the woman and any other person to whom she has thus been given in marriage, during the life-time of her husband, would be illicit intercourse within the meaning of the section in question. An examination of the record in this case suggests some doubt as to whether a more serious offence, falling under the abduction sections of the Indian Penal Code, was not committed; but under the circumstances, and in view of the fact that the applicants Naurang and Tota were re-tried after having been once discharged and that the sentence passed upon them is a fairly substantial one, I am not disposed to direct further action to be taken against them. I dismiss this application.

Application dismissed.

CALCUTTA HIGH COURT.
CRIMINAL REVISION PETITION No. 998 OF 1914.
August 11, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Richardson.
CHINTAMONI JENA AND OTHERS—PETITIONERS
versus
JAGANNATH RAMANUJA DAS AND ANOTHER—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 145—Record of Rights recently published, entries in—Presumption therefrom—*Factum *of possession.*

Whatever presumption may be raised by a recently published Record of Rights, it does not in itself establish the *factum* of possession; and if the Magistrate decides the *factum* of possession wrongly in a proceeding under section 145, Criminal Procedure Code, that is not a question with which the High Court can interfere under the Charter, it not being a question of jurisdiction. [p. 652, col. 1.]

EMPEROR *v.* ABDUL RAZZAK.

Babus *Girish Chandra Pal* and *Nalini Chandra Pal*, for the Petitioners.

Messrs. *Chakravarti* and *J. Chowdhury*, Counsel, and Babu *Suresh Chandra Chakravarti*, for the Opposite Party.

JUDGMENT.—The question which appears to be one of jurisdiction on the Rule really depends upon the second ground of the Rule, which is that effect has not been given to the presumption arising from the entries in a recently published Record of Rights. That certainly is not a question going to the jurisdiction and we, therefore, cannot interfere. We at first thought that the other ground that there should have been separate proceedings in respect of the several plots claimed by the several sets of tenants, was a separate point going to the jurisdiction. But we find that this is not so. The other sets of tenants have not come here at all, and the present applicants have only come upon the ground that they had obtained tenant rights and possession by a recently published Record of Rights. It is needless to say that whatever presumption may be raised by such a record, it does not in itself establish the *factum* of possession, and that if the Magistrate decides the *factum* of possession wrongly that is not a question with which the High Court can interfere under the Charter, it not being a question of jurisdiction.

The Rule is discharged.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 37 OF 1915.

February 19, 1915.

Present:—Justice Sir George Knox, Kt.

EMPEROR THROUGH SESSIONS JUDGE OF CAWNPORE—PROSECUTOR

versus

ABDUL RAZZAK AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 193 (2) — Power of Sessions Judge to transfer appeal to Assistant Sessions Judge — Jurisdiction — 'Case', meaning of.

Section 193, clause 2 of the Code of Criminal Procedure, confers on the Sessions Judge no power to transfer appeals to the Assistant Sessions Judge. The word "case" in the section does not include an appeal. (p. 653, col. 2.)

Chattarpal Singh v. *Raja Ram*, 7 A. 661; A. W. N. (1885) 156; *In the petition of Musa Asmal*, 9 B. 164; *Allah Dei Begam* v. *Kesri Mal*, 2 A. L. J. 576; A. W. N. (1905) 199, referred to.

Criminal Miscellaneous reference made by the Sessions Judge of Cawnpore, as per his letter No. 67/111, dated 9th February 1915.

JUDGMENT. By an order, dated the 3rd of February 1915, the Sessions Judge of Cawnpore transferred two Criminal Appeals Nos. 7 of 1915 and No. 14 of 1915 pending in his Court to the Court of the Assistant Sessions Judge for trial.

The section of the Code which he considered justified this procedure on his part was section 193, clause 2. This section provides that Assistant Sessions Judges shall try such cases only as the Sessions Judge of the division by general or special order may make over to them for trial. In the opinion of the learned Sessions Judge the word "case" as used in this clause is not defined, and he saw no reason why it should be confined to cases and not extend to appeals or other matters.

This Court has called for the records of the cases in question by the powers conferred upon it by section 435 of the Code of Criminal Procedure. So far as I know the word "case" has never been defined in any General Clauses Act or in the Code of Criminal Procedure, nor am I aware that this particular point has come up to this Court for decision.

In *Chattarpal Singh* v. *Raja Ram* (1), Mr. Justice Mahmud held that so far as the Code of Civil Procedure was concerned the word "case" should be understood in it broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision. With all due respect I think a safer rule is to consider the word in connection with the particular Code or law in which it is found. Under the present circumstances there is considerable difficulty in assigning to the word such a broad meaning. The first difficulty will be found in section 409 of the Code of Criminal Procedure. That section deals with appeals. The right of appeal is a creation of Statute. Without some particular provision authorizing an appeal no right of appeal is conferred. Even when a right of appeal has been conferred, the Court to which such appeal lies must also be specified. A right of appeal without any specification

(1) 7 A. 661; A. W. N. (1885) 156.

as to the Court to which such appeal should be preferred would be a useless right.

The appeals with which we are concerned in the present case are appeals created by section 408 of the Code of Criminal Procedure. That section provides for persons convicted on trials mentioned therein and wishing to appeal can appeal to the Court of Session. To find out what a Court of Session is, we have to turn to section 9 of the Code of Criminal Procedure and a liberal interpretation of section 9 might bring within the words "Court of Session" not only Sessions Judges but also the Additional Sessions Judge and the Assistant Sessions Judge, if there be any such within the Sessions division. If such an interpretation could be adopted it might, therefore, be argued that the words "Court of Session" in this section 408 were wide enough to include all these officers. I pass over the anomaly in such an interpretation of the Court of the Assistant Sessions Judge being a Court from which appeals lie to the Court of Session. Section 409 by providing that an appeal shall lie to the Court of Session or Sessions Judge and shall be heard by the Sessions Judge or by an Additional Sessions Judge, seems to make it clear that the Legislature intended that all appeals under the Code of Criminal Procedure lying to the Court of Session were to be heard only by the Sessions Judge or by an Additional Sessions Judge.

The Bombay High Court has had occasion to consider this question in more than one case. *In the petition of Musa Asmal* (2), they had to deal with a similar provision contained in sections 17 and 18 of Act X of 1872. Mr. Justice West held that section 18 clearly was not meant to give a *quasi*-revisional power over the Magistrates of the District and at the same time no appellate jurisdiction. In a reference made by the Sessions Judge of Surat the same High Court held that a joint Sessions Judge could not try applications under Chapter 32 of the then current Code of Criminal Procedure. They endorsed the view stated by the Sessions Judge that the joint Sessions Judge was absolutely precluded from taking action under Chapter 32 of the Criminal Procedure Code, which relates to reference and revision.

(2) 9 B. 164.

There is another section in the present Code of Criminal Procedure which bears upon the point and that is section 526. That section provides that the High Court can order "that any particular criminal case or appeal" be transferred from one Court to another. If the view taken by the learned Sessions Judge of Cawnpore be correct, the word "appeal" used in this section would be pure surplusage. But in section 526 this phrase is used four times over and is again repeated in section 527 of the Code of Criminal Procedure. It will be found that a view similar to this has been taken where the words "case" and "appeal" are to be found in other laws. I will mention only one, *Allah Dei Begam* v. *Kesri Mal* (3).

I entertain no doubt, therefore, that section 193, clause 2, confers on the Sessions Judge no power to transfer appeals to the Assistant Sessions Judge.

I set aside the order passed as being an illegal order, and direct that the case of Abdul Razzak and Abdul Shakur be returned to the Sessions Court of Cawnpore for trial by the learned Sessions Judge or by the Additional Sessions Judge of Cawnpore, if there be such a Judge in existence at the present time.

Order set aside.

(3) 2 A. L. J. 576; A. W. N. (1905) 199.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 3 OF 1914.

December 3, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Beachcroft.

CORPORATION OF CALCUTTA—COMPLAINANT

versus

MANMOTHA NATH SET AND BROTHERS—DEFENDANTS.

Criminal Procedure Code (Act V of 1898), s. 432—Reference by Municipal Magistrate of Calcutta under Calcutta Municipal Act (III B. C. of 1899), ss. 3 (32), 343, 442, applicability of—"Owner of land," meaning of—Chairman's duty - Service of notices on owner and occupier.

Per *Fletcher, J.* The term "owner of land" as defined in section 3, sub-section (32) of the Calcutta Municipal Act includes the landlord. The duty of removing a building which comes within the terms of section 343 after notice has been served, falls clearly, amongst others, on the landlord. [p. 654, col. 1.]

CORPORATION OF CALCUTTA *v.* MANMOTHA NATH SET.

Under section 343 of the Calcutta Municipal Act the person who is the owner of the land, having had a notice served upon him, is liable to comply with the terms thereof. [p. 654, col. 2.]

Section 442 of the Calcutta Municipal Act does not, in any manner, abridge the power that is conferred by section 343. [p. 654, col. 2.]

Per *Beachcroft, J.*—Section 442 of the Calcutta Municipal Act provides that if the Chairman considers a building to be in so dangerous a state as to render immediate steps necessary for the safety of the public, he is to take those steps and then to serve notices on the owner and occupier. This section contemplates a case of much greater urgency than section 343 does, and in no way limits the powers of the Chairman under the latter section. [p. 654, col. 2.]

Babu *Baranashibashi Mukerjee*, for the Complainant.

Babu *Hira Lal Sanyal*, for the Defendant.

JUDGMENT.

FLETCHER, J.—This case comes before us on a reference made by the Municipal Magistrate of Calcutta in his capacity as a Presidency Magistrate under section 432 of the Code of Criminal Procedure. The question referred by the learned Magistrate is not very clearly stated in the letter of reference: but the learned Magistrate has sent a supplemental letter and the question which has to be gathered from the two letters is whether section 343 of the Calcutta Municipal Act is applicable when the hut and the land on which it is built belong to different individuals. The case that the Magistrate has before him is a case where the tenant on the land is the owner of the hut and the only question we have to consider is whether, under section 343 of the Calcutta Municipal Act, the notice can be served upon the person who is the owner of the land. The section says that it may be served upon the owner of the land. The definition of 'owner of land' obviously includes both the landlord and the tenant. "Owner of land" is defined in section 3, sub-section (32), and that obviously includes the landlord. The duty of removing a building which comes within the terms of section 343 after notice has been served falls clearly, amongst others, on the landlord. That seems to me to be without doubt.

Then the learned Magistrate seems to have got somewhat confused over section 442. He seems to have included that section in some manner in this letter of reference. Section 442 contemplates a different set of circumstances. What is contemplated by section 442 is that where in the opinion of the Chairman a building is so imminently dangerous that it is necessary to erect a boarding to prevent it from falling on passengers—I suppose, passengers in a public street—and for that another set of provisions is enacted. But section 442 does not, in any manner, abridge the power that is conferred by section 343. Under section 343 the person who is the owner of the land, having had a notice served upon him, is liable to comply with the terms thereof. That is the only point that arises on the reference. I think the learned Municipal Magistrate after this expression of opinion ought to have no difficulty in disposing of the case before him.

BEACHCROFT, J.—In regard to the first part of the question, it is quite clear that section 343 applies to the facts stated. The language of the section is clear and unambiguous.

The second part of the question is, "whether notice should have been issued in this case to the owner of the hut under section 442 of the Act." No doubt the Chairman could have issued a notice on the owner of the hut after taking the steps contemplated in the first part of the section, if he considered the building to be in such a ruinous state as to make these steps necessary. But that was a matter for the Chairman to decide. The section provides that, if he considers a building to be in so dangerous a state as to render immediate steps necessary for the safety of the public, he is to take those steps and then to serve notices on the owner and occupier. It contemplates a case of much greater urgency than section 343 does, and in no way limits the powers of the Chairman under the latter section.

Reference answered.

ISMAIL KHAN *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 73 OF 1915.

February 26, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ISMAIL KHAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Post Office Act (VI of 1898), ss. 19, 20, 61, 70 —Sending of cocaine by post, whether offence under Post Office Act.

Cocaine not being an "explosive" or a dangerous, filthy, "noxious" or "deleterious substance" within the meaning of section 19 of the Post Office Act, the sending of it by post is not an offence under section 61 of the Post Office Act. [p. 655, col. 2.]

Criminal Reference made by the Sessions Judge of Kumaon.

Mr. *C. J. A. Hoskins*, for the Applicant.

Mr. *A. E. Ryves*, (Government Advocate), for the Crown.

JUGDMENT—Ismail Khan has been convicted under section 60A of the Excise Act and under section 61 read with section 70 of the Post Office Act; on conviction, on the first charge he was fined Rs. 200 and on the second one Rs. 100. The learned Sessions Judge to whom Ismail Khan appealed has affirmed the convictions but referred the matter to this Court for the purpose of having the sentences considered with a view to enhancement. Notice was duly served upon Ismail Khan and he has been represented by Mr. Hoskins as Counsel. Mr. Hoskins on his behalf urges, first, that both convictions were illegal, and that in any event the punishment was sufficient. In our opinion the Court below was justified in finding that the accused had been guilty of an offence under section 60A of the Excise Act and that he was rightly convicted. So far as the conviction under section 61 read with section 70 of the Post Office Act is concerned, we think that the conviction was not justified by law. Section 70 of the Post Office Act, VI of 1898, provides that any person, "who abets the commision of any offence punishable under the Act or attempts to commit any offence so punishable, shall be punishable with the punishment provided for that offence." We have now to see what offence Ismail Khan is alleged to have abetted. Section 61 is the only section referred to. That section provides that "whoever in contravention of the provisions of section 19 or section 20 sends or tenders or makes over in order to be sent by post any postal article or anything shall be punishable with imprisonment for a term which may extend to one year or with fine, or with both." We have now to see whether any person in contravention of the provisions of section 19 or section 20 sent any article by post. Section 19 is as follows :—" Except as otherwise provided by rule and subject to such conditions as may be prescribed thereby, no person shall send by post any explosive, dangerous, filthy, noxious, or deleterious substance, any sharp instrument not properly protected, or any living creature which is either noxious or likely to injure postal articles in course of transmission by post or any officer of the Post Office." Clause (2) " no person shall send by post any article or thing which is likely to injure postal articles in course of transmission by post or any officer of the Post Office." It is quite clear that the provisions of section 20 have no bearing on the case. It seems to us that the provisions of section 19 really deal with the sending of articles or animals by post which will be likely to injure any person occupied in the execution of the Post Office work, or which might be likely to cause injury to articles in the course of transmission through the post. It does not seem to aim at the restriction of any trade. It is very hard to say that cocaine could be considered to be an "explosive", or a dangerous, filthy, "noxious" or "deleterious substance" within the meaning of the section. No doubt the abuse of cocaine may be followed by very serious consequences but this, it seems to us, is not what the section was intended to provide against. It is said that rules have been made to prevent the sending of these articles by post. The sending of articles by post in contravention of the rules so made does not seem to be an offence under section 61, which only deals with the sending of articles in contravention of section 19 and section 20. We think, therefore, that the accused was wrongly convicted of an offence under the Post Office Act. We think, however, that the sentence under section 60A of the Excise Act was inadequate. We, therefore, set aside the

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conviction under section 70 read with section 61 of the Post Office Act and acquit the accused of that offence and remit the fine. We enhance the sentence under section 60A of the Excise Act to a sentence of three months' simple imprisonment in addition to the fine of Rs. 200. The fine of Rs. 100, if paid, will be refunded.

Order modified.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE NO. 145 OF 1914.

August 11, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

EMPEROR—PROSECUTOR

versus

RABBI RAUT AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 438—Reference—Interested party, report made by, order thereupon invalid—Sufficient inquiry—Accused, evidence of, to be taken by Court.

The petitioners presented a petition to a Sub-Divisional Magistrate complaining against certain persons, the servants of a factory, and prayed for proceedings against these persons under sections 144 and 107, Criminal Procedure Code. The Sub-Divisional Magistrate asked the Manager of the factory to report. On receipt of report the petitioners were called upon to show cause why they should not be prosecuted under section 182, Indian Penal Code:

Held, that this order was bad in law, for the Manager being an interested party ought not to have been asked to make a report in the judicial proceedings;

that an order, under section 476, Criminal Procedure Code, directing that action should be taken against the petitioners under section 182, Indian Penal Code, was also bad in law;

that sufficient inquiry had not been made into the complaint made by the petitioners and that a local inquiry was desirable;

that in such cases the accused petitioners should be examined if they choose to give evidence.

Reference made by the Sessions Judge of Darbhanga under section 438 of the Criminal Procedure Code.

Babus *Atulya Charan Bose* and *Baikuntha Nath Mitra*, for the Petitioners.

Mr. *Sultan Ahmed* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—This is a reference made by the Sessions Judge of Darbhanga under section 438, Criminal Procedure Code. It appears that on the 8th April 1914, the petitioners presented a petition to the Sub-Divisional Magistrate of Samastipur, complaining against nine persons who are servants of the Birauli Factory. In the concluding portion of their petition the petitioners prayed for proceedings against these nine persons under sections 144 and 107, Criminal Procedure Code. The substance of the petition was that these nine persons had criminally intimidated the petitioners, assaulted them and attempted to wrongfully confine them. On the filing of this petition the Sub-Divisional Magistrate passed the following order: "To Mr. Wylde of Birauli Factory. Please report on the circumstances of this petition. Put up on the 25th April 1914." This order is open to great objection. It was Birauli people who were the accused. Mr. Wylde, the Manager of the Birauli Factory, and, therefore, an interested party ought not to have been asked to make a report in these judicial proceedings. On the 20th of April a report was received and thereupon the petitioners were called upon to show cause why they should not be prosecuted under section 182, Indian Penal Code. On the 25th of May four witnesses were examined for the petitioners and two witnesses for the other side; then on the 26th of May an order under section 476, Criminal Procedure Code, was made directing that action should be taken against the petitioners under section 182, Indian Penal Code. We are of opinion that the order dated the 20th of April 1914 and that dated the 26th of May 1914 should be set aside. We are further of opinion that sufficient inquiry has not been made into the complaint made by the petitioners. There should be further inquiry into the truth of the statements made by them in their petition. We may herein suggest that a local inquiry is desirable in this case. It may be made by the Sub-Divisional Magistrate himself or he may depute a subordinate Magistrate for this purpose. It appears that the petitioners complain that although some witnesses on their side were examined, they themselves have not been examined. They should be examined if they choose to give evidence. We accept the reference, set aside the orders above referred to and send back the case for further inquiry.

Order set aside; Case sent back.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 26 OF 1914.

October 14, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Beachcroft.

EMPEROR—PROSECUTOR

versus

BABAR ALI GAZI AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Reference—Jury, verdict of disagreement with, in respect of some of accused—Judge, duty of—Confessions of co-accused, when to be acted upon

Per *Fletcher, J.*—When the Judge agrees with the verdict of the Jury as against any particular accused, it is clearly his duty to pass sentence on that accused. [p. 657, col. 1.]

The confessions of the co-accused can be taken into consideration, but the Court requires corroboration before it will act upon them. [p. 657, col 2.]

Per *Beachcroft, J.*—Sub-section (2) of section 307 of the Code of Criminal Procedure does not intend that when the Judge is not prepared to accept the verdict of the Jury in its entirety, the whole case is to be referred to the High Court. It only contemplates a reference in the case of those persons in respect of whom the Judge declines to accept the verdict. [p. 658, col. 1.]

Babu *Hira Lal Sanyal*, for Babu *Surendra Kumar Bose*, for the Accused.

Mr. *Orr*, Deputy Legal Remembrancer, Bengal, for the Crown.

JUDGMENT.

FLETCHER, J.—This case comes before us on a reference made by the Sessions Judge of Jessore under the provisions of section 307 of the Code of Criminal Procedure. The accused were tried before the learned Sessions Judge and a Jury on a charge of dacoity with murder under section 396 of the Indian Penal Code.

The Jury by a unanimous verdict found the accused Nos. 3 and 6 guilty of an offence under section 396 of the Indian Penal Code and the other four accused guilty of an offence under section 395 of the Indian Penal Code.

The learned Sessions Judge agreed with the verdict as against the accused No. 1, Babar Ali, but failed to pass sentence on him, being of opinion that as he disagreed with the verdict as regards the other accused he was bound to refer the whole case to this Court. The learned Judge, however, was in error in the view that he took and it was clearly his duty to pass sentence on the accused No. 1 Babar Ali. As against the accused No. 1, Babar Ali, the case must go back to the learned Judge for him to pass sentence on this accused. The charge against all the accused under section 396 of the Indian Penal Code had reference to the dacoity perpetrated in the house of one Sona Bibi, a widow, when it is alleged that she was murdered. The skeleton that was subsequently found may not have been that of Sona Bibi. The evidence, however, leaves no doubt that a dacoity took place in the house of Sona Bibi and her disappearance amply supports the charge of murder.

The view that seems to have commended itself to the learned Judge that as a period of seven years had not elapsed since the disappearance of Sona Bibi the Court could not presume her death, is fallacious.

There was in the present case evidence before the Court from which the Court could infer that Sona Bibi had been murdered on the night in question, and it is not necessary to rely on the presumption mentioned by the learned Judge. As I have already stated the learned Judge agrees with the verdict of the Jury as against Babar Ali. He was a confessing prisoner, and the learned Judge believed the confession to be true. The accused No. 4 was also a confessing prisoner. But the learned Judge did not believe his confession, to be "quite voluntary," and he further states in the letter of reference that the accused No. 4 retracted his confession at the first opportunity before the Committing Magistrate on the 15th of June. There is no reason to think the learned Judge is correct in his first assumption, his second is incorrect. I see no reason to differentiate between the confession made by Babar Ali and the accused No. 4. Pyar Molla. I think, therefore, that we ought to convict the accused No. 4, Pyar Molla, of an offence under section 396 of the Indian Penal Code and sentence him to transportation for life. As against the remaining four accused the confessions can be taken into consideration, but the Court requires corroboration before it will act upon the confessions of co-accused. The corroboration in the evidence in this case, although it raises a case of suspicion, falls far short of what is required to support a conviction. It consists principally of statements of witnesses as to seeing the accused or some of them together on the night of the occurrence and as against one of the accused as to the dentification of certain ornaments found with one of the accused which had sometime o

other been pledged with the deceased woman. These statements, though giving rise to suspicion, are consistent with the innocence of these four accused.

I, therefore, think that we ought to accept the reference made by the learned Judge as regards the accused No. 2, Jamadar Mandal, the accused No. 3, Meser Sheikh, the accused No. 5, Panchu Shana, and the accused No. 6, Seyamaddi Shana and that they ought to be acquitted.

BEACHCROFT, J.—I agree. Sub-section (2) of section 307 of the Code of Criminal Procedure does not intend, as the learned Judge seems to think, that when the Judge is not prepared to accept the verdict of the Jury in its entirety, the whole case is to be referred to this Court. It only contemplates a reference in the case of those persons in respect of whom the Judge declines to accept the verdict. When the Judge agrees with the Jury in respect of any particular accused, the Judge ought to convict and sentence or acquit that accused as the case may be.

Reference accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 33 OF 1915.

January 28, 1915.

Present:—Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

PARAS RAM DUBE—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 82, 83, 354, 376 —Rape by boy of tender age - Presumption.

The presumption of English Law against the possibility of the commission of the offence of rape by a boy under the age of 14 years has no application in India. Such a question is a question of fact only.

Criminal revision from an order of the Additional Sessions Judge of Gorakhpur.

JUDGMENT.—I called for the record of this case on examination of the Sessions statement from the District of Pasti for the month of November 1914. One Paras Ram, a boy described as being between 12 and 14 years of age, was charged with having committed the offence of rape on the person of a little girl about seven years of age. The learned Sessions Judge has convicted in the alternative under section 376 or section 354 of the Indian Penal Code, not because he was in any doubt as to the facts, but because he considered that there was a difficulty as to whether a boy of the age of the accused could legally be convicted of the major offence charged. The presumption of English Law against the possibility of the commission of the offence of rape by a boy under the age of 14 years has no application in this country. The law on the subject of infancy in connection with criminal liability is laid down in sections 82 and 83 of the Indian Penal Code and nowhere else. It was a simple question of fact which the learned Sessions Judge had to try, as to whether, in the course of the assault perpetrated by the accused on the person of this little girl, such penetration had been effected as is required by law to constitute the offence of rape. If the statement of the girl, Kolharia, is read in connection with the medical evidence, there can be no doubt that the offence of rape was committed. I thought it advisable to place these remarks on record in view of the difficulty felt by the Sessions Judge. I do not propose to interfere with the sentence passed by him. The question of the proper punishment for an offence of this sort by boys of tender age is not an easy one, and many Sessions Judges of experience are of opinion that a sentence of whipping only is the most appropriate one that can be inflicted in such cases. I think the accused, Paras Ram, has been somewhat leniently dealt with, but interference on the part of this Court is not now called for. Let the record be returned.

Petition rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION NO. 373 OF 1913.

April 17, 1913.

Present:—Mr. Justice Imam and Mr. Justice Chapman.

PURNA CHANDRA MOULIK —PETITIONER

versus

DENGAR CHANDRA PAL—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 247, 352, scope

VIRUPANA GOWD v. EMPEROR.

of—Complainant absent—Accused, acquittal of—Death of complainant—Substitution of name of legal representative—Compoundable offence.

Where the man on whose complaint a prosecution under section 352 of the Indian Penal Code was started, died, and on his death, his nephew applied to be substituted in place of his deceased uncle:

Held, that no substitution should be allowed and an order should be passed under section 247 acquitting the accused on the failure of the complainant to appear at the hearing of the case, unless for some reason the Magistrate thought proper to adjourn the case to some other day.

Babu *Gunada Charan Sen*, for the Petitioner.

JUDGMENT.—This was a Rule calling on the District Magistrate of Faridpur to show cause why the proceedings in this case should not be dropped.

The man, on whose complaint the prosecution was started, died and, on his death, his nephew, one Bisveswar Pal, applied to be substituted in place of his deceased uncle.

The case is one under section 352, Indian Penal Code, which is compoundable, and we see no reason for the substitution of Bisveswar in place of the deceased complainant. An order under section 247 ought to have been passed by the Magistrate on the failure of the complainant to appear at the hearing of the case, and section 247 empowers the Magistrate to acquit the accused person unless for some reason he thinks proper to adjourn the case to some other day. The only ground on which the learned Magistrate has chosen to proceed with the case is that the accused had been guilty of the contempt of the process of the Court and he has considered that a good ground.

To our mind, it is not a sufficient ground. The accused is acquitted and the Rule is made absolute.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 684 TO 688 OF 1914.

February 23, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

VIRUPANA GOWD AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 234 to 236—Misjoinder of charges—Transaction, meaning of—Illegality—Irregularity.

The accused were charged of having entered the house of the third prosecution witness with a view to coerce the deceased person and his brother to deliver certain promissory notes and receipts and, later in the evening, of having obstructed the complainant's party when they proceeded to prefer a complaint in regard to what the accused had done in the morning:

Held, that the accused could not be charged together for their action in the morning and in the evening in one and the same trial, and that the joinder amounted to an illegality which could not be cured by the application of section 537 of the Criminal Procedure Code. [p. 660, col. 1; p. 662, col. 2.]

Whether a series of acts forms the same transaction or not depends upon community of purpose and the continuity of aim. [p. 661, col. 1.]

An objection as to misjoinder of parties can be taken in the High Court, even if the same was not taken before the Sessions Judge. [p. 661, col. 1.]

Courts have not to concern themselves with the ultimate object of the offender in determining the nature of the transaction. It is the immediate purpose of the attack that determines the character of the particular transaction. Mere interval of days will not disturb the oneness of the transaction nor necessarily the fact that different sets of persons were engaged on different occasions. If the aim of the accused on the different occasions was directed towards effecting different purposes, the transactions are different. In each case it is a question of fact whether the acts are so connected together as to form part of the same transaction. [p. 662, cols. 1 & 2.]

The word 'transaction' means a completed act. [p. 662, col. 2.]

Appeal against an order of the Court of the Additional Sessions Judge of the Bellary Division, in Case No. 59 of the Calendar for 1914.

Messrs. *T. Richmond*, *S. Ranganatha Aiyer*, *E. R. Osborne*, *K. Subba Reddi* and *K. Pandalai*, for the Appellants.

Mr. *C. Sidney Smith*, for the Government.

JUDGMENT.

SPENCER, J.—An objection has been taken in appeal that the trial was illegal on account of misjoinder of charges and however much this result after a prolonged trial in the Sessions Court may be regretted,

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I have little hesitation in finding that the objection is sound and that the conviction of the accused must in consequence be quashed.

It is clear from the Privy Council decision in *Subrahmania Ayyar* v. *King-Emperor* (1) that if there has been a misjoinder, it will have the effect of vitiating the trial and cannot be cured by the application of section 537, Code of Criminal Procedure.

In the present case there was an occurrence on the morning of June 29th, when certain persons are alleged to have come in an unlawful assembly armed with deadly weapons and besieged the house of prosecution witness No. 2 and thrown stones at prosecution witnesses Nos. 1, 2, 3 and the deceased, who were inside. There was another occurrence on the same afternoon when certain persons are alleged to have pursued and overtaken prosecution witnesses Nos. 1, 2, 3 and the deceased and murdered the latter individual when they were on their way to Jalibenchi to lodge a complaint about the morning occurrence before a Magistrate.

The question is whether the morning occurrence and the afternoon occurrence were parts of the same transaction within the meaning of section 239, Code of Criminal Procedure. The test applied by this Court in *Choragudi Venkatadri* v. *Emperor* (2) and more recently in *Koduballi Chathu* v. *Emperor* (3) is to see whether the series of acts to be treated as forming the same transaction are connected together by the essential elements of community of purpose and continuity of action.

From the frame of charge it might be argued that a common purpose ran through the doings of the mob on the day in question, as the object of the rioters has been given in both of the first two Courts as to beat Dodda Basavanna Gowd, Basavanna Gowd and Chennana Gowd.

Even here it may be questioned from a narration of what occurred whether the real purpose of those assembled in the morning was not to obtain by use of criminal force certain promissory notes and a receipt from the possession of Dodda Basavanna Gowd, and whether the real purpose of those who pursued the prosecution party in the afternoon was not to prevent them by use of criminal force from complaining to the authorities.

Be this as it may, when we come to consider whether there was continuity of action between the morning and afternoon occurrences, we find that the Sessions Judge showed his consciousness that there was not such continuity. He felt the necessity of framing a separate count for the afternoon occurrence in which he charged the same persons for an offence under the same section of the Indian Penal Code in identically the same words, with the sole difference that the place of offence is given as Korlayondi in the first count and as the field of Jalibenchi in the second count. Again in paragraph 10 of his judgment he observes that when prosecution witnesses Nos. 1 to 3 set out in the afternoon, they had no expectation of being attacked again and received no warning from any in the village. The prosecution witnesses state that four persons came and pacified the rioters and then the accused went away and the witnesses came down, a note was made in writing of the names of the offenders, and the deceased took his meals in the 3rd prosecution witness's house. Prosecution 2nd witness after describing the acts which he witnessed in the morning stated: "Thus the morning affair ended," and everything tends to the conclusion that those matters would have ended for the time being, if the accused party had not somehow got wind of the next move of the prosecution party, which was to go to a Magistrate and try to get them punished for what they had done in the morning. I have no doubt from what came out at the trial that the stone throwing and other assaults in the morning were acts complete in themselves. The procedure would moreover have been simplified by having separate trials and there would thereby have been no risk of the accused being prejudiced by the difficulty which the Judge and assessors may have felt in keeping distinct the part taken by each accused in the morning and the afternoon transactions and in having to decide whether any of those present on one

(1) 25 M. 61 (P. C.); 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257; 2 Wier 271.

(2) 5 Ind. Cas. 847; 33 M. 502; 11 Cr. L. J. 258; 7 M. L. T. 299; 20 M. L. J. 220; (1910) M. W. N. 65.

(3) 3 Cr. L. R. 382.

occasion were also present on the other occasion. The easiest course would have been to try the accused first for the offences committed in the afternoon and to proceed with the trial for the offences committed in the morning after seeing the result of the first trial.

I am of opinion that the convictions must be quashed and a re-trial ordered.

SESHAGIRI AIYAR, J.—I agree. Mr. Richmond has taken the preliminary objection that the trial of the accused in this case offends against the provisions of sections 233 and 235 of the Code of Criminal Procedure. The objections to the joinder of charges was not taken before the Sessions Judge. It is unfortunate that the case should have been proceeded to trial without raising a formal objection. We cannot on that ground refuse to listen to the argument regarding misjoinder. In the case of *Krishnasami Pillai* v. *Emperor* (4) no objection was taken to the joinder of charges in the Sessions Court, and yet the learned Judges who heard the case allowed it to prevail.

The facts of the case as set out by the Sessions Judge are these :—On the morning of the 29th June 1914 the accused and their servants, including certain Boyis whom the Sessions Judge finds to have taken part in the rioting, came to the house of the 3rd prosecution witness, where the deceased man and his brother and relations were already staying, with a view to coerce them into delivering certain promissory notes and receipts. They had a revolver with them and threatened to shoot P. W. No 3, if he refused to give up the papers. The complainants' party went inside the house and bolted the door. Subsequently at the medition of stangers, among whom the 8th P. W. had taken a leading part, the accused's party left the place. Later, in the afternoon at about 1-30 P. M. the complainants' party started from the house of the 3rd P. W. to go to Jellabenchi with a view to prefer a complaint against the accused for their conduct in the morning. After they had gone about four furlongs from the house, they were attacked by the Boyis who were joined later on by occused Nos. 1 to 13. It was on this occasion that one of the complainants' party met his death.

The objection taken is that a single trial of the accused for offences which were committed on these two distinct occasions, namely, at or near the house of the 3rd prosecution witness in the morning, and half a mile away from the house in the afternoon, is illegal and that the whole trial is, therefore, vitiated. I have been forced to the conclusion that this contention is well founded. It was pointed out by a Full Bench of the Allahabed High Court in *Queen-Empress* v. *Juala Prasad* (5) with reference to section 233, "that this section contains the general law. The reason of it is, that the mind of the Court might be prejudiced aginst the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the Courts trying him on one of the charges not to be unfairly influenced by the evidence aginst him on the other charges." The Legislature has provided exceptions to the rule contained in section 233; and those exceptions are so framed as to minimise the danger of prejudice to the accused by the joining together of more than one offence in the same trial.

Section 235, which is one of the exceptions to the general rule, permits of a joinder in cases where the acts are so connected together as to form one transaction. After giving my best consideration to the question, I am unable to hold that the occurrence in the morning and that in the afternoon are parts of the same transaction. The motive which led to the morning attack was to secure possession of certain documents which the accused wanted. The motive which animated the second one, so far as one may gather from the probabilities and from evidence given by the 1st prosecution witness, was to prevent the attacked party from presenting a complaint to the Magistrate in reference to the occurrence in the morning. I am willing for purposes of argument to accept the finding of the Sessions Judge that the same men took part on both the occasions. Nonetheless I am unable to hold that there was any common aim in the two

(4) 26 M. 125; 2 Weir 295.

(5) 7 A. 174 at p. 177; A. W. N. (1884) 324

quarrels. In a rough way it may be said that the common object was to injure the complainants, party. But that is not the meaning to be attributed to clause (1) of section 235. As was pointed out in *Emperor* v. *Sheraf Alli Allibhoy* (6). "There must be a continuity and community of purpose and the two occurrences should be so related to one another in point of purpose or as cause and effect or as principal and subsidiary action." Applying this test I am unable to say that there was a community of purpose between the two attacks.

As I have pointed out already, the purpose of the second attack was to stifle the prosecution. In a very instructive judgment Lord Blackburn in *Castro* v. *Queen* (7) points out that Courts have not to concern themselves with the ultimate object of the offender in determining the nature of the transaction. That object may be to cause injury in some way or other to the complainant. But it is the immediate purpose of the attack that determines the character of the particular transaction. In Lord Halsbury's Laws of England, Volume IX, page 342, it is said: "It is a well-established rule of practice that if different felonies, not being different ways of describing the same act, are charged in separate counts of one indictment, the Judge will put the prosecutor to his election to proceed and offer evidence on one charge only." The criterion in all these cases is, what was that the attacking party had in view as their immediate object. Mere interval of days will not distrub the oneness of the transaction nor necessarily the fact that different sets of persons were engaged on different occasions. But if the aim of the accused on the different occasions is directed towards effecting different purposes, the transactions are different. The view is supported by *Chouagudi Venkatadri* v. *Emperor* (2) and by *Gobind Koeri* v. *Emperor* (8). The case nearest in point is that reported as *Laskari* v. *Empror* (9). In *Mussalappa* v. *Emperor* (10) it was pointed out by Sir Arnold White, C. J., that in each case it is a question of fact whether the acts are so connected together as to form part of the same transaction and referring to the illustrations, he says that the word "transaction," should be read in the ordinary sense of a completed act. I entirely agree with this view. In the present case the disturbance of the morning was completed as soon as the mediators intervened and pacified the parties. The second attack began because of an attempt on the part of the complainants' party to take the matter to the notice of the authorities. The second one cannot be said to be subsidiary to the first nor dependent upon it. They were two independent acts aimed at securing two independent purposes.

For these reasons I have come to the conclusion that the joinder of the two charges is illegal and as pointed out by Mr. Justice Ayling in *In re Anantha Padiyara* (11), the illegality cannot be cured and the conviction must be set aside. See also the judgment of myself and Mr. Justice Spencer in *Mala Mekalakati Subbadu, In re* (12). The Sessions Judge should be ordered to re-try the accused.

Conviction set aside; Re-trial ordered.

(6) 27 B. 135; 4 Bom. L. R. 930.

(7) 6 App. Cas. 229 at p. 243; 50 L. J. Q. B. 497; 44 L. T. 550; 29 W. R. 669; 14 Cox. C. C. 546; 45 J. P. 452.

(8) 29 C. 385; 6 C. W. N. 468.

(9) 4 Ind. Cas. 1; 13 C. W. N. 1113; 10 Cr. L. J. 452.

(10) 6 Ind Cas. 242; 7 M. L. T. 367; 11 Cr. L. J. 293; (1910) M. W. N. 541.

(11) 26 Ind Cas. 143; 15 Cr. L. J. 695

(12) 28 Ind. Cas. 522; 2 L. W. 265; 28 M L. J. 381; 16 Cr. L. J. 298.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 376 OF 1914.

March 3, 1915.

Present:— Mr. Justice Spencer and Mr. Justice Trotter.

RAJANA APPADU—PETITIONER—APPELLANT

versus

RAJANA APPAMMA—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Order awarding maintenance Appeal.

An order awarding maintenance under section 488 of the Criminal Procedure Code is an order passed in a criminal trial and is not appealable.

Reg. v. *Thaku* bin *Ira*, 5 B. H. C. R. 81 Cr., followed.

Appeal, under clause 15 of the Letters Patent against an order of the Hon'ble Mr. Justice Ayling, in Criminal Revision Petition No. 756 of 1914, preferred against that of the Court of the Joint Magistrate of Parvathipur, in Maintenance Case No. 9 of 1914.

Mr. A. *Viswanadha Aiyar*, for the Appellant.

Mr. *V. Ramesam*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken that no appeal lies, as an order under section 488, Criminal Procedure Code, awarding maintenance is an order passed in a criminal trial. We think the objection is good. Clause (7) describes the person against whom proceedings are taken as an accused and provides that he may give evidence in his own behalf—a right which would exist without being conferred by statute if the proceedings were civil.

Clause (6) provides that the evidence shall be recorded in the manner prescribed for the trial of summons cases, and clause (3) provides that a person neglecting to comply with the order may be imprisoned.

The Bombay High Court in *Reg.* v. *Thaku* bin *Ira* (1) took the view that maintenance proceedings were under the Code of Criminal Procedure then in force a "judicial proceeding of a Criminal Court" from which no appeal lay.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 5 B. H. C. R. 81 Cr.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 1247 OF 1914.

September 9, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice, Teunon.

HIRN *alias* AKBAR ALI MAHOMED —ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 118, 122 Good behaviour, security for—Sureties offered not to be refused except after judicial inquiry.

Sureties for good behaviour under section 118 read with section 110 offered by accused should not be refused, except after judicial inquiry by the Magistrate who has made the order under section 118, and such inquiry should be made under the provisions of section 122 of the Criminal Procedure Code.

Mr. *P. N. Dutt* and Babu *Nakuleswar Mukherjee*, for the Petitioner.

JUDGMENT.—In this case the accused-petitioner had been required to furinish security for good behaviour under section 118 read with section 110 of the Criminal Procedure Code. Thereupon he offered two sureties, and the matter was referred by the Magistrate to the Police for inquiry. The Police submittsd a report to the effect that the sureties were not acceptable and, proceeding upon that report, the Magistrate refused to accept the sureties. It has been repeatedly pointed out that sureties offered should not be refused except after judicial enquiry by the Magistrate who has made the order under section 118, such inquiry to be made under the provisions of section 122 of the Criminal Procedure Code. This Rule was, therefore, granted calling upon the Deputy Commissioner to show cause why the petitioner should not be given an opportunity of showing that the sureties offered were fit to be accepted. No cause has been shown and on the facts we have stated, we make this Rule absolute and direct that the Magistrate do now hold an inquiry in accordance with law and upon that enquiry decide whether th sureties offered are or are not fit persons.

Pending this further inquiry the sureties offered will be provisionally accepted.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 995 OF 1914.

January 26, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

EMPEROR—APPELLANT

versus

DIP NARAIN—ACCUSED—RESPONDENT.

Confession—Joint trial of person who confesses along with other accused—Admissibility of confession.

Where several persons were tried for an offence under sections 211 and 109 of the Indian Penal Code and one of them entered confession, but not being convicted on the plea of guilty was tried jointly with the other accused:

EMPEROR *v.* DIP NARAIN.

Held, that his confession was admissible in evidence as against all the accused. [p. 667, col. .]

Criminal appeal on behalf of the Government against an order of acquittal of the Sessions Judge of Azamgarh.

Mr. *Ryves*, for the Crown.

Mr. *C. C. Dillon* (with him Messrs. *S. C. Mukerji*, *Surendra Nath Sen*, *R. K. Malviya* and *Iqbal Ahmed*), for the Accused.

JUDGMENT.—This an appeal by the Local Government against the acquittal of one Dip Narain, who was convicted by a Magistrate of the first Class of an offence punishable under sections 211-109 of the Indian Penal Code, but acquitted by the learned Sessions Judge of Azamgarh on appeal. As a matter of fact nine persons were put on their trial before the Magistrate, all of whom were convicted and all of whom appealed. The Sessions Judge dismissed seven of the appeals, but acquitted Dip Narain and one *Musammat* Talia. There has been no appeal against the acquittal of the latter.

The task before us is a simpler one than was before the Courts below, as many matters which were in controversy there have been accepted in argument in this Court as fully established by the evidence. We find, that Gaya Sunar, resident of Shahzadpur in the Fyzabad District, was on bad terms with his relatives, Sarju and Lachhman. He somehow or other came to believe that a false charge brought against these persons could be sucessfully prosecuted, if suitable measures were taken, before a certain Bench of Honorary Magistrates exercising jurisdiction at Azamgarh. He came into Azamgarh for that purpose, and there got into communication with various persons, including Gulab Sunar and one Muhammad Ishaq, a dealer in timber. A conspiracy was hatched for the filing of a false complaint before a Bench of Honorary Magistrates consisting of Raja Muhammad Shah and Babu Krishen Deo Narain Singh. Salaran Teli of Azamgarh was employed to come forward as complainant, and it seems to us perfectly clear on the evidence, if indeed this much also has not been practically conceded in argument before us, that there were members of the conspiracy who professed to be able to ensure its success by bringing improper influence to bear on Babu Krishen Deo Narain Singh. Accordingly, on April 3rd 1914, Salaran filed a complaint before the Honorary Magistrates already named, in which he falsely charged Sarju and Lachhman with having committed, within the jurisdiction of the said Magistrates, offences punishable under sections 323,406 and 417 of the Indian Penal Code. Salaran was examined on his complaint and put in a list of witnesses. We cannot refrain from remarking that a Magistrate of experience could scarcely have helped seeing that the story told by Salaran was a most extraordinary one, and that, even if it might prove on inquiry that there was any truth in the other allegations made by him, the story of the assault said to have been committed by Sarju and Lachhman on April 1st bore every appearance of being a piece of imaginative embroidery. The Honorary Magistrates, however, took cognizance of the complaint as one of "causing hurt" (under section 323, Indian Penal Code) only, and issued process for the attendance of the accused persons and of the witnesses named by Salaran, fixing April 17th, 1914, for the trial. On that date Sarju and Lachhman, having come to Azamgarh and secured the services of Sheikh Faiyaz Husain, a local Mukhtar, presented a petition before the Sub-Divisional Magistrate asking for a transfer of the case against them to some other Court. There were allegations made in this petition which satisfied the Sub-Divisional Magistrate that prompt action was called for on his part. He transferred the complaint of Salaran to his own file, and went over in person to the Court of the Honorary Magistrates to take possession of the record and secure the attendance before himself of the complainant and his witnesses. The falsity of the complaint was at once disclosed. Salaran absconded; his witnesses denied all knowledge of the affair. The complaint was dismissed, and the Sub-Divisional Magistrate initiated a proceeding under section 476 of the Code of Criminal Procedure which resulted in the trial out of which the present appeal has arisen.

As against Dip Narain, the case for the prosecution is that he was an active member of the conspiracy which organised the institution by Salaran of his false complaint of April 3rd, 1914, and more particularly

that he was the member to whom the others looked as the instrument through which improper influence was to be brought to bear on the Honorary Magistrate, Babu Krishen Deo Narain Singh.

In this connection we may at once proceed to comment on one aspect of the case which calls for special notice. The learned Sessions Judge seems to have been much influenced by the view that the case for the prosecution involved serious allegations against this Honorary Magistrate. He considered those allegations grossly improbable and very inadequately supported by the evidence. He then followed out a train of reasoning according to which the acquittal of Dip Narain appears to follow as a necessary consequence on the failing of the prosecution to establish any specific charge of corruption or misconduct against Babu Krishen Deo Narain Singh. We are quite unable to look at the case in this light. The Honorary Magistrate was not on his trial. No charge was preferred against him, and no onus lay on the prosecution of establishing any such charge. The question with which we are concerned is whether Dip Narain represented himself, or was understood by the other conspirators, to be a person in a position to bring corrupt influences to bear on the Honorary Magistrate. Whatever remarks we may find it necessary to make on any portions of the evidence, we have to bear in mind that the point for determination is the guilt or innocence of Dip Narain, and that his guilt is perfectly consistent with the entire innocence of the Honorary Magistrate.

When we come to ask ourselves whether there is anything seriously improbable in the suggestion for the prosecution that Gaya Sunar and his fellow-conspirators believed themselves able to influence the conduct of Babu Krishen Deo Narain Singh through Dip Narain, we find that there is reliable evidence on the record which lends plausibility to the suggestion. Dip Narain seems to be a local shopkeeper. He speaks of himself as a "tenant" of Babu Krishen Deo Narain Singh; but it does not appear that he has any ostensible connection with that gentleman, or any ostensible business of any kind, which should make him a constant attendant in the Court of the Honorary Magistrates on days on which Babu Krishen Deo Narain Singh is sitting. Yet Abdul Ghafur, *peshkar* of the Honorary Magistrates' Court, deposes as follows:—"Dip Narain comes daily when Babu Kishen Deo Narain sits. I have often been to Babu Kishen Deo Narain's house and I have seen Dip Narain there. Dip Narain used to give *pan* to Babu Kishen Deo Narain and Raja Mohammad Shah." This witness seems to us quite unshaken in cross-examination. The general tone of his evidence is by no means that of a man who has been got at to bolster up a chrage against Dip Narain and to blacken the character of Babu Krishen Deo Narain Singh. He deposes that Dip Narain was present in Court on April 3rd when Salaran was examined on his complaint, but admits that he does not remember Dip Narain's presence on April 17th, though the latter is an admitted fact. He represents Dip Narain as ministering to the needs of both the Honorary Magistrates on the Bench when Babu Krishen Deo Narain Singh sits there. We accept his evidence as true, and we regard it as proving that Dip Narain habitually conducted himself in a manner calculated to impress outsiders with a belief in the existence of confidential relations between himself and Babu Krishen Deo Narain Singh, particularly with reference to the proceedings of the latter on the Bench of Justice.

At first sight the above conclusion may not seem to carry us very far; but there is no getting away from the fact that in arriving at it we have virtually disposed of this appeal. For when once the case for the prosecution has been cleared of that mist of presumed improbability through which it presented itself to the eyes of the learned Sessions Judge, the evidence against Dip Narain is simply overwhelming. Setting aside for the moment all items of evidence as to which there has been serious controversy, we find on the record the statements of four witnesses, Girdhari, Amjad Ali, Neor and Chhittru, all of whom depose to having seen meetings of the persons accused of this conspiracy at the house of the accused, Gulab Sunar, and three of whom depose to the presence of Dip Narain at these meetings. These witnesses were believed in the Courts below, and have been relied on by the learned Sessions Judge as against all the

accused persons other than Dip Narain and *Musammat* Talia. Their evidence seems to us to have been procured under circumstances which practically exclude the defence theory of collusion and fabrication. In our Court only the evidence of Chhittru was seriously attacked, and this attack wat based on a previous statement of his (one made in the course of the proceedings under section 476 of the Code of Criminal Procedure) on which he had never been cross-examined. The accused persons were very efficiently defended in the Courts below, and if there had been any real force in the argument now pressed on our notice, we are confident that the alleged discrepancy would have been put to the witness Chhittru when he was recalled for cross-examination. The argument itself is based on an ambiguous phrase in Chhitru's former deposition. We do not find it convincing, and we regard the evidence given by these four witnessess as reliable. It has been argued that it is not conclusive; but it is evidence of facts which, in the absence of reasonable explanation, do connect Dip Narain with the presentation of Salaran's false complaint. It requires to be read in connection with the evidence of the *peshkar*, Abdul Ghafur. The association of Dip Narain with the other conspirators at the house of Gulab, under the circumstances stated, is a matter from which the Court may reasonably infer his complicity in the conspiracy. Moreover the evidence of Amjad Ali carries the case even beyond the bounds of legitimate inference, for he deposes to a statement by Gulab that he was "getting up a case" and to a request for assistance from this witness.

Then there is the evidence of Fida Husain, the clerk of Mohammad Shafi, Mukhtar, who was engaged to act for Salaran in the prosecution of the false charge. He deposes to the active participation of Dip Narain in getting the false complaint drafted and in the arrangements made for its presentation in Court. He is corroborated by Mohammad Shafi himself, who even deposes that it was from Dip Narain's hand that he received a preliminary fee of one rupee. The Magistrate who tried the case looked upon Fida Husain as probably an accomplice, and was dissatisfied with the manner in which Mohammad Shafi fenced with certain questions put to him in cross-examination. More particularly, he thought the Mukhtar was not speaking the truth when he said that Fida Husain, though he had been his clerk, had ceased to act as such before the transactions in question in this case. The learned Sessions Judge seems to have worked up to the conclusion that all the evidence given by these two witnesses was deliberately false. Yet it is an undoubted fact that Mohammad Shafi was engaged to act for Salaran in the prosecution of Salaran's false complaint, and Fida Husain did write out the complaint filed by Salaran in Court and the power-of-attorney in favour of Mohammad Shafi. They were necessary witnesses to any inquiry into the circumstances under which Salaran's complaint came to be filed. The suggestion that they have embroidered on the facts which undoubtedly were within their knowledge, for the sake of getting Dip Narain into trouble, rests on the very slenderest of foundations. It was no doubt a very awkward thing for Mohammad Shafi, from the point of view of his professional career, to be suddenly caught out in the position of ostensible legal adviser to a gang of conspirators engaged in the manufacture of a flagrantly false case. The position would tend to make him somewhat economical of the truth while in the witness-box, and he may have influenced Fida Husain to be the same. To this extent the evidence of the two witnesses requires to be cautiously considered; but we find no real reason for disbelieving their evidence where it affects Dip Narain. That they are not the tools of any conspiracy for getting Babu Krishen Deo Narain Singh into trouble may reasonably be inferred from the fact that they say nothing whatever against him.

This is the position we have reached without even touching upon the two most controverted points in the case, the evidence of the witness Chedi Rangrez and the confession of the accused Muhammad Ishaq. If we could be sure that these two men spoke the truth to the best of their knowledge, we need not have discussed any other evidence. Both assert that the filing of Salaran's complaint was the outcome of an elaborate conspiracy, in connection with which Dip Narain was an important member, acting (or purporting to act) as go-between for the others in their dealings with Babu Krishen

Deo Narain Singh. The confession of Mohammad Ishaq obviously requires to be taken into consideration against all the accused, the learned Sessions Judge need have had no misgivings on this point. Muhammad Ishaq was not convicted on his plea of guilty, and he was tried jointly with the other accused. Under the circumstances of this case the trying Magistrate would have shown very poor discretion if he had convicted Muhammad Ishaq on his plea of guilty, thereby recording his belief in the substantial truth of Muhammad Ishaq's confession, before the other accused had even entered on their defence. The case obviously required the most thorough sifting out before any Court could say with confidence that Muhammad Ishaq's confession was substantially true, even where it implicated himself. As it is, the learned Sessions Judge has taken into consideration the confession of Muhammad Ishaq to a far greater extent than did the trying Magistrate; only he has used it to discredit the witness Chedi and to throw doubt on the prosecution case generally, as if the prosecution could be made responsible for all the allegations which Muhammad Ishaq saw fit to make against the Honorary Magistrate.

We have no doubt that both the Courts below were right in thinking that both Mohammad Ishaq and Chedi had made statements which were palpably untrue. We should not think of convicting anyone except possibly Mohammad Ishaq himself on the confession *plus* the evidence of Chedi. Yet we think the learned Sessions Judge was quite mistaken in looking upon Chedi as a witness wholly unacquainted with the facts to which he purported to depose. He was probably telling about as much of the truth as he felt he could conveniently do without making it too obvious that his proper place was in the dock and not in the witness-box. Having said this much, we think it idle to enter upon conjectures as to why Mohammad Ishaq and Chedi should have said precisely what they did. On no reasonable theory do we find anything in these statemnts which shakes our belief in the rest of the prosecution evidence; there is a complete case against Dip Narain without them.

The defence, as embodied in Dip Narain's own statement, we find to be singularly unconvincing. It rests upon the fact that Faiyaz Husain, Mukhtar, acted for Sarju and Lachhman in the proceedings before the Sub-Divisional Magistrate. Faiyaz Husain had been the opponent of Babu Krishen Deo Narain Singh in a Municipal election in which the latter was successful. The suggestion is that, in order to revenge himself for his disappointment, this Mukhtar has engineered all that part of the prosecution case which seems to cast discredit on the proceedings of the Honorary Magistrate. Dip Narain is supposed to have been implicated, *firstly*, in order to strike at Babu Krishen Deo Narain Singh through him; *secondly*, because he refused to vote for Faiyaz Husain at the contested election; and *thirdly*, because he refused to make a statement implicating Babu Krishen Deo Narain Singh at the inquiry before the Sub-Divisional Magistrate. This last is the point on which Dip Narain himself lays most stress, and in doing so he throws mud freely, not only at the Mukhtar Faiyaz Husain, but at the Sub-Divisional Magistrate himself. His allegations against this officer are wholly unsupported by evidence and we regard them as obviously false. His defence evidence is directed towards proving that he had some ostensible business on April 17th in the Municipal Office which adjoins the Court of the Honorary Magistrates, and towards substantiating his story about the contested Municipal election. One witness also says that Mohammad Shafi owed Dip Narain money, a fact which Mohammad Shafi himself had in a fashion admitted. It is obvious enough that Mohammad Shafi would not obtain a release from his debt by getting Dip Narain sent to jail; and the whole of the defence evidence might be accepted, though some of it seems of very doubtful value, without really affecting our view of the case for the prosecution.

We are satisfied that the learned Sessions Judge has allowed himself to be wholly led astray in this case by a sort of belief that the prosecution was really directed against Babu Krishen Deo Narain Singh, and that Dip Narain could not be convicted unless the Court believed the allegations against that gentleman which are to be found in Mohammad Ishaq's confession, and nowhere else on the record. We hold it to

be fully proved that Dip Narain was a party to the conspiracy which resulted in the filing of Salaran's false complaint.

We set aside the Sessions Judge's order of acquittal; we restore the Magistrate's order convicting Dip Narain on the charge under sections 211-109 of the Indian Penal Code as framed. No special argument has been addressed to us on the subject of sentence, and we see no adequate reason for departing from the sentence originally passed by the trying Magistrate. We sentence Dip Narain to be rigorously imprisoned for one year and to pay a fine of Rs. 60, in default of payment of fine he will undergo further rigorous imprisonment for two months. He must surrender to his bail accordingly. Any period of imprisonment which he may have already undergone will count towards execution of the sentence now imposed.

Order modified.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NOS. 1863 AND 1902 OF 1914.

February 5, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Beachcroft.

IN CR. R. No. 1863 OF 1914

SUBEDAR AHIR—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

IN CR. R. No. 1902 OF 1914

CHHATRADHARI MISSER—ACCUSED—PETITIOER

versus

EMPEROR ON THE COMPLAINT OF GANESH LOHAR AND BARKA MANJHI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 234—One trial of not more than three offences of same kind against same person—Great care and caution to be used with different complainants—Charges, when to be brought together.

Per *Fletcher, J.*—Section 234 of the Code of Criminal Procedure is not limited to cases where the offences have been committed against the same person. [p. 669, col. 1.]

Empress of India v. *Murari*, 4 A. 147, dissented from.

Manu Miya v. *Empress*, 9 C. 371; 11 C. L. R. 52 and *Queen-Empress* v. *Juala Prasad*, 7 A. 174; A. W. N. (1884) 321, referred to.

Nanda Kumar Sircar v. *Emperor*, 11 C. W. N. 1128; 6 Cr. L. J. 321; *Ali Mahomed* v. *Emperor*, 1 Ind. Cas. 33?; 13 C. W. N. 418; 9 Cr. L. J. 277, not followed.

Sri Bhagwan Singh v. *Emperor*, 3 Ind. Cas. 319; 13 C. W. N. 507; 10 Cr. L. J. 272; 9 Cr. L. J. 142; 5 M. L. T. 349, referred to.

The power given by section 234 is one that requires to be used with great care and caution where there are different complainants. [p. 669, col. 1.]

Per *Beachcroft, J.*—Where there is no fear of the accused being prejudiced the charges are always tried together. [p. 669, col. 2.]

Dr. *Dwarka Nath Mitter* and Babus *Baikuntha Nath Mitter* and *Manindra Nath Banerjee*, for the Petitioners in both.

Babu *Krishna Kamal Maitra*, for the Complainant in No. 1902 of 1914.

JUDGMENT.

FLETCHER, J.—The only question raised in the hearing of these two Rules is whether section 234 of the Code of Criminal Procedure authorises one trial of not more than three offences of the same kind committed within the space of 12 months when the offences have been committed against different persons. The judicial decisions on this question are not uniform. In the case of *Empress of India* v. *Murari* (1), it was laid down by the Court that "the combination of three offences of the same kind for the purpose of one trial can only be where they have been committed in respect of one and the same person, and not against different prosecutors." A different view was taken by this Court in the case of *Manu Miya* v. *Empress* (2). The case of *Queen-Empress* v. *Juala Prasad* (3), the next authority in order of date, is not opposed to the decision in *Empress of India* v. *Murari* (1) for in the case of *Queen-Empress* v *Juala Prasad* (3), the several sums that had been embezzled had become the property of the Government and there was, therefore, only one complainant. The next case is *Nanda Kumar Sircar* v. *Emperor*(4), to which decision I was a party. In that case a similar view was taken to that expressed in the case of *Empress of India* v. *Murari* (1). That decision was followed in the case of *Ali Mahomed*

(1) 4 A. 147.
(2) 9 C. 371; 11 C. L. R. 52.
(3) 7 A. 174; A. W. N. (1884) 321.
(4) 11 C. W. N. 1128; 6 Cr. L. J. 321.

v. *Emperor* (5), but dissented from in the case of *Sri Bhagwan Singh* v. *Emperor* (6).

On a further consideration I am of opinion that the decision in the case of *Nanda Kumar Sircar* v. *Emperor* (4) cannot be supported. No doubt section 234 of the Code of Criminal Procedure is taken from section 5 of the Statute 24 and 25 Vict., C. 96. The words "against the same person" which appear in section 5 of 24 and 25 Vict., C. 96, do not appear in section 234 of the Code of Criminal Procedure.

Section 234 of the Code of Criminal Procedure, I think, is not limited to cases where the offences have been committed against the same person.

At the same time I think that the power given by section 234 is one that requires to be used with great care and caution where there are different complainants.

In the result, I think, these two Rules ought to be discharged.

BEACHCROFT, J.—The only question which arises in these two rules is whether section 234, Criminal Procedure Code, is limited to a case where there is one complainant in respect of all the offences charged or whether it applies where the complainants are different persons.

Looking to the plain words of section 234, I should hardly have thought the matter open to argument. Section 234 is one of the exceptions to the general rule contained in section 233, *viz.*, that every charge is to be tried separately. It provides that three charges of the same offence committed in the course of 12 months may be tried together, and the second part of the section explains what is meant by the same offence. Had the Legislature thought fit to impose such a limitation as that contended for on behalf of the petitioner it would presumably have done so expressly, whereas the section is framed in the widest terms, and when the Legislature has imposed no limitation, it is not for us to do so.

But there are cases in the Courts in which the view has been taken that the limitation contended for applies. It is not necessary to discuss the case of *Empress of India* v. *Murari* (1), to which reference was made in the Full Bench case of *Queen-Empress* v. *Juala Prasad* (3), from the report of which there is reason to suppose that one of the Judges who decided the earlier case had changed his views. But in the case of *Nanda Kumar Sircar* v. *Emperor* (4) the opinion was expressed that section 234 "evidently refers to different acts done by the same individuals or same sets of individuals against the same complainant." In that case the earlier case of *Manu Miya* v. *Empress* (2) does not seem to have been brought to the notice of the learned Judges. The decision in that case was directly contrary to the view contended for on behalf of the petitioner. The Legislature in the Code of 1882 endorsed the view taken by the learned Judges by introducing an explanation of what is to be understood by the phrase "offences of the same kind" and that explanation is repeated in the present Code.

Three classes of cases constantly occur in the *mufassil* in which an accused is charged with offences of the same kind against different complainants. In one a man breaks into several houses in one night; in another a man whose house is searched for stolen property is found to have received property stolen from different persons on different occasions; in the third a man cheats several persons in pursuance of a system *e. g.* by pretending to have the power of doubling money. In the last-mentioned case the joint trial might pershaps be defended on the ground that the offences were committed in the course of one transaction, without having recourse to section 234, but in the other cases the offences are not committed in the course of the same transaction. In these cases where there is no fear of the accused being prejudiced the charges are always tried together. In the whole of my experience as Magistrate and Sessions Judge I do not remember objection ever having been raised to the accused being tried at one trial for three offences in such cases. Such an objectien would have struck me with surprise as I am sure it would almost all judicial officers in the *mufassil*, who have constantly to try cases in which the provisions of this section are applicable, especially when the view, described in that

(5) 1 Ind. Cas. 335; 13 C. W. N. 418; 9 Cr. L. J. 277.

(6) 3 Ind. Cas. 319; 13 C. W. N. 507; 10 Cr. L. J. 272; 9 C. L. J. 149; 5 M. L. T. 349.

In re MURUGESA NAIDU.

judgment as evident, had been definitely rejected by two Judges of this Court so far back as 1882.

It may be that the decision arrived at in *Nanda Kumar Sircar* v. *Emperor* (4) was correct in that there were three charges of rioting and three of hurt, and that such a case would not be covered by section 234 But so far as that case decided that section 234 applies only to offences against the same complainant, I must express my dissent from it.

It is argued that unless the section is limited in the way suggested, an accused might be much embarrassed by the joinder of charges, *e. g.*, a man might be tried at one trial on three charges of murder committed on different occasions. Such an argument entirely loses sight of the fact that it must be presumed that these who are selected for the administration of the Criminal Law are fit for their duties, and will not use their powers in an arbitrary and oppressive manner. The Criminal Court must be credited with the possession of a little common sense.

Finally it was argued that other sections of the Code would be found difficult to work if the unrestricted interpretation were placed on section 234. The only section referred to was section 247. It was suggested that if one of three complainants were absent, the accused would be acquitted of all three charges. Leaving out of consideration for the moment the fact that charges are not drawn up in summons cases, the obvious answer is that he would not be acquitted of all three offences, but only of the offence in respect of which the complainant was absent.

I think the Rules should be discharged and the petitioner in Revision Case No. 1863 remanded to jail to serve out the remainder of his sentence.

Rules discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 623 OF 1914.

CRIMINAL REVISION PETITION No. 529 OF 1914.

February 15, 1915.

Present:—Mr. Justice Ayling.

In re MURUGESA NAIDU—ACCUSED—PETITIONER.

Madras District Police Act (XXIV of 1859), ss. 45, 53 Receiving unauthorised fee or recompense—Prosecution after three months, if barred—Application for certified copies of depositions for cross-examination—Copies not granted—Adjournment, refusal of—Grave prejudice—Conviction, legality of.

The object of section 53 of the Madras District Police Act, XXIV of 1859, is to impose a bar of limitation against actions and prosecutions against officers for acts done or purporting to be done in pursuance of their official powers, and to impose further restrictions on such proceedings in respect of notice, tender and costs. [p. 671, col. 2.]

The prosecution of a Police constable for receiving an unauthorised fee or recompense is not barred by limitation owing to the fact that the offence complained of was committed more than three months before the prosecution was launched. [p. 671, cols. 1 & 2.]

The words "under the provisions of this Act or under the general Police powers," occurring in section 53 of the Madras District Police Act (XXIV of 1859) apply to the phrase "anything done or intended to be done" occurring in the same section, and do not qualify "actions or prosecutions against any person." [p. 671, col. 2.]

High Court Proceedings, 7th July 1869 No. 1211; 1 Weir 846; 4 M.H.C.R. App. liv; and *Gundam Venkatasami* v *Chinnam Purushottama*, 5 M. H. C. R. 466, 1 Weir 847, followed.

Criminal Revision Case No. 469 of 1898, dissented from.

An accused who had applied for copies of the depositions of prosecution witnesses to instruct a Vakil to cross-examine them, did not get the copies in spite of reminders. He applied for the adjournment of the case on the hearing day, but the adjournment was refused and he was convicted:

Held, that the adjournment had been improperly refused and that the accused had, in consequence, been gravely prejudiced thereby and had no fair chance of defending himself and that the conviction could, therefore, not be supported. [p. 672, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the first Class Magistrate of Tirupatur, dated the 11th August 1914, in Calendar Case No. 45 of 1911.

FACTS.—A Police constable was prosecuted under section 45 of the Mardas District Police Act, XXIV of 1859, for receiving an unauthorised fee or recompense, more than three months after its alleged occurrence. The accused pleaded not guilty to a charge

framed against him, cross-examined one of the prosecution witnesses, but declined to cross-examine the rest without a Vakil. The case having been adjourned for defence evidence, he applied for certified copies of the evidence of prosecution witnesses to enable him to engage a Vakil and instruct him to cross-examine the witnesses. He failed to get the copies in spite of reminders and on the adjourned date applied for further adjournment, which was refused. The case was then proceeded with and the man was convicted. He thereupon preferred this criminal revision petition.

Mr. *S. T. Srinivasagopalachariar*, with him Mr. *P. Ramakrishna Iyer*, for the Petitioner :—The prosecution is time-barred as the same was not launched within three months of the commission of the alleged offence. The words "under the provisions of this Act or under General Police powers hereby given" must be read as qualifying the words "actions or prosecutions against any person." Criminal Revision Case No. 460 of 1898. Further the refusal to grant adjournment has rendered it impossible for the accused to defend himself properly and he was, therefore, gravely prejudiced. The conviction cannot, therefore, stand.

The Public Prosecutor, for the Government:—The interpretation put by the petitioner renders the section meaningless. The words in question go with "anything done or intended to be done:" *High Court Proceedings, 7th July* 1869, *No.* 1211 (1), *Gundam Venkatasami* v. *Chinnam Purushottama* (2). The accused had not at all been prejudiced by the refusal of adjournment. There was nothing to prevent his engaging a Vakil. The conviction is, therefore, proper and legal.

ORDER.—The petitioner, a Police constable, has been convicted by the Joint Magistrate of Tirupatur of an offence under section 45 of the Madras District Police Act (Act XXIV of 1859) by receiving an unauthorised fee or recompense.

The first point argued on his behalf is that the prosecution is time-barred under section 53 of the same Act, more than three months having elapsed between the commission of the alleged offence and its institution. The construction of this section is not altogether free from doubt; but, in my opinion, it does not apply to a case like the present one. The Counsel for the petitioner contends that the three months limitation applies to all prosecutions for offences constituted by the Act: and he relies on an unreported decision by Boddam, J., in Criminal Revision Case No. 460 of 1898. He would have the words "under the provisions of this Act, or under the general Police powers hereby given" read as qualifying the words "actions or prosecutions against any person." How any "prosecutions," to say nothing of "actions," can be said to be brought "under the general Police powers hereby given" it is impossible to understand; and Mr. S. T. Srinivasagopalachari has to admit that his interpretation makes nonsense of the second clause of the section regarding notice "to the defendant, or to the Superintendent or other superior officer." The reason for the following clauses is also difficult to conjecture on this view of the scope of the section.

If, on the other hand, the words "under the provisions of this Act or under the General Police powers hereby given" be taken as applying to "anything done or intended to be done," then the section becomes perfectly coherent and intelligible, and its intention is obvious—to impose a bar of limitation against actions and prosecutions against officers for acts done or purporting to be done in pursuance of their official powers: and to impose further restrictions on such proceedings in respect of notice, tender and costs. The only obstacle to such a construction is the insertion of commas after the words "intended to be done" and "provisions of this Act." The second of these is certainly superfluous under any construction: and it seems to me more reasonable to disregard the first and view it as either superfluous or inserted by mistake than to adopt a reading of the section so irrational as that contended for by the petitioner's Counsel. The view I am disposed to take has been taken apparently without hesitation by two Benches of this Court [*Vide High Court Proceedings, 7th July* 1869, *No.* 1211 (1) and *Gundam Venkatasami* v. *Chinnam Purushottama* (2): and I must respectfully dissent from the ruling of Boddam, J., in the case relied on for the petitioner.

(1) 1 Weir 846; 4 M. H. C. R. App. liv.

(2) 5 M. H. C. R. 466; 1 Weir 847.

I hold that the prosecution was not barred by section 53 of the Police Act.

The conviction must, however, be set aside on another ground. The petitioner has, in my opinion, been gravely prejudiced by the procedure of the Joint Magistrate, and he had no fair chance of defending himself.

The hearing of the prosecution witnesses commenced as soon as the accused (petitioner) appeared or was brought before the Court on 30th July 1914. The accused, who was not represented by a Vakil, after pleading not guilty to the charge framed, cross-examined one witness and as is stated "declined to cross-examine the others without a Vakil." Whether the cross-examination of these witnesses was postponed or omitted does not appear: but the case was adjourned till 11th August 1914 for defence evidence. On 31st July 1914, the accused put in a petition for copies of the depositions of the prosecution witnesses and other documents to which he was legally entitled, for the purpose of engaging a Pleader and conductings the proceedings. On 3rd August 1914, not having received these copies, he filed another petition stating (in effect) that they were necessary to enable him to instruct a Vakil, and that in case they could not be granted him before the adjourned date, a further adjournment might be necessary. Finally, on 11th August 1914, he put in a third petition calling attention to the previous two, and stating that as he had still not been given the copies, he had been unable to "engage a Vakil and conduct the case." He, therefore, asked that the case should be adjourned and copies given him.

The Joint Magistrate refused the adjournment, callled on the accused to examine his defence witnesses, and, as the accused professed himself unable to do so without a Vakil, closed the case without them and convicted and sentenced the accused.

In his judgment he does not refer to the copy petitions, but says "as accused is evidently trying to delay the case, without corresponding benefit, adjournments have been refused."

The learned Public Prosecutor is unable to suggest any reason why the copies far which the accused applied were not granted; or to explain the Joint Magistrate's procedure.

The accused's request for an adjournment on 11th August 1914 appears to have been quite reasonable. No doubt he might have engaged a Vakil, but without the copies applied for, he could not have properly instructed him. If, for whatever reason, the copies for which the accused had applied had not been given to him before the hearing on 11th August 1914, common fairness should have dictated an adjournment of the case, so that the accused might not be prejudiced in his defence.

I set aside the conviction and sentence and direct the re-trial of the petitioner.

It is brought to notice that the offence was committed within the limits of the Chingleput District. I direct that the petitioner be re-tried by the District Magistrate of Chingleput District or any subordinate Magistrate having jurisdiction to whom he may see fit to transfer the case.

Conviction set aside; Re-trial ordered.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1414 OF 1914.

October 13, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Teunon.

MAHAJAN SHEIKH AND ANOTHER —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 75—Warrant—Seal of Court.

Under section 75 of the Code of Criminal Procedure the seal of the Court is essential to the validity of a warrant.

Babu *Manmatha Nath Mukherjee*, for the Petitioners.

JUDGMENT—Under section 75 of the Code of Criminal Procedure the seal of the Court is essential to the validity of a warrant. The absence of a seal in this case made the warrant void and there consequently was no legal arrest. We, therefore, make the Rule absolute. If the petitioners are on bail, the bail will be discharged; if in custody, they will be released.

Rule made absolute.

MOTUPALLI GANGESETTI *v.* PALURI RAMAMURTHI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 856 OF 1910.

January 28, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

MOTUPALLI GANGESETTI AND OTHERS—DEFENDANTS—APPELLANTS

versus

PALURI RAMAMURTHI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Joint family—Alienation by manager—Family necessity—*Bona fide *belief from inquiries as to necessity, whether sufficient—High Court, power of, to find upon issue of fact—Civil Procedure Code (Act V of* 1908*), s.* 103.

A sale of the family lands, by the managing member, is binding upon the other members of the undivided family, if the purchaser, before making the purchase, made *bona fide* inquires as to the necessity for the sale and then purchased the land for a fair price, *bona fide* believing in the existence of necessity. [p. 673, col. 2.]

A High Court is entitled under section 103 of the Civil Procedure Code to find upon a question of fact on the evidence on record, even though no finding has been arrived at on that point by the lower Appellate Court. [p. 673, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 234 of 1903, preferred against that of the Court of the District Munsif of Bhimavaram, in Original Suit No. 415 of 1902.

FACTS.—Plaintiff sued to set aside a sale executed to the defendant by the plaintiff's deceased elder brother, on the ground that the sale was not binding on him. The defendants alleged that the sale was by the manager of the undivided family for defraying the funeral expenses of the father and was, therefore, binding on the plaintiff.

The District Munsif held that though the consideration for the sale was not shown to have been utilised for the experses of the funeral ceremonies, the sale was binding on the plaintiff as the circumstances of the case indicated that the sale must have been for some justifiable necessity. He, therefore, dismissed the plaintiff's suit. On appeal the Subordinate Judge agreed with the District Munsif in his finding that the sale was not shown to have been utilised for the funeral expenses but decreed the plaintiff's suit, as the sale was not for a family necessity. The defendants appealed to the High Caurt.

Mr. M. Purushotham Naidu, for the Appel lants :—The Subordinate Judge was in error in holding that the defendants were bound to see to the application of the purchase-money for the purpose specified in the document. The defendants were only bound to make *bona fide* inquiries and satisfy themselves that real necessity existed and if *bona fide* believing in the existence of necessity they purchased the property for a fair price, the sale was perfectly valid.

Messrs. *P. Narayanamurthi* and *V. Ramadoss*, for the Respondents:—The Subordinate Judge found that the purchase-money was not applied for the funeral expenses of the father. There is no finding by the Subordinate Judge that the defendants made *bona fide* inquiries and were satisfied as to the necessity for the sale. There was evidence that there was no necessity to alienate properties for the purpose alleged. The sale was, therefore, not binding on the plaintiff.

JUDGMENT.—The Subordinate Judge has found the sale by the plaintiff's elder brother to the 1st defendant of the plaint land not to be binding on the plaintiff simply because the 1st defendant failed to prove that the Rs. 80 (purchase-money) was really spent for the expenses of the funerals of the plaintiff's father.

But the sale can be upheld against the plaintiff if the 1st defendant *bona fide* made inquiries as to the necessity for the sale and then purchased the land for a fair price, as he alleged in paragraph 2 of his written statement. Whether the 1st defendant did so make *bona fide* inquiries and made his purchase *bona fide* has not been found by the Subordinate Judge. Under the new Civil Procedure Code (see the new provision in section 103) we are entitled to come to our own conclusion on this point on the evidence.

We are satisfied from the 1st defendant's evidence and from the circumstances (1) that the sale-deed was executed on the next day after the father's death, (2) that the plaintiff's own brother-in-law attested it and (3) that the plaintiff's mother and

plaintiff's maternal uncle did not seek to set aside the sale during the plaintiff's long period of minority after the sale. We are satisfied from all these circumstances and from the evidence of the 1st defendant (an illiterate person) that he lent the money on a representation by the plaintiff's elder brother and the other relatives of the family on the day after the plaintiff's father's death that the money was urgently required for the cremation and funeral expenses, that the purchase was made after a *bona fide* inquiry and with a *bona fide* belief in the necessity for the sale. Even if the evidence of the plaintiff's mother that there was no necessity for the sale be true and her story that she remembers that the family granary was full at her husband's death is reliable, that evidence has little bearing on the question of the 1st defendant's *bona fides* as plaintiff's mother (who had the misfortune to become a widow on the previous day) was not the person from whom any inquiries would be made as to the necessity for the sale.

We, therefore, hold that the sale was binding on the plaintiff and reversing the lower Appellate Court's decree restore the decree of the Munsif with costs in all Courts against the plaintiff.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 187 OF 1914.

February 22, 1915.

Present:—Mr. Justice Rafique.

JAMILUDDIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Hafiz ABDUL MAJID—PLAINTIFF—RESPONDENT.

Purdah, *observance of—Right of privacy common in United Provinces—Intervention of space between two houses—Privacy, right of, effect on.*

In the United Provinces the custom of *purdah* has for centuries been strictly observed by all Hindus and Muhammadans except the poorest. [p. 674, col. 2.]

Gokal Prasad v. *Radho*, 10 A. 358; A. W. N. (1888) 138, followed.

The intervention of a space between two houses cannot affect the right of privacy if, as a matter of fact, that right is invaded by the new constructions complained of. [p. 675, col. 2.]

Kavarji Premchand v. *Bai Javer*, 6 B. H. C. R. 143, followed.

Second appeal from a decree of the Additional Subordinate Judge of Allahabad, dated the 15th November 1913.

Messrs. *Girdhari Lal Agarwala* and *Shaila Nath Mukerji*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—The parties to this appeal are neighbours and they live in *Mohalla* Bakhtiari in the city of Allahabad. The defendants-appellants made certain additions to their house, which according to the plaintiff-respondent invaded the privacy of his house. He instituted a suit in the Court of the Munsif of Allahabad for the closing of the doors in the verandah marked A and B respectively on the plan and for the demolition of parapets marked C and D and for a perpetual injunction restraining the defendants from doing any similar acts in future. The claim was resisted on various grounds. It was alleged in defence that no custom of *purdah* prevailed in the *Mohalla* of Bakhtiari, that the house of the plaintiff was overlooked by other houses, that the plaintiff had no right of privacy, and that he had acquiesced in the new constructions complained of. The learned Munsif after inspection of the spot and recording the evidence came to the conclusion that the additions made by the defendants to their house encroached upon the privacy of the plaintiff and decreed the claim accordingly. The defendants appealed and the learned Additional Subordinate Judge affirmed the decree of the first Court. The defendants have come up in second appeal to this Court and repeat the pleas which they had taken in defence before the first Court. I shall consider the grounds of appeal *seriatim*. By the first ground of appeal it is contended that the custom of *purdah* does not obtain in the *Mohalla* Bakhtiari. Both parties produced evidence on this point, and the lower Courts, after carefully considering the evidence, came to the conclusion that the custom of *purdah* does prevail in the *mohalla*. But apart from the evidence in the case it has been laid down by this Court in the well-known case of *Gokal Prasad* v. *Radho* (1) that "at any rate in these Provinces the custom of *purdah* has for centuries been strictly observed by all Hindus except those

(1) 10 A. 358; A. W. N. (1888) 135.

of the lowest classes and by all Muhammadans except the poorest." The fact that *purdah* is observed both by the Hindus and the Muhammadans in these Provinces except the poorest classes admits of no doubt or discussion. The parties to this appeal are Muhammadans among whom *purdah* is observed more strictly and more generally. The first ground of appeal is quite baseless.

The second ground of appeal is to the effect that the plaintiff has failed to prove a right of privacy. This plea is not quite intelligible. The learned Vakil who appears for the appellants explains it by saying that the enclosure to the courtyard of the plaintiff is in bad repairs and does not sufficiently protect the women of the plaintiff's house from the gaze of neighbours and passers-by and hence the plaintiff has no right of privacy. In support of this reference is made to a remark in the judgment of the lower Appelllate Court, which is to the effect: "It is true that this compound is not complete and is not the inner courtyard of a building intended for females, but the fact remains that it is part of the house which is in occupation of the plaintiff's females who do keep *purdah*." I am unable to infer from this passage that the courtyard of the plaintiff is in such bad repairs as to expose the females of the plaintiff's house to the gaze of the neighbours or the passers-by and thus deprive the plaintiff's females of their right of privacy.

The third ground of appeal is to the effect that the plaintiff's house is overlooked by other houses of his neighbours and the courtyard is open to public view. The lower Appellate Court has held that it has not been clearly established that the plaintiff's house is overlooked by some other houses of his neighbours. This is a finding of fact and cannot be questioned at this stage. Besides, as remarked by the lower Appellate Court, the fact that a woman appears before certain persons is no reason for supposing that she would allow herself to be seen by other persons who are strangers to her. I reject the third ground of appeal.

The contention embodied in the fourth ground of appeal is that a public road or a plot of *nazul* land and certain other plots of land intervene between the house of the plaintiff and that of the defendants and, therefore, the plaintiff has no cause of action No authority has been cited in support of this contention. On the contrary there is an authority against it, vide *Kavarji Premchand* v. *Bai Javer* (2). The intervention of a space between two houses cannot affect the right of privacy if, as a matter of fact, that right is invaded by the new constructions complained of. This ground of appeal, therefore, fails and is rejected.

The fifth ground of appeal raises the question of acquiescence. It has been found by the lower Appellate Court upon evidence in the case that there was no acquiescence by the plaintiff in the new constructions. Nothing has been urged in support of the fifth ground of appeal which could make me take a view different from that taken by the Court below. I, therefore, disallow the objection. The appeal fails and is dismissed with costs. The learned Vakil for the appellants wants extension of time within which to carry out the directions in the decree. I allow three months' time for this purpose.

Appeal dismissed.

(2) 6 B. H. C. R. 143.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3828 OF 1912.

March 12, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

PUNCHA THAKUR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BINDESRI THAKUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Temple—Offerings to deity, share in, if can be mortgaged—Transfer of Property Act (IV of 1882), s. 6, cl. (a)—Income, uncertain and indefinite, whether transferable.

Per *Sharfuddin, J.*—A right to share the offerings made to a deity in a Hindu temple is *res extra commercium* and is not transferable. [p. 676, col. 2.]

Lakshmanaswami Naidu v. *Rangamma*, 26 M. 31, followed.

Kashi Chandra Chuckerbutty v. *Kailash Chandra Bandopadhya*, 16 C. 356; 3 C. W. N. 279, referred to.

Offerings are, according to their true significance, made to the deity of which the image is its visual symbol and their appropriation by the officiating priest is not a right with which he is entitled to traffic. [p. 676, col. 2.]

Dino Nath Chuckerbutty v. *Pratap Chandra Goswami*, 27 C. 30; 4 C. W. N. 79, referred to.

PUNCHA THAKUR *v.* BINDESRI THAKUR.

The income arising from the offerings which are voluntary presents, is uncertain and indefinite and thus an income from such a right is not transferable under the Transfer of Property Act, and therefore the mortgage of that right and the purchase of it in execution of the mortgage-decree are invalid. [p. 677, col. 1.]

Per *Coxe, J.*—The chance that future worshippers will give offerings to the temple is a mere possibility within the meaning of section 6, clause (*a*), of the Transfer of Property Act, and so it cannot be transferred. [p. 677, col. 1.]

Appeal against the decree of the Officiating Additional Subordinate Judge, Mozaffarpore, dated the 7th of October 1912, affirming that of the Officiating Munsif, first Court, Mozaffarpore, dated the 29th of June 1912.

Babus *Baldeo N. Singh* and *Sahay Ram Bose*, for the Appellants.

Babus *Asita Ranjan Chatterjee* and *Gour Chandra Pal*, for the Respondents.

JUDGMENT.

SHARFUDDIN, J.—The suit out of which this second appeal arises was instituted by the plaintiffs for recovery of possession of a 3-annas share in the offerings made to the temple of Sri Bhairo Nath on establishment of their title thereto. The plaintiffs and the defendant third party form a joint Hindu family. It is alleged that out of the 16-annas offerings, they owned and possessed a 3-annas share and to that extent they used to get *charhawa* (offerings) offered by the people. The defendant second party, it appears, in execution of a decree put up that share to sale and himself purchased it. Thereafter he sold it to the defendant first party. The defendant third party, father of plaintiffs Nos. 1 to 4, and the father of plaintiff No. 5 had executed a mortgage-bond with respect to the above share in favour of the defendant second party and it was in execution of the mortgage-decree obtained on the strength of the above mortgage that the defendant No. 2 sold and purchased that share which he afterwards sold to the defendant first party.

In the plaint it is urged that the right in the share of the offerings is inalienable and so the father of the defendant No. 5 and the third party defendant, father of plaintiffs Nos. 1 to 4, had no right to mortgage it and that, therefore, the defendant second party and his vendee the defendant first party acquired no valid title as the whole transaction from mortgage to sale was invalid.

The suit was contested only by the defendants Nos. 1 and 2 of the first party and by the defendant No. 4 of the second party. Their contention is that the suit is barred by limitation and that the right in the offerings is transferable.

The first Court gave a modified decree in favour of the plaintiffs and the defendant third party jointly. The defendants Nos. 1 and 2 of the first party, therefore, appealed to the lower Appellate Court which affirmed the judgment and decree of the first Court and dismissed the appeal. The decree passed by the first Court which was affirmed on appeal is in the following terms:—"That the suit be decreed modifiedly with full costs, that the plaintiffs' title be declared, that they jointly with the defendant third party do recover possession over 2-annas 16-*gundas* 1-*kara* share of *charhawa* interest and that permanent injunction be issued on the defendants first and second parties restraining them from receiving the *charhawa* offerings for the aforesaid share."

The defendants Nos. 1 and 2 now appeal to this Court.

Two grounds were urged on their behalf, *first*, that of estoppel and *second*, that the right to offerings was transferable.

The first question to be decided is whether such a right as is claimed by the plaintiffs is transferable or not.

I am of opinion that such a right is not transferable. There are certain rights that cannot be transferred; they are termed *res extra commercium*, for instance sacerdotal office which belongs to the priest of a particular temple. It was so held in *Lakshmanaswami Naidu* v. *Rangamma* (1). Similarly a right to receive offerings from pilgrims resorting to a temple or shrine is inalienable and no suit can be maintained for the recovery of *wasilat* in respect of properties derived from a turn of worship which from its very nature is voluntary. It was so held in the case of *Kashi Chandra Chuckerbutty* v. *Kailash Chandra Bandopadhya* (2). Indeed, no man can compel another to make voluntary offerings. Offerings are, according to true significance, made to the diety of which the image is its visual symbol and their appropriation by the officiating priest

(1) 26 M. 31.
(2) 26 C. 356; 3 C. W. N. 279.

is not a right with which he is entitled to traffic. This was held to be so in the case of *Dino Nath Chuckerbutty* v. *Pratap Chandra Goswami* (3).

A very strong reason has been given by the lower Appellate Court that such a right is not transferable. It says: "In the present case the duty of a *pujari* seems to have been assigned to Brahmans who make *pujas* to the idol Bhairo Nath. To my mind the performance of *puja* or *sheba* of the idol creates a right to receive the offerings made to it. If it be assumed for a moment that a right to receive offerings is alienable or transferable, then it is clear that an alienation of such right can be made in favour of Muhammadans or persons of another caste who would obviously be incompetent to perform the *puja*." Offerings are voluntary presents to the deity to which, no doubt, the *shebait* is entitled. They are nothing but voluntary payments. The income arising from them is uncertain and indefinite and an income from such a right is not transferable under the Transfer of Property Act.

For the above reasons, I am of opinion that the mortgage of that right and the purchase of it in execution of the mortgage-decree are invalid and that the judgment of the lower Appellate Court cannot be assailed on that point.

It is somewhat difficult to reconcile the decree given with the character of the property which is clearly not transferable, but this point is not raised in the grounds of appeal and need not be considered.

As to estoppel I think the statutory provisions being against transfer, no question of estoppel can arise.

The appeal is dismissad with costs.

COXE, J.—I agree. It appears to me that the chance that future worshippers will give offerings to the temple is a mere possibility within the meaning of section 6, clause (*a*), of the Transfer of Property Act. Such a possibility cannot be transferred and, in my opinion, this being a statutory provision, no question of estoppel can arise.

Appeal dismissed.

(3) 27 C. 30; 4 C. W. N. 79.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 482 OF 1914.

February 23, 1915.

Present:—Mr. Justice Chamier.

SHAFAAT-ULLAH—PLAINTIFF—APPELLANT

versus

IZZAT-ULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 95—Mortgagor allowed to redeem in part—Contract—Integrity of mortgage, if broken—Co-heirs redeeming a mortgage—Charge—Dispossession by other co-heirs—Suit for possession, maintainability of.

Where a mortgage-deed provides that the mortgagor might redeem any portion of the property upon payment of a proportionate part of the debt and some of the heirs of the mortgagor redeem their share in the property, the integrity of the mortgage is not broken up. [p. 678, col. 2.]

One of the co-heirs of a mortgagor who, being a person interested in the mortgaged property, pays off the mortgage-money and redeems the property, is entitled to possession of the property, and the other co-heirs cannot defeat the charge he thereby acquires on the property under section 95 of the Transfer of Property Act by keeping him out of possession. [p. 679, col. 1.]

Second appeal from a decree of the Additional Judge of Moradabad, confirming that of the Munsif of Sambhal.

Mr. *Ibn Ahmad*, for the Appellant.

Mr. *Muhammad Ishaq Khan* (with him Dr. *S. M. Sulaiman* and Mr. *Iqbal Ahmad*), for the Respondents.

JUDGMENT.—The facts of this case are as follows, so far as they have been determined. Many years ago certain property was mortgaged by *Musammat* Fateh-un-nissa to the predecessor of defendants Nos. 9 to 11. The mortgage was of a usufructuary character and the mortgagee was placed in possession. Some years after the mortgage, Fateh-un-nissa died leaving four sons. Her first son is represented in this suit by defendants Nos. 6, 7 and 8. Her second son is represented by defendants Nos. 3, 4 and 13. The third son is represented by defendants Nos. 1 and 2 and the fourth son is represented by the plaintiff, Shafaat-ullah, and defendants Nos. 5, 12, 14 and 15. Each branch of the family became entitled to one-fourth of Fateh-un-nissa' estate, but under an arbitration award each branch got definite properties not necessarily corresponding exactly to its one-fourth share. It was provided in the mortgage-deed that the mortgagor might redeem any portion of the

property upon payment of a proportionate part of the debt, and it is said that in the award it was provided that each branch might settle with the mortgagee in respect of its own portion of the property. Defendants Nos. 6 to 8 brought a suit for redemption of that portion of the property which had been allotted to them by the award, but as might be expected, they got a decree for redemption not of the property allotted to them by the award, but of a one-fourth share of the whole. The case of the plaintiff is that, being one of the persons entitled to redeem the mortgage, he has paid to the mortgagee or rather to the mortgagee's representatives the amount remaining due on the mortgage, and in this suit he claims possession of the remainder of the property, that is, of the mortgaged property excluding what was decreed to defendants Nos. 6 to 8 in their suit. The representatives, of the mortgagee put in no defence, but the suit was resisted by most of the other members of the mortgagor's family. It appears that when the money was paid by the plaintiff to the mortgagee's representatives the latter surrendered possession and the plaintiff applied for mutation of names. Thereupon many of the other members of the family, including those who have resisted this suit, put in objections, and the result appears to have been that mutation of names was made in favour of all the persons entitled to the property, as if the mortgage had been paid off by all of them. It is, in fact, the case of several of the defendants that each of the different persons entitled to the property contributed his *quota* of the money paid to the mortgagees, and, therefore, they say that they are entitled to retain possession. The plaintiff's case is that he found the whole of the money that was paid to the mortgagees, and, therefore, he alone is entitled to possession and is entitled to retain possession until the other members of the family pay him what is due on account of their shares. There is also a subsidiary question between the plaintiff on the one side and the defendants Nos. 6 to 8 on the other. The plaintiff complains that defendants Nos. 6 to 8 have taken possession of one-fourth of a grove to which they are not entitled under the award. This question may be dismissed from further consideration, with the remark that defendants Nos. 6 to 8 have taken possession only of what was decreed to them, and unless and until the plaintiff gets possession of the rest of the property, so that the award may be given effect to, defendants Nos. 6 to 8 are entitled to retain possession of what they have got. Both the Courts below have dismissed the suit, on the ground that the plaintiff was not entitled to redeem more than his share or more than the share of his branch of the family. In my opinion it is quite clear that the plaintiff as one of the persons entitled to the property is competent to redeem the whole mortgage. This is not a case of the integrity of the mortgage having been split up by partial redemption effected by defendants Nos. 6 to 8; for what they did was strictly in accordance with the mortgage. They, being some of the persons entitled to the property, might have, if they had chosen, redeemed the whole mortgage, but they took advantage of the clause of the deed referred to above to redeem a portion only, and they were entitled to redeem that portion not because they had inherited any particular share in the property from Fateh-un-nissa, but because the mortgage-deed empowered the mortgagor, and, therefore, also the mortgagor's representatives or any one of them, to redeem a portion of the property on payment of a proportionate part of the debt. For the same reason it appears to me quite clear that the plaintiff is entitled to redeem the remainder of the mortgaged property, and the reasons given by the Courts below for dismissing the suit appear to me to be unsound. In this Court the same reasons were put forward; but an additional and more serious argument was advanced, namely, that a suit of this character is not maintainable at all. Section 95 of the Transfer of Property Act has been discussed in several cases in this Court and it has been held that in the case of a mortgage made without delivery of possession, one of several mortgagors redeeming the property is entitled to a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming, and that the words "obtains possession" and "obtaining possession" apply not only to a case of mortgage under which possession has been delivered to the mortgagee. It is

admitted that if the plaintiff was entitled to redeem the remainder of the mortgage, and if, having done so, he had succeeded in obtaining possession, he would have been entitled to a charge on the shares of the other members of the family. But it is contended that as the other members of the family or some of them have succeeded in preventing the plaintiff from obtaining possession, the plaintiff cannot sue for possession. It seems to me that if this contention is sound, it follows, according to the decisions of this Court, that the plaintiff has not even a charge on the shares of the other members for his proportion of the expenses incurred by him in redeeming the mortgage. (I am assuming, of course, for the present that the whole of the money paid to the mortgagee was found by the plaintiff). The construction of section 95 advocated by the defendants in his case appears to me to put a high premium on violence. Their argument comes to this, if one of several mortgagors redeems a mortgage, and the mortgagee is ready and willing to hand over possession to the person who pays him the mortgage-money, yet if the co-mortgagors can succeed by force or otherwise in preventing the person who paid the money from taking possession of the property, their shares in the property are freed from all liability for their proportion of the mortgage-money. Neither side has been able to cite any authority on the subject; but it seems to me that the plaintiff, being a person interested in the property and having paid to the mortgagees what remained due to them, was entitled to possession of the property, and that the defendants cannot be allowed to defeat the plaintiff's charge on the property by keeping him out of possession.

But before I can dispose of this appeal, I must have findings on the issues which have not been taken up by the Courts below. I direct that the record be returned to the lower Appellate Court in order that findings may be recorded on the issues other than Nos. 3 and 5. Fresh evidence may be admitted. I invite attention to the fifth ground taken in the memorandum of appeal to the lower Appellate Court in order that the question raised in that ground of appeal may be considered by the Judge. On return of the findings ten days will be allowed for objections.

Case sent back.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1715 OF 1911.

February 6, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

VADAKKE ITIVETTIYAKATH NACHIKUTTI UMMA AND ANOTHER—DEFENDANTS Nos. 7 AND 8—APPELLANTS

versus

PALLITHANAKATH BEERANKUTTI —PLAINTIFF AND OTHERS—DEFENDANTS Nos. 1 TO 6—RESPONDENTS.

Malabar Tenants Improvements Act (Mad. Act I of 1900)—Improvements—Tenant's right to compensation—Contract restricting that right, whether binding.

A tenant is entitled to compensation for improvements according to the provisions of Madras Act I of 1900 and any contract restricting that right is not binding upon him [p. 679, col. 2.]

Neechooli Parie Amma v. *Chathanadath Kalassin Kunhikandan*, 12 Ind. Cas. 765; (1911) 2 M. W. N. 513; 11 M. L. T. 30; 22 M. L. J 221; 36 M. 410, followed.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 1120 of 1910, preferred against that of the Court of the District Munsif of Tirur, in Original Suit No. 562 of 1909.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.

Mr. *K. P. Govinda Marar*, for the Respondents.

This second appeal coming on for hearing on the 14th March 1913, the Court (Benson and Sundara Aiyar, JJ.,) delivered the following

JUDGMENT.—Following our judgment in *Neechooli Parie Amma* v. *Chathanadath Kalassin Kunhikandan* (1), we hold that the appellants are entitled to compensation for improvements according to the provisions of Madras Act I of 1900 and that the contract restricting that right is not binding. They are also entitled to the costs of this second appeal. We request the lower Appellate Court to submit a

(1) 12 Ind. Cas. 765; (1911) 2 M. W. N. 513; 11 M. L. T 30; 22 M. L. J. 21; 36 M. 410.

finding on the question of the amount of compensation to which the appellants are entitled after taking any evidence that the parties may adduce. The finding will be submitted within one week after the re-opening of this Court after the recess. Seven days will be allowed for filing objections.

In compliance with the above the Subordinate Judge of South Malabar at Calicut submitted the following

FINDING.—I have been directed to submit a finding on the following question:—

"To what amount of compensation are the appellants (defendants Nos. 7 and 8) entitled?"

2. The amount of compensation has to be ascertained according to the provisions of Madras Act I of 1900. A Commissioner was appointed for the purpose. He has filed an account which shows that the amount of compensation payable to the appellants for their improvements is Rs. 421-12-4. Neither the appellants nor the respondents have taken any objection to its correctness.

3. I find that the appellants are entitled to Rs. 421-12-4 as compensation for their improvements.

This second appeal coming on for final hearing this day after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and modify the decree of the lower Appellate Court by awarding Rs. 421-12-4 to the defendants Nos. 7 and 8 in lieu of Rs. 58-6-9 awarded by the lower Courts, with costs in this and the lower Appellate Court. The time for redemption is extended to three months from this date.

Appeal partly allowed;
Decree modified.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 471 OF 1914.

March 4, 1915.

Present:—Mr. Justice Chamier.

NAIKRAM—PLAINTIFF—APPELLANT

versus

JAWALA PRASAD—DEFENDANT—RESPONDENT.

Grove—Land granted to plant grove—No time fixed—No grove planted—Condition, whether broken—License—Unrevocable—Resumption.

Where a land was granted for the purpose of planting a grove with a provision that the grantee might cut down the trees and re-place them as often as he pleased, and might appropriate to his own use the produce of the trees, grass and any other produce of the land and if any revenue was assessed on it the grantee had to pay it:

Held, that the grant created an interest in the land in favour of the grantee and it was not a license revocable at the will of the grantor. [p. 681, col. 1.]

Held, further, that as no time was specified in the grant to plant the grove, the condition could not be said to have been broken until the grantee rendered the plantation impossible either permanently or for an indefinite period. [p. 681, col. 2.]

Second appeal from a decree of the District Judge of Agra, confirming that of the Munsif of the place.

Messrs. *W. K. Porter* and *Shiam Krishna Dar*, for the Appellant.

Mr. *Nihal Chand*, for the Respondant.

JUDGMENT.—This appeal arises out of a suit brought by the appellant for possession of some plots of land which were made over to the respondent under a document, dated April 14th, 1883, and described as an "*ijazat nama waste lagane bagh ke.*" It appears that there has been other litigation between the parties in the Revenue Court. The appellant sued for ejectment of the respondent on the ground that he had allowed a certain person to hold possession as *shikmi* for a longer period than is permitted by the Tenancy Act. The respondent pleaded that he was the proprietor of the land. That question was not decided, for the Court dismissed that suit on the ground that the so-called *shikmi* was merely a servant of the respondent. Next the appellant brought a suit for recovery of rent from the respondent. The Assistant Collector held that the respondent was a proprietor and not a tenant. The Collector on appeal confirmed the dismissal of the suit, on the ground that the relationship of landlord and tenant was not proved to exist between the parties. There was a second appeal to the District

Judge who held that the respondent was either a proprietor or a rent-free-holder, and in either case was not liable to pay a rent. The appellant then brought the present suit.

His case is that the land was granted to the respondent under the document mentioned above for the purpose of planting a grove and that though many years have elapsed, the respondent has planted no trees. The appellant, therefore, claims to be entitled to recover the land from the respondent whom he describes as a mere licensee. The Munsif held that the document in question did not confer on the respondent proprietary rights in the land but that it was a grant, permanent in its nature, made for the purpose of planting trees, that the respondent had planted a large number of trees, though not as many as he might have planted, and that the condition of the grant had, therefore, been sufficiently complied with. Accordingly he dismissed the suit. On appeal the District Judge held that the document of April 1883 did not evidence a mere license and that the grant was not revocable at will. The learned Judge was of opinion that the document conferred an interest in the land on the respondent, that the position of the respondent is analogous to that of a lessee, and that, therefore, the suit is not maintainable in the Civil Court. The document of April 14th, 1883, has been read out to me, and I am inclined to think that the intention of the parties to it was that the respondent should have the right of an ordinary grove-holder. The document provides that the respondent shall plant trees on the land, may cut down those trees and re-place them as often as he pleases, and may appropriate to his own use the produce of the trees, grass and any other produce of the land, that if any revenue is assessed on the land the respondent is to pay it and that, if the respondent or his successor wishes to sell the grove, the grantor will have a right of pre-emption. It is quite clear to me that this document evidences something much more than a license revocable at will. I have myself little doubt that the intention was that the respondents should not be entitled to retain the land unless he planted a grove on it, and it appears to me that it is not a grant to which the provisions of Chapter X of the Tenancy Act are applicable. The document fixes no time within which the grove is to be planted and it does not provide for resumption of the land in case the respondent does not plant the grove. In these circumstances it appears to me that the appellant is not entitled to recover possession merely because it is proved that the respondent has not planted a grove on the land, and I, therefore, see no reason for sending the case back to the lower Appellate Court for a finding on the question whether a grove has been planted or not. It seems to me that the document evidences the creation of an interest in the land in favour of the respondent subject to the condition that he shall plant a grove. But as no time is specified for the performance of the condition, the condition cannot be said to have been broken until the respondent renders the preformance of the condition impossible either permanently or for an indefinite period (see section 33 of the Transfer of Property Act). The appellant alleges that the land is under cultivation. If so, a grove may yet be planted on the land. In my opinion the appellant has made out no cause of action for recovery of the land in question. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 290 OF 1913.

March 10, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

CHHABILA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

DURGA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Suit against trustee—Death of one of two plaintiffs during pendency of suit—Third person, right of, to represent—Fresh sanction, whether necessary.

Section 92 of the Civil Procedure Code, 1908, is not mandatory but is permissive and directory. A suit under section 92, Civil Procedure Code, brought by two persons is brought by them in their representative capacity as members of the public interested in the trust in question. It is necessary for the continuance of the suit that there should be at least two plaintiffs. If one representative dies it is open to another member of the public interested in the

CHHABILA RAM v. DURGA PRASAD.

trust to come forward to take his place and thus to prevent the suit abating. He should also obtain the necessary sanction. [p. 683, col. 1.]

Two persons *B* and *C*, with the permission of the Legal Remembrancer, brought a suit of the nature contemplated in section 92 of the Civil Procedure Code against *D*. During the pendency of the suit *B* died. *K* applied to be brought on the record. The Court dismissed the suit as *K* was not the legal representative of *B*:

Held, that the Court ought to have given *K* an opportunity *first* of obtaining sanction from the Legal Remembrancer and *secondly* of showing that he was a person interested in the trust and on proof of these two qualifications the Court ought in the interest of the public to have made *K* a co-plaintiff in the suit. [p. 683, col. 1.]

First appeal from the decision of the District Judge of Mainpuri, dated the 18th February 1913.

FACTS.—Two persons, Chhabila Ram and Bhagwan Das, having obtained the sanction of the Legal Remembrancer instituted a suit under section 92, Civil Procedure Code. Bhagwan Das died and one Kanhaya Lal applied to the Court below to be brought on the record as a plaintiff in place of the deceased. The District Judge dismissed his application on the ground that he was not the heir or legal representative of the deceased. The suit was also dismissed on the ground that there were no two persons on the record who had obtained the sanction under section 92. The plaintiff and Kanhya Lal appealed to the High Court.

Dr. *S. N. Sen*, for the Appellants:—The provisions of section 92 having been fulfilled once, it is not necessary to obtain fresh sanction. The Court below was not justified in dismissing the suit. It ought to have allowed the application of Kanhaya Lal and should have proceeded with the suit. As soon as sanction is obtained under section 92, any *one* of the persons who have obtained the sanction is competent to carry on the suit. Section 92 nowhere lays down that at least *two* persons are required to proceed with the suit.

The rulings quoted by the Court below do not apply, inasmuch as in the present case when the suit was instituted there was no defect. *Parsotam Rao* v. *Janki Bai* (1) helps me in principle.

Mr. *Lakshmi Narayan*, for the Respondents:—It is clear on the authorities [*Gopal Dei* v. *Kanno Dei* (2), *Darves Haji Mahamad-Sidik* v. *Jainudin* (3) and *Abdul Rahman* v. *Cassum Ebrahim* (4)] that the *previous* sanction of the Legal Remembrancer is a condition precedent to the *institution* of the suit. Now it logically follows that at least *two* persons should also *carry on* the suit. As soon as one of the persons dies, there are no two persons before the Court to proceed with the suit and the Court has no option but to dismiss it. In the present case the person who applied to be made a plaintiff was neither the heir nor the legal representative of the deceased plaintiff. He has neither obtained the sanction under section 92 nor has he even applied for it or asked the Court for time to enable him to obtain the sanction. Under these circumstances the right and proper course for the Court below was to dismiss the suit.

Again it cannot be said that Kanhaya Lal was in any way the legal representative of the deceased. He has no *locus standi* to come into Court unless he obtains the sanction. But even if he does, such subsequent sanction would not avail him. Sanction cannot be obtained piecemeal. Moreover, if sanction is refused to Kanhaya Lal, another person can come forward and ask the Court to adjourn the hearing of the suit. This sort of thing cannot be allowed by the Court to go on indefinitely. Suppose that both the plaintiffs die. Can any two persons come forward and carry on the suit? I submit not. In fact the right to sue does not survive in such cases; nor can the sanction subsequently obtained have a retrospective effect.

JUDGMENT.—This appeal arises out of a suit brought by two persons under the conditions mentioned in section 92 of the Code of Civil Procedure. These two persons were, Chhabila Ram and Bhagwan Das. They obtained the sanction of the Legal Remembrancer and instituted the suit. The trustee against whom they sued was Baboo Durga Prasad, the present respondent in this appeal. While the suit was pending Bhagwan Das died. One Mohunt Kanhaya Lal applied to the Court to have his name

(1) 28 A. 109; A. W. N. (1905) 206.

(2) 26 A. 162; A. W. N. (1903) 227.

(3) 30 B. 603; 8 Bom. L. R. 751.

(4) 11 Ind. Cas. 726; 36 B. 168; 13 Bom. L. R. 583.

brought on the record as co-plaintiff in place of that of Bhagwan Das, claiming to be the heir and legal representative of the deceased. Apparently Kanhaya Lal was not related in any way and could not have been deemed to be the heir and legal representative of Bhagwan Das in his personal capacity. The Court refused the application and dismissed the suit, as it was no longer maintainable by one plaintiff. The judgment shows clearly that the question of Kanhaya Lal's obtaining sanction from the Legal Remembrancer was before the Court. That Court was of opinion that the defect in the suit could not be cured by allowing Kanhaya Lal time to apply for sanction. It, therefore, dismissed the suit. It is quite clear that a suit of this nature brought by two persons is brought by them in their representative capacity as members of the public interested in the trust. It has been held that section 92 is not mandatory, but is permissive and directory. It seems to us also to be clear that, when a suit is brought by two or more persons under the conditions mentioned in section 92 for the continuance of the suit it is necessary that there should be at least two plaintiffs, *i. e.*, two persons interested in the trust and holding the sanction of the Advocate-General or, in these Provinces, of the Legal Remembrancer, in order to enable them to carry on the litigation. It is clear that if one representative dies it is open to another member of the public interested in the trust to come forward to take his place and thus to prevent the suit abating. It is also necessary that this other member of the public thus interested should obtain the sanction of the Advocate-General or the Legal Remembrancer. The suit being one which had been brought with sanction and it being a matter of a public trust, the lower Court ought, in our opinion, to have given Kanhaya Lal an opportunity, *first*, of obtaining sanction from the Legal Remembrancer and *secondly*, of showing that he was a person interested in the trust and on proof of these two qualifications the Court ought in the interest of the public to have made Kanhaya Lal a co-plaintiff in order to enable the suit to be carried on, provided no good cause was shown by the other side against his being allowed to represent the public interest in the trust. The rulings quoted by the Court below, *viz.*, *Gopal Dei* v. *Kanno Dei* (2), *Abdul Rahman* v. *Kassum Ebrahim* (4), are totally beyond the question and have no weight in the decision of the matter. We accordingly allow the appeal. We set aside the decree of the Court below and we remand the case to the Court below wtih directions to re-admit it on its original number and to proceed to hear and determine the same in view of the directions given above. The costs of this appeal including fees on the higher scale will be costs in the cause and will abide the result.

Appeal decreed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 813 OF 1912.

May 28, 1914.

Present:—Justice Sir Asutosh Mokerjee, KT., and Mr. Justice Beachcroft.

RUP CHAND GHOSE—DEFENDANT—APPELLANT

versus

NARENDRA KRISHNA GHOSE—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 12, 56 (3)—Permanent tenure, transfer of--Landlord, statutory receipt demanded from—Tender, if vitiated—No condition imposed on landlord—Money not to be refused by landlord.

The transfer of permanent tenure under section 12 of the Bengal Tenancy Act is complete as soon as the document; is registered, in other words, a valid transfer under section 12 of the Bengal Tenancy Act operates to discharge the transferor from the liability to pay rent, which thereupon passes to the transferee. [p. 684, col. 2.]

Kristo Bullav Ghose v. *Kristo Lal Singh*, 16 C. 642 and *Joy Gobind* v. *Monmotha Nath*, 33 C. 580, referred to and followed.

Girish Chandra Guha v. *Khagendra Nath Chattopadhyay*, 9 Ind. Cas. 1001; 13 C. L. J. 613; 16 C. W. N. 64, referred to.

The transferee of a tenure is entirely within his rights when he demands a receipt in the prescribed form under section 56, clause (3) of the Bengal Tenancy Act, with a statement therein that he is the tenant. [p. 685, col. 2.]

Huxham v. *Smith*, (1809) 2 Camp. 19; 11 R. R. 651; *Griffith* v. *Hodges*, 1 C. & P. 419; *Peacock* v. *Dickerson*, (1825) 2 C. & P. 5'; *Mitchell* v. *King*, (1833) 6 C. & P. 237; 40 R. R. 810; *Jennings* v. *Major*, (1837) 8 C. & P. 61; *Hastings* v. *Thorley*, (1838) 8 C. & P. 573; *Bowen* v. *Owen*, (1847) 11 Q. B. 130; 17 L. J. Q. B. 5; 11 Jur. 972; 75 R. R. 396; 116 E. R. 425; *Strong* v. *Harvey*, (1825) 3 Bing. 304; 11 Moore 72 4 L. J. C. P. (o. s.) 57; 130 E. R 530; *Ford* v. *Noll*, (1842) 2 Dowl. (N. S.) 617; 2 L. J. C. P. 2, referred to.

A tender is not vitiated because a receipt is asked. [p. 686, col. 2.]

Jagat Tarini Dasi v. *Naba Gopal Chaki*, 34 C. 305; 5 C. L. J. 270, followed.

RUP CHAND GHOSE *v.* NARENDRA KRISHNA.

When a transferee tenders money to the landlord with a request for a receipt in the statutory form, he does not seek to impose on the landlord any condition on which he is not entitled to insist and the money validly tendered can only improperly be refused by the landlord. [p. 686, col. 2.]

Appeal from the decree of the Additional District Judge, 24-Perganas, dated the 19th February 1912, affirming that of the Subordinate Judge, third Court, Alipur, dated the 20th March 1911.

Babus *Umakali Mukherjee* and *Panchanan Ghose*, for Babu *Satya Chandra Chandra*, for the Appellant.

Babu *Nagendra Nath Ghose*, for the Respondent.

JUDGMENT.—This is an appeal by the eighth defendant in a suit for arrears of rent. The only point in controversy between the parties relates to the claim for interest. The defendant contends that he is not liable for the interest, because he made a valid tender of rent to the landlord before the suit was brought and such tender was improperly refused. The Courts below have overruled this objection and have held him responsible for interest. On the present appeal, the contention has been reiterated that there was a valid tender of rent which was not accepted, because the tenant asked for a receipt in the statutory form. To appreciate the point in controversy, we must refer briefly to the terms of the contract between the parties.

On the 24th August 1898, Annoda Prasad Mojumdar, represented in this suit by the first seven defendants, obtained a permanent and transferable tenure from the plaintiff. The tenure-holder gave collateral security, at the same time, to the landlord for the rent as also for the due fulfilment of various obligations which he undertook under the terms of the contract. On the 19th March 1904, Annoda Prasad Mojumdar transferred the tenure to Rup Chand Ghose, now appellant before us. Under this conveyance, Rup Chand Ghose undertook to indemnify his vendor if the latter should be ever called upon by the landlord to fulfil his obligations under the terms of the original lease. It was also expressly stated that if the transferee could get his name registered in the books of the landlord, and on himself furnishing security, could obtain a return of the security bond given by the original tenant, the transferee would stand released from his obligation to his vendor. It is common case of the parties that rent was tendered to the landlord on behalf of the transferee, who claimed a receipt whereon his name should be entered as the tenant. The landlord refused to give a receipt in this form and offered to grant a receipt in which Annoda Prasad Mojumdar was to be named as the original tenant and Rup Chand Ghose was to be described as the person in occupation. The transferee declined to accept a receipt in this form. The result was that the money tendered by him was not accepted by the landlord, who subsequently instituted this suit for recovery of arrears of rent with interest and cesses. The substantial question for determination is, whether there was a valid tender, as the appellant maintains, or whether, as the landlord contends, the tender was clogged with such conditions as entitled him to refuse the money. This question must be determined with reference to the rights of the parties as they stood at the time when the tender was made. The appellant contends that he was the tenant of the tenure at that time and that under the provisions of the Bengal Tenancy Act he was entitled, on payment of the rent due, to receive a receipt in which his name was bound to appear as that of the tenant. This view has been controverted on behalf of the landlord. In our opinion, the position assumed by the landlord cannot possibly be supported.

It was ruled by this Court in the case of *Kristo Bullur Ghose* v. *Kristo Lal Singh* (1) that the transfer of a permanent tenure under section 12 of the Bengal Tenancy Act is complete as soon as the document is registered, in other words, as stated in *Joy Gobind* v. *Monmotha Nath* (2), a valid transfer under section 12 of the Bengal Tenancy Act operates to discharge the transferor from the liability to pay rent, which thereupon passes to the transferee. This view has been accepted as incontestable in a long series of dicisions, amongst which may be mentioned *Chintamoni Dutt* v. *Rash Behari Mondul* (3), *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (4),

(1) 16 C. 642.
(2) 33 C. 580.
(3) 19 C. 17.
(4) 12 C. W. N. 478.

Kishori Raman v. *Ananta Ram* (5) and *Girish Chandra Guho* v. *Khagendra Nath Chattopadhyaya* (6). It follows, consequently, that in the case before us, after the registration of the conveyance executed by the original tenant on the 19th March 1904, the transferee became, by operation of law, the tenant of the tenure and as a necessary consequence the transferor ceased to be such tenant. This does not, however, imply that the transferor was absolved from liability under the terms of the contract between him and the landlord, it is conceivable that a person may cease to be tenant and yet continue liable to his landlord under his personal covenant. What then were the rights of the transferee in this case? Under section 56, clause (3), of the Bengal Tenancy Act every tenant who makes a payment on account of rent to his landlord is entitled to obtain forthwith from the landlord a written receipt for the rent paid by him signed by the landlord; and the receipt and counter-foil must specify such of the several particulars shown in the form of receipt given in Schedule II as can be specified by the landlord at the time of payment. The form of receipt given in the Schedule shows that the landlord must specify the name of the tenant. It follows accordingly that the transferee, when he tendered the rent as tenant, was entitled to claim a receipt with his name thereon as that of the tenant. The demand which he made for a receipt in this form was strictly in accord with the provisions of the Statute, and the landlord had no valid reason, if he accepted the money, to withhold the receipt in this form. But it has been argued on behalf of the landlord that the decision of the Judicial Committee in *Naba Kumari Debi* v. *Behari Lal Sen* (7) shows that the transferee would not have been prejudiced if he had accepted a receipt in the form offered by the landlord and should accordingly have accepted such receipt. There are two obvious answers to this contention. In the first place, the landlord did not propose to give the tenant a receipt containing a statement in the terms mentioned in the judgment of the Judicial Committee. In the second place, the landlord proposed to insert in the receipt a statement which would have undoubtedly compromised the position of the transferee: the landlord proposed to describe the original tenant as still the tenant of the tenure and the transferee as merely the person in occupation thereof. This would imply that the original tenant was still the tenant of the tenure, and that the transferee was not the tenant thereof, although he might be in possession of the land under some arrangement with the tenant. In our opinion, the transferee was entirely within his rights when he demanded a receipt in the form prescribed by the Bengal Tenancy Act with a statement therein that he was the tenant. The landlord must consequently be deemed to have improperly declined to accept the money.

But it has been argued for the landlord-respondent that the view just indicated is contrary to well-settled principles of English Law and that a tender with a condition or reservation is not a valid tender. In support of this contention, reference has been made to judicial decisions to which we may very briefly refer.

In *Huxham* v. *Smith* (8) a tender of payment was made upon the condition that a particular document should be given up. It was held that it was not a legal tender. In *Griffith* v. *Hodges* (9) Abbott, C. J., said, "no man can insist on a receipt in full of all demands, and if a man makes a tender of money, insisting at the same time on a receipt in full of all demands, I have no doubt that such a tender is bad." In *Cheminant* v. *Thornton* (10) a person called upon his creditor, tendered him ten sovereigns and said he might take those ten sovereigns in full of his demand. It was ruled by Abbott, C. J., that the tender "was not good, being made in full of the demand." In *Peacock* v. *Dickerson* (11) the debtor offered the creditor three pounds, three shillings and eight pence in cash, which the creditor was willing to take in part, but the debtor said that he owed him no more and took

(5) 10 C. W. N. 270.
(6) 9 Ind. Cas. 1001; 13 C. L. J. 613; 16 C. W. N. 64.
(7) 34 C. 902 at p. 908; 11 C. W. N. 865; 9 Bom. L. R. 846; 17 M. L. J. 397; 4 A. L. J. 570; 6 C. L. J. 122; 34 I. A. 160 (P. C.); 2 M. L. T. 433.

(8) (1809) 2 Camp. 19; 11 R. R. 651.
(9) 1 C. & P. 419
(10) (1825) 2 C. & P. 50.
(11) (1825) 2 C. & P. 51.

up the money again and would not let the creditor take in part. Abbott, C. J., said: "This tender is not good, a party tendering money should tender it without making any terms and should have it still open to the one party to say that more was due, and to the other that the sum tendered was sufficient." In *Mitchell* v. *King* (12) Vaughan, B., said: "A tender, to be legal tender, must be unconditional. If the money is put down only on a condition that a party will take it as a settlement, that is not a good tender....A tender clogged with the terms that the money is to be taken as a settlement is not good." To the same effect are the decisions in *Jennings* v. *Major*(13), *Sutton* v. *Hawkins*(14), *Hastings* v. *Thorley* (15) and *Robinson* v. *Ferreday* (16). It may be observed, however, with regard to the case of *Hastings* v. *Thorley* (15) that it was subsequently doubted by Lopes, J., in *Jones* v. *Bridgman*, (17) and a more liberal view has sometimes been taken. In *Bowen* v. *Owen* (18) a tenant sent a person to his landlord with a letter saying "I have sent with the bearer ...a sum of twenty-six pounds, five shillings and seven pence....to settle one year's rent of Nant-y-pair" and the bearer informed the landlord that he had the money with him to pay; but the latter refused, saying that there was more than that due. The bearer left, but afterwards returned and said that he had a few pounds in his pocket in addition to the sum named in the letter; but the landlord again refused saying there was more due. It was argued on the landlord's behalf that these offers, coupled with the letter, amounted only to a conditional tender and the learned Judge who tried the case ruled that that was so. But the King's Bench held differently, Earl, J., saying, "the person making a tender has the right to exclude presumptions against himself by saying 'I pay this as the whole that is due', but, if he requires the other party to accept it as all that is due, that is imposing a condition; and, when the offer is so made, the creditor may refuse to consider it as a tender." The cases of *Strong* v. *Harvey* (19) and *Foord* v. *Noll* (20) support the same view. But these cases are of no assistance to the respondent. The fundamental principle which underlies them is that the debtor who made the tender sought to impose a condition on which, it was held, he was not entitled to insist under the law. We need not now consider whether the view taken in these cases should be applied in similar cases in this country as embodying a rule of justice, equity and good conscience. In so far as this Court is concerned, it was ruled in the case of *Jagat Tarini Dasi* v. *Naba Gopal Chaki* (21) that a tender is not vitiated because a receipt is asked. This is in accordance with the decision in *Jones* v. *Arthur* (22) and *Richardson* v. *Jackson* (23), though a different view has sometimes been taken [*Laing* v. *Meader* (24), *Cole* v. *Blake* (25)]. It is plain, in the case before us, that the transferee as tenant was entitled, under the provisions of the Bengal Tenancy Act, to demand a receipt in a particular form. When he tendered the money with a request for a receipt in the statutory form, he did not seek to impose on the landlord any condition on which he was not entitled to insist and it follows that the money validly tendered was improperly refused by the landlord.

The result is that this appeal is allowed, the decree of the District Judge varied and the claim for interest disallowed. The appellant will have his costs in all the Courts, and a self-contained decree will be drawn up in this Court. In view of the conduct of the respondent who has persisted in an obviously unfounded and vexatious claim, we assess the hearing-fee in this Court at five gold *mohurs*.

Appeal allowed.

(12) (1833) 6 C. & P. 237; 40 R. R. 810.
(13) (1837) 8 C. & P. 64.
(14) (1838) 8 C. & P. 259.
(15) (1838) 8 C. & P. 573.
(16) (1839) 8 C. & P. 752.
(17) (1878) 39 L. T. 500.
(18) (1847) 11 Q. B. 130; 17 L. J. Q. B. 5; 11 Jur. 972; 75 R. R. 306; 116 E. R. 425.
(19) (1825) 3 Bing. 304; 11 Moore 72; 4 L. J. C. P. (o. s.) 57; 130 E. R. 530.
(20) (1842) 2 Dowl. (N.S.) 617; 12 L. J. C. P. 2.
(21) 5 C. L. J. 270 34 C. 305.
(22) (1840) 8 Dowl. P. C. 442; 59 R. R. 583; 4 Jur. 859.
(23) (1841) 8 M. & W. 298; 9 Dowl. P. C. 715; 10 L. J. Ex. 303.
(24) (1824) 1 C. & P. 377.
(25) (1793) 1 Peake, 238; 3 R. R. 681.

DUNI CHAND *v.* ARJA NAND.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 114 OF 1914.

February 16, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

DUNI CHAND—APPLICANT—APPELLANT

versus

ARJA NAND AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 5 O. XLIII, rule 1—Order refusing to make a person party to appeal as representing a deceased appellant, appeal from, whether maintainable.

An order dismissing an application to be brought on record as the representative of a deceased appellant is not a decree and no appeal lies from such an order.

First appeal from an order of the Additional District Judge of Saharanpur, dated 19th of May 1914.

FACTS.—One Jaigopal executed a Wil in favour of his daughter's son, Arja Nand, in 1907. On Jaigopal's death Arja Nand got possession of the property. Nihal Chand, brother of Jaigopal, brought a suit against Arja Nand for possession and declaration that the Will executed by Jaigopal was null and void, as Jaigopal lived jointly with him. The Munsif dismissed the suit. Nihal Chand preferred an appeal to the District Judge. During the pendency of the appeal Nihal Chand died leaving behind *Musammat* Dakho Kuar as his widow. Duni Chand, who was the son of the brother-in-law of Nihal Chand made an application to the Appellate Court to be brought on the record in place of Nihal Chand, deceased, claiming to be his adopted son. The application was opposed by Arja Nand, respondent to the appeal. The Additional District Judge, after going through the evidence produced by the parties on the question whether Duni Chand was or was not the legal representative of Nihal Chand deceased, rejected the application. Duni Chand appealed to the High Court.

Mr. *Permeshwor Dayal*, for the Respondents raised a preliminary objection that no appeal lay from the order passed by the lower Court refusing appellant to be brought on the record as legal representative of Nihal Chand deceased. The order passed by the lower Court was one under Order XXII, rule 5, of the Civil Procedure Code. No appeal from such an order is provided for in Order XLIII, rule 1, of the Code.

Har Narain Singh v. *Kharag Singh* (1), *Sankali* v. *Murlidhar* (2), *Bala Bai* v. *Ganesh* (3), were discussed.

Whatever be the law under the old Code of Civil Procedure, there is no doubt that no appeal is allowed under Act V of 1908.

Referring to sections 367 and 588 (18) of Act XIV of 1882, it appears that an apppeal was expressly provided for from such an order under that Act. So the rulings on the point under the old Code do not apply to the present case.

Mr. *Nihal Chand*, for the Appellant, contended that the order in question must be deemed to have been passed either under rule 9 or 10 of Order XXII of the present Code of Civil Procedure.

As such an appeal lies from the order. In case no appeal lies, the case may be taken up in revision as the lower Court has acted with material irregularity in not bringing the appellant on the record. If the appellant will not be brought on the record, he will be left without any remedy.

JUDGMENT.—This is an appeal against an order of the Additional Judge of Saharanpur, dismissing the appellant's application to be made plaintiff in the place of Nihal Singh deceased, the original plaintiff. The defendants-respondents contend that no appeal lies. In our opinion the contention is well-founded. It is not suggested that the order amounts to a decree as defined in the Code. As an order it is certainly not appealable, for it was not passed under either rule 9 or rule 10 of Order XXII. We were asked to treat the appeal as an application for revision. We are not prepared to do this. The Court below does not appear to have acted without jurisdiction or irregularity in the exercise of its jurisdiction. Moreover Nihal Singh left a widow who appears to be his legal representative, if the appellant is not the adopted son, and who may yet succeed in getting herself made plaintiff in place of her deceased husband. It may also be possible to appeal against the order of the Court when passed, dismissing the suit as having abated. There are two reported decisions

(1) 9 A. 87; A. W. N. (1886) 89.
(2) 12 A. 200; A. W. N. (1890) 23.
(3) 27 B. 162; [illegible]

S. N. DAR, B. A. LL. B.
Vakil [illegible] Court,
SRINAGAR (Kashmir)

of this Court that no such appeal lies, but the Bombay and Madras High Courts have held that such an order is tantamount to a decree and is appealable as such.

The present appeal is dismissed with costs.

Appeal dissmised.

MADRAS HIGH COURT.

CIVIL APPEAL No. 110 OF 1913.

February 11, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

RAMANATHAN CHETTY AND OTHERS—DEFENDANTS Nos. 2, 5, 6—APPELLANTS

versus

SUBRAMANIAM CHETTY AND ANOTHER—PLAINTIFFS AND DEFENDANT No. 1—RESPONDENTS.

Hindu Law—Succession certificate—Money due to member of joint Hindu family—Suit to recover same—Succession certificate, if necessary—Adopted son—Ancestral property.

Where one *M* died leaving a widow and she adopted a boy in pursuance of a power given to her to adopt and the adopted son brought a suit to recover a sum of money due to his adoptive father which he became entitled to by right of survivorship:

Held, that he was entitled to recover the money without the production of a succession certificate. [p. 690, col. 2.]

Ancestral property is not taken by an adopted son as his father's heir and he is not bound, therefore, to produce a succession certificate to recover what is found to be ancestral property. [690, col. 2: p. 691, col. 1.]

Subramanian Chetty v. Rakku Servai, 20 M. 232; 7 M. L. J. 100, *Pallamraju v. Bapanna*, 22 M. 380, followed.

Perayya v. Ahmad Abdul Rahiman Sait, 25 Ind. Cas. 206; (1914) M. W. N. 671; 1 L. W. 612; 27 M. L. J. 236, not followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad, in Original Suit No. 34 of 1911.

Messrs. *K. Srinivasa Aiyangar* and *A. Krishnaswami Aiyar*, for the Appellants.

Messrs. *T. Rangachariar* and *A. Venkatarayaliah*, for the Respondents.

JUDGMENT.—Defendants Nos. 2, 5 and 6 the repersentatives of one S. A. Subramaniam Chetty, appeal against the decree directing them to pay the plaintiff, who claims to be the adopted son of one Meyyappa Chetty, a sum of Rs. 10,329-3-5 with interest. The plaintiff's case is that Meyyappa Chetty entrusted his nephew S. A. Subramaniam Chetty, who is described as "a well propertied man" and a money-lender, with a sum of Rs. 3,812-1-6 for investment. Subramaniam Chetty first deposited the amount in Keemandan M. P. Firm at Rangoon and afterwards when he himself commenced business at Rangoon, withdrew the amount from the Keemandan M. P. Firm and deposited it in his own Rangoon branch. These deposits both in the Keemandan Firm and afterwards in the S. A. Firm, were made in the names of V. M. Rm. and M. Rm. M. which were the *vilasams* of Meyyappa Chetty. Mayyappa Chetty died and his widow adopted the plaintiff at the instance of Subramaniam Chetty, who told the plaintiff that he had got this amount deposited with him by Meyyappa Chetty. Subramaniam Chetty also is dead, and his representatives are now sued. The defence is that Meyyappa Chetti never entrusted Subramaniam Chetty with any amount and that the *vilasams* V. M. Rm. and M. Rm. M. do not represent Meyyappa Chetty. The fact and validity of the adoption of the plaintiff by the widow also are denied. The Subordinate Judge has recorded findings in favour of plaintiff on all these questions. The defendants appeal.

We are of opinion that the plaintiff is the adopted son of Meyyappa Chetty. Meenakshi Achi, the widow, states that she adopted him, that the *pungalis* of Meyyappa Chetty took part in the adoption and that the plaintiff has been living with her ever since, as her adopted son. She performed the plaintiff's marriage as the son of Meyyappa Chetty. P. W. No. 5 is the man who gave his daughter in marriage to the plaintiff as the adopted son of Meyyappa Chetty and got Meyyappa's daughter married to his son in exchange. He also says that he was present at the adoption. A *pungali*, P. W. No. 3, also gives evidence in favour of the plaintiff. Subramaniam Chetty's mother, 3rd defendant, who died before the trial, supported the plaintiff's adoption. She said, when examined in a previous case, that the plaintiff was the son of Meyyappa Chetty. The 5th defendant, an executor, who now disputes the adoption, had also described the plaintiff as the son of Meyyappa Chetty in the same case. He did not go into the

witness-box and there is no explanation given of the statement made by him at that time. P. W. No. 2 who was employed under the 6th defendant also says that the 6th defendant attended the adoption. Sixth defendant does not deny the statement, he has not examined himself. The only evidence against this is that of D. W. No. 3 who according to the plaintiff's witnesses, was present at the time of the adoption. He is the father of the 5th defendant to whose admission in a previous suit we have already referred. His granddaughter is married to the 2nd defendant who is alleged to be the adopted son of Subramaniam Chetty, and the Judge says that from the way in which he gave his evidence he has no hesitation in concluding that he is unreliable. It is argued that the other *pungalis* who are admitted to have been present have not been examined and that the *muri* which is admitted to have been written at that time has not been produced. It is not shown with whom the *muri* is, and it was open to the defendants to examine the *pungalis*. We think that the evidence of the witnesses who were present at the adoption, the acquiescence of the *pungalis* and treatment of the plaintiff as the adopted son of Meyyappa Chetty by the persons interested are sufficient to prove the adoption.

It is then argued that the adoption is invalid as it is not shown that the widow had authority to make the adoption. She proves that her husband had authorised her to make the adoption. Her husband's directions on his death-bed to his relative and *pungalis* that they should see the adoption carried out need not be treated, as contended by the Vakil for the appellants, as a joint authority in favour of the wife and all these *pungalis* to make such an adoption. It was also said that there is no evidence of the giving and taking in adoption. We think the evidence clearly proves that there was an authority, a gift and an acceptance. We hold accordingly that the plaintiff is the adoptive son of Meyyappa Chetty.

The next question is whether Meyyappa Chetty deposited the amount, as alleged, with Subramaniam Chetty. S. A. Subramanyam Chetty was apparently a wealthy man. Exhibit A series clearly show that he deposited a sum of Rs. 3,500 as alleged by the plaintiff with the Keemandan M. P. Firm at Rangoon on 16th September 1895. Exhibit A6 shows that the amount belonged to V. M. Rm. It was deposited by Subramaniam Chetty in that name, so that Subramaniam Chetty alone might operate on that account though the money really belonged to V. M. Rm. It is also proved that S. A. Subramaniam Chetty withdrew the amount from Keemandan M. P. Firm and deposited it in his own firm when he opened a branch at Rangoon (see Exhibit A); and his own accounts also show that the deposit was made in the name of V. M. Rm. as the money belonged to the person who was represented by that *vilasam*.

The question that arises for decision then is whether V. M. Rm. represented Mayyappa Chetty, the plaintiff's adoptive father. It is not argued in appeal that M. Rm. M. is not a *vilasam* of Meyyappa Chetty. P. W. No. 1, who was a clerk under Subramaniam Chetty, and after his death under the 6th defendant, states that V. M. Rm. represented Meyyappa Chetty and that the latter's money was deposited with Subramaniam Chetty's Rangoon firm. He was not put any question in cross-examination in respect of the deposit. P. W. No. 2 who was a clerk under the 6th defendant also says that V. M. Rm. refers to Meyyappa Chetty. He states that he wrote the letter, Exhibit D, to the dictation of defendants Nos. 5 and 6. These persons who now dispute the plaintiff's claim were executors under the Will of Subramaniam Chetty and they stated in that letter according to the appellant's construction of it that the deposit to the credit of V. M. Rm. related to Subramaniam Chetty's maternal relative but according to the plaintiff the letter shows that the money belonged to Subramaniam Chetty's maternal uncle, *i.e.*, Meyyappa Chetty. We attach no weight to the contention of the appellants that this letter is not sufficient to prove an admission that the money belonged to Meyyappa Chetty as it only states that it belongs to a relative in the maternal line. Assuming that the term is vague enough to suggest only a maternal relative and not the maternal uncle, the defendants do not say who that relative is. The 6th defendant does not deny the genuineness of Exhibit D, nor does he explain to whom it refers

We are, therefore, of opinion that Exhibit D was intended to refer to Mayyappa Chetty. P. W. No. 3 who like Mayyappa Chetty belonged to *varivayal* family, also says that V. M. Rm. refers to Mayyappa Chetty. We are, therefore, of opinion that the plaintiff's contention that V. M. Rm. refers to Meyyappa Chetty is proved and that he is entitled to the amount deposited under that *vilasam*.

The next question is whether the suit is barred by limitation. It is said that the accounts show that the deposit was made not payable on demand but for periods of two months. In support of this contention, reliance is placed on the entries which calculate interest at *thavanai* rate, and it is argued that *thavanai* means that the amount is deposited for a period of two months and it would be unreasonable to hold that the person is entitled to draw interest which prevailed for a period of two months unless the Chetty had security of the use of the money for the same period, and that Article 60 of the Limitation Act which only applies to deposits payable on demand, does not, therefore, apply. On behalf of the plaintiff it is contended that *thavanai* does not indicate that the amount is deposited for two months, but that it only shows that interest is calculated at a certain rate which prevailed for a period of two months. This contention was not raised in the Court below. But we think that it is unnecessary to determine the meaning of the term, as there is sufficient evidence in the case to show that the deposit was payable on demand and that it was not made for a period of two months. We have already stated that what Meyyapa Chetty probably did was to deposit the money with Subramaniam Chetty to deal with it in any way he liked, and there is no evidence as to what instructions were given by Mayyappa Chetty. The probabilities are that he left it to Subramaniam Chetty to utilise it in the way most profitable to Mayyappa Chetty. Subramaniam Chetty deposited it with Keemandan M. P. Firm at Rangoon on his own responsibility. That deposit was probably for fixed periods of two months and a suit against Keemandan M. P. Firm might probably not be governed by Article 60 of the Limitation Act. Afterwards Subramaniam Chetty withdrew it and deposited it with his own Rangoon branch. The accounts were rendered in the first instance to S. C. They show that the deposit was made "Oor Maral V. M. Rm". or in other words, it was Subramaniam Chetty himself and not Meyyappa Chetty who deposited it in the Rangoon branch; Chokalingam Chetty who was the agent at Rangoon, states that instructions to pay *thavanai* interest were given to him by the principal, *i. e.*, by Subramaniam Chetty. The evidence, therefore, does not show that Mayyappa Chetty deposited the amount with Subramaniam Chetty on what are called *thavanai* conditions. It only shows that Subramaniam Chetty directed his firm at Rangoon to pay interest to V. M. Rm. at the *thavanai* rate. We have already pointed out that the probabilities are that Meyyappa Chetty would not have imposed any conditions to Subramaniam Chetty as to how the money was to be utilised, but that he would have left the matter entirely to his discretion. The presumption, in these circumstances, is that the money was payable to Subramaniam Chetty to Meyyappa Chetty on demand. If Article 60 applies, it is conceded that the suit is not barred by limitation.

It was also argued before us that the plaintiff is not entitled to recover the amount without producing a succession certificates and the decision reported in *Perayya* v. *Ahmad Abdul Rahiman Sait* (1) is relied upon. That decision was based upon a judgment in *Venkataramanna* v. *Venkayya* (2) which has been subsequently overruled [see *Subramanian Chetti* v. *Rakku Servai* (3), *Pallam Raju* v. *Rapanna* (4)]. The attention of the learned Judge in the Madras Weekly Notes case was not apparently drawn to these decisions. It was also contended that the plaintiff who was adopted only after the death of Meyyappa Chetty did not take the property as a co-parcener by survivorship. It is quite clear that ancestral

(1) 25 Ind. Cas. 206; (1914) M. W. N. 671; 1 L. W. 612; 27 M. L. J. 236.
(2) 14 M. 377.
(3) 20 M. 232; 7 M. L. J. 100.
(4) 22 M. 380.

property is not taken by an adopted son as his father's heir and is not bound, therefore, to produce a succession certificate to recover what is found to be ancestral property.

For these reasons we confirm the decree of the lowor Court and dismiss the appeal with costs. The memorandum of objections also is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 81 OF 1914.
March 13, 1915.
Present:– Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
MEHDI HASAN—DEFENDANT—APPELLANT
versus
BACHA PANDE —PLAINTIFF—RESPONDENT.

Pre-emption—Suit by preferential claimant brought after decree obtained by remote claimant—Limitation.

A lease of some property was executed on 27th June 1910. A remote pre-emptor brought a suit on the 31st of March 1911 and obtained a decree on 18th of September 1911. After the decree a preferential claimant brought a suit for pre-emption, against the defendant who had obtained the decree, on 31st May 1912:

Held, that the suit was barred by limitation.

Raj Narain Rao v. *Dunya Pande*, 5 Ind. Cas. 527; 7 A. L. J. 259; 32 A. 340, distinguished.

First appeal from an order of the District Judge of Azamgarh, dated the 18th March 1914.

FACTS.—A lease of certain property was executed on the 27th of June 1910. Mehdi Hasan brought a suit for pre-emption on the 31st of March 1911 and obtained a decree on the 18th of September 1911. After the decree Bacha Pande brought the present suit for pre-emption against Mehdi Hasan on the ground that he had a preferential rights to pre-empt. The first Court dismissed this suit as barred by limitation but the lower Appellate Court reversed the decision of the Court of first instance and remanded the suit. The defendant thereupon appealed to the High Court against the order of remand.

Mr. *Safi-uz-zaman*, for the Appellant.

Mr. *Narmadeshwar Prasad Upadhya*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The alienation complained of was made on the 27th of June 1910 to a stranger. The appellant-defendant brought a suit on the 31st of March 1911 and obtained a decree for pre-emption. The present suit was not instituted until the 31st of May 1912, that is to say, long after limitation expired, in respect of the same alienation which gave rise to the alleged right of pre-emption. It is perfectly clear, therefore, that the present suit is barred by limitation. Reliance is placed upon the case of *Raj Narain Rai* v. *Dunya Pande* (1). The facts in that case were quite different. There the plaintiffs had brought the suit for pre-emption well within the year after the alienation had been made. It was true that in the meantime another party had got a decree. The Court held that the suit being within time and the plaintiff not being a party to the suit in which the decree for pre-emption had been made, the plaintiff was not bound by that decree. In our opinion the decree of the Court of first instance dismissing the plaintiff's claim was correct and ought to be restored. We allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

(1) 5 Ind. Cas. 527; 7 A. L. J. 259; 32 A. 340.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.
REVENUE REVISION PETITION NO. 41 OF 1913-14.
November 18, 1914.
Present:—Mr. Tweedy, S. M. and Mr. Holms, J. M.
Musammat KISHAN DAI—APPLICANT
versus
RAM KISHUN—OPPOSITE-PARTY.

Agra Tenancy Act (II of 1901), s. 11—Occupancy right, acquisition of—Period of lease in contravention of Act, exclusion of.

Where a tenant had been in possession of a land for eleven years when the Agra Tenancy Act came into force and then sublet it in contravention of the provisions of the Tenancy Act:

Held, that the tenant did not acquire the right of occupancy and that the whole period of sub-lease when it exceeded one year was to be excluded and, not only the period of sub-lease less the first year. [p 691, col. 1.]

ESAHUQ CHOWDHURY *v.* ABEDANNISSA BIBI.

Application for revision of an order of the Commissioner of the Allahabad Division, dated the 27th January 1914.

JUDGMENT.

HOLMS, J. M.—This seems to me to be a case in which the Commissioner has failed to exercise the jurisdiction vested in him by law and not to have considered the somewhat intricate legal points which have arisen in this case. The material part of his judgment is only an assertion that it is clearly proved that the present respondent has occupancy rights in the land in suit. There is nothing to show that the Commissioner applied his mind to the consideration of the question which arose. The applicant informs me that the Comissioner did not send for the record, and this is not denied by the respondent. The result has been that a mistake in law made by the Assistant Collector has not been corrected.

Upto the beginning of 1309 *Fasli*, the year in which the present Tenancy Act came into force, the respondent even with the benefit of Selected Decision No. 4 of 1900 only eleven years to count to his occupancy rights. Since then the land has been sublet by him and under the proviso of section 11 of the present Tenancy Act any time for which the land has been sublet in contravention of the provisions of the Act should be excluded. Respondent urges that as a sub-lease for the first year, if it stood alone, was legal, he being then a non-occupancy tenant, that this one year should not be excluded in computing the period of twelve years necessary for a right of occupancy. Illustration (*a*) of section 11 seems to be absolutely clear on this point. Under it the whole period of sub-lease when it exceeded one year, when given by a non-occupancy tenant, was excluded and not only the period of sub-lease less the first year. In this view the respondent has not acquired occupancy rights.

I would, therefore, set aside the orders of the lower Courts and decree the suit for ejectment, the respondent paying costs all through.

TWEEDY, S. M.—I concur.

Application allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3951 OF 1912.

June 9, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

ESAHUQ CHOWDHURY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Srimati ABEDANNISSA BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift made in lieu of dower—Death-bed illness—Gift, principles of, applicability of.

The provisions of the Muhammadan Law applicable to gifts made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of a dower-debt which is really of the nature of a sale. [p. 693, col. 1.]

Ghulam Mustafa v. *Hurmat*, 2 A. 854; *Abbas Ali* v. *Karim Bakhsh*, 4 Ind. Cas. 466; 13 C.W.N. 160; *Khamrunnisa* v. *Shah Hazarath Saib*, 12 Ind. Cas. 457; (1911) 2 M. W. N. 412; 21 M. L. J. 958, followed.

Appeal against the decree of the Subordinate Judge, second Court, Burdwan, dated the 23rd of September 1912, affirming that of the Munsif, first Court, Burdwan, dated the 17th of January 1911.

Babus *Dwarka Nath Chakrawarti*, *Bepin Behari Ghosh* and *Peary Mohan Chatterji*, for the Appellants.

Dr. *Rash Behary Ghosh* and Babu *Probodh Chandra Dutta*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a judgment of the learned Subordinate Judge, second Court of Burdwan, dated the 23rd September 1912, affirming the decision of the Munsif. The suit was brought by the plaintiffs for a declaration that the *kobala* set up by the defendant No. 1 was collusive and invalid and not binding upon them. The question that we have got to decide lies within a narrow compass. The defendant No. 1 is the widow of a Muhammadan gentleman. This Muhammadan gentleman had agreed to pay a certain sum as dower to the said defendant. The dower was deferred dower; but it is the common case, and so found by the learned Subordinate Judge that a portion of the dower was outstanding at the date of the execution of the *kobala* in question. The deceased gentleman executed a conveyance of this property to the defendant in satisfaction of her dower-debt. A question has been raised before us whether the principles of the Muhammadan Law with

reference to the death-bed illness which apply to gifts apply also to a sale when the sale is for dower-debt. The matter is not *res integra*. The very matter has already been dealt with in the Allahabad High Court: [See *Ghulam Mustafa* v *Hurmat* (1)] where the learned Judges held that the provisions of the Muhammadan Law applicable to gifts made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of a dower-debt which is really of the nature of a sale. That case is exactly on all fours with the present and it has been followed and approved of both by this Court and the Madras High Court. See *Abbas Ali* v. *Karim Bakhsh* (2) and *Khamrunnisa* v. *Shah Hazarath Saib* (3). We are of opinion that that decision in *Ghulam Mustafa* v. *Hurmat* (1) is correct and we think we ought to follow the same. It does not seem to us from a perusal of the books that have been handed up to us in the course of the argument that the principles relating to a gift apply to a transaction such as the one that is now before us. In our opinion the learned Judge of the lower Appellate Court came to a correct conclusion. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree. Case XII, page 177, of Macnaughten's Muhammadan Law, appears to be distinguishable from the present case inasmuch as it is not stated there that the sale was in consideration of a dower-debt.

Appeal dismissed.

(1) 2 A. 854.
(2) 4 Ind. Cas. 466; 13 C. W. N. 160.
(3) 12 Ind. Cas. 457; 21 M. L. J. 958; (1911) 2 M. W. N. 412.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL NO. 43 OF 1913-14.
December 3, 1914.

Present:—Mr. Holms, J. M. and Mr. Campbell J. M.

THE MAHARAJA OF BENARES—APPELLANT

versus

VIJAI NARAIN SINGH AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 199—Ejectment suit—Proprietary title pleaded—Appeal.

When a defendant in an ejectment suit pleads that he is in possession not as a sub-tenant of the plaintiff but as a proprietor holding the plot as his *khud kasht* a question of proprietary title is in issue and an appeal lies to the District Judge.

Second appeal from the order of the Commissioner of the Benares Division, dated 17th March 1914, in the case of ejectment.

JUDGMENT.

HOLMS, J. M.—The only ground urged is that as a question of proprietary title was in issue, no appeal lay to the Commissioner.

In the Full Bench ruling, *Bindeshwari* v. *Gokul* (1), the High Court held that, when a defendant in an ejectment suit pleaded that he was in possession, not as a sub-tenant of the plaintiff but as a proprietor holding the plot as his *khud kasht*, a question of proprietary title was in issue and the appeal lay to the District Judge. The Board had before this followed a previous decision of the High Court of 28th June 1912 to the contrary. In a recent case, however, which came before me, the present Board followed the Full Bench decision of 1914. Following this, the appeal should have been to the District Judge and not to the Commissioner.

Respondent urges that as this point was not taken before the Commissioner it cannot be taken now. The latest decision of the High Court to which I have been referred in *Genda* v. *Sukh Nath Rai* (2), does not support this contention. The reason why the point was not taken before apparently was that the Full Bench ruling had not then been published.

I would, therefore, set aside the order of the Commissioner and direct that the memorandum of appeal be returned for presentation to the District Judge. Parties will bear their own costs in both Appellate Courts.

CAMPBELL, J. M.—I agree.

Order set aside.

(1) 22 Ind. Cas. 964; 12 A. L. J. 251; 36 A. 183.
(2) 30 A. 25; 4 A. L. J. 686; A. W. N. (1907) 271.

VENKATACHELA PILLAI v. RANGA PILLAI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 13 OF 1914.

December 11, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

VENKATACHELA PILLAI AND OTHERS—DEFENDANTS-APPELLANTS

versus

RANGA PILLAI AND OTHERS—PLAINTIFFS RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 27, 33—Appellate Court, powers of—Reception of additional evidence—"Substantial cause," meaning of—Errors in decree—High Court, power of, to correct in absence of some of the parties.

An Appellate Court is entitled to receive additional evidence if it thinks necessary to do so in the interest of justice. [p. 694, col. 2.]

The disability to produce documents in the first Court for causes not due to fault or negligence of the party is "substantial cause" within the meaning of Order XLI, rule 27 (*b*), of the Code of Civil Procedure, for admission of such evidence. [p. 694, col. 2.]

A High Court is entitled to correct errors in the decree of a lower Court even if some of the parties are not present before it in appeal. [p. 695, col. 1.]

Kessowji Issur v. *Great Indian Peninsular Railway Company*, 31 B. 381 (P. C.); 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115; *Krishnama Chariar* v. *Narasimha Chariar*, 31 M. 114; 3 M. L. T. 308; *Andiappa Pillai* v. *Muthukumara Theran*, 14 Ind. Cas. 140; (1912) M. W. N. 450; 11 M. L. T. 241; 36 M. 477; *Peddibhotta Kameswaramma* v. *Bezwada Chelapathi*, 26 Ind. Cas. 50; (1914) M. W. N. 864; *Kalka Singh* v. *Bharat Singh*, 12 Ind. Cas. 332; 14 O. C. 327; *Sheo Singh* v. *Raghubans Kunwar*, 27 A. 634, 15 M. L. J. 352; 9 C. W. N. 1009; 2 C. L. J. 194; 8 O. C. 317, followed.

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 7 of 1911, preferred against that of the Court of the District Munsif of Conjeevaram, in Original Suit No. 255 of 1909.

Mr. *T. V. Venkatrama Aiyar*, for the Appellants.

Messrs. *T. R. Venkatarama Sastri* and *A. S. Viswanadha Aiyar*, for the Respondents.

JUDGMENT.—The learned District Judge has found mainly on the strength of a document, Exhibit M, which was received in evidence by him on appeal that the plaintiffs (respondents) have proved that they were the nearest reversionary heirs of the deceased, Devaraja Pillai. It is contended by Mr. T. V. Venkatarama Aiyer for the appellants (who are most of the alienee-defendants) that that document was wrongly admitted in evidence and reliance is placed on *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) and *Krishnama Chariar* v. *Narasimha Chariar* (2).

The decision of their Lordships of the Privy Council in *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) was considered in several later cases in this Court. It is necessary, however, to refer only to *Andiappa Pillai* v. *Muthukumara Thevan* (3), Second Appeal No. 819 of 1911 and *Subba Naidu* v. *Ethirajammal* (4) and *Peddibotla Kameswaramma* v. *Bezwada Chelapathi* (5). In all these cases, it was held that when the Appellate Court wishes to admit fresh evidence in order to enable it to pronounce a judgment to the satisfaction of its own mind, there is nothing in *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) to prevent its doing so. It has been further observed in some of these later cases that the expression "for any other substantial cause" in Order XLI, rule 27, (old section 568) gave further power to the Appellate Court to admit fresh evidence on the same grounds as would justify the Court of first instance in granting a review. That the discovery, after the filing of the appeal of fresh evidence not known to and not available to the appellant after due diligence in the first Court is such substantial cause and that such evidence could be admitted at the hearing of the appeal has been also decided in *Kalka Singh* v. *Bharat Singh* (6) and that view is supported by the decision of their Lordships of the Privy Council in *Sheo Singh* v. *Raghubans Kunwar* (7), their Lordships having approved in that case of the reception of such fresh evidence by the Appellate Court notwithstanding the arguments addressed to them that the reception of such evidence was improper.

In the present case reading the judgment of the learned District Judge as a whole, we are satisfied that Exhibit M was admitted by

(1) 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 4 A. L. J. 461; 34 I. A. 115 (P. C.).

(2) 31 M. 114; 3 M. L. T. 308.

(3) 14 Ind. Cas. 140; (1912) M. W. N. 450; 11 M. L. T. 241; 36 M. 477.

(4) 28 Ind. Cas. 640.

(5) 26 Ind. Cas. 50; (1914) M. W. N. 864.

(6) 12 Ind. Cas. 332; 14 O. C. 327.

(7) 27 A. 634; 15 M. L. J. 352; 9 C. W. N. 1009; 2 C. L. J. 194; 8 O. C. 317.

him during the hearing of the appeal for "substantial cause" because he was satisfied that the plaintiffs were unable to produce it in the Court of first instance through no fault or negligence of their own. The learned District Judge, no doubt, does not refer expressly to the plaintiff's negligence not having been the cause of their ignorance of the existence of Exhibit M till after the decision of the District Munsif was pronounced, but having regard to the learned Judge's refusal to allow the plaintiff to produce another document as evidence before him on the ground that the plaintiffs were negligent in not having filed it before the Munsif, we think that he allowed Exhibit M to be produced in appeal because he was satisfied that the plaintiffs were not guilty of negligence in not having produced this particular document before. In the case in *Krishnama Chariar* v. *Narasimha Chariar* (2) the additional evidence was apparently allowed by the Appellate Court in the very same irregular manner which was pointed out by their Lordships of the Privy Council in *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) as not permitted by law and hence that decision is not relevant.

The other questions argued before us are either questions of fact or points not taken up in the grounds of second appeal and we cannot entertain them.

There are, however, certain minor errors which have crept into the decree of the District Court (one of these minor errors also appears in the judgment) and we are entitled to correct them under Order XLI, rule 33, even if some of the parties are not before us or have not appealed. These errors relate to the properties alienated to the defendants Nos. 2 to 9, 11, 12 and 16. As these alienations have been declared by both the Courts to be binding on the plaintiffs, the decree of the District Court will be modified by removing the words beginning with "that the plaintiff do pay Rs. 120" up to the words "hereunder" the words "subject to the above limitations" and the words "after removal of the houses" up to the figures "11 and 12" and by inserting the words "other" between "the" and "suit properties."

The appellants will pay three-fourths of plaintiff's costs and bear their own.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1282 OF 1912.]

November 12, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

HARI RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALLAH DITTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), *s.* 11, *proviso —Sale to subsequent vendee—Limitation—Record—Mutation register*—Arora *tribe—Residence in the same village not a* sine qua non *for success.*

The period of limitation in a pre-emption suit against the subsequent vendees is six years from the date of the sale in their favour. [p. 696, col. 1.]

Karam Dad v. *Ali Muhammad*, 18 Ind. Cas. 70; 31 P. R. 1913; 28 P. W. R. 1913; 61 P. L. R. 1913 (F. B.), followed.

Under the proviso to section 11 of the Punjab Pre-emption Act, 1905, the law does not make residence in the same village a *sine qua non* for success in a pre-emption suit and hence, in the case of a sale by one *Arora*, another *Arora* residing in a different village may be regarded as a member of the same tribe with the vendor. [p. 696, col. 1.]

Mangha Ram v. *Mengha Ram*, 2 Ind. Cas. 938; 62 P R. 1909; 63 P. L. R. 1909; 83 P. W. R. 1909, referred to.

A mutation register is a record within the meaning of the proviso to section 11 of the Punjab Pre-emption Act, and where a *jamabandi* has been destroyed, the Court will presume, under section 14 of the Indian Evidence Act, that proper entries in pursuance of the mutation order must have been made in the *jamabandi*. [p. 696, col. 2.]

Second appeal from the decree of the Divisional Judge, Multan, dated the 13th of April 1912, affirming that of the District Judge, Multan, dated the 21st of August 1911, dismissing the claim.

Rai Bahadur Pandit *Sheo Narain*, for the Appellants.

Mr. *Fazal Ilahi*, for the Respondents.

JUDGMENT.—The facts of this case are that one Atma Ram sold, on the 23rd November 1909, the land in dispute to defendants Nos. 1 to 3, who in turn sold one-third of it to Muhammad Yar, Ilahi Bakhsh and Allah Diwaya, by a deed executed on the 11th April 1910 and registered on the 22nd July 1910. The plaintiffs brought the present suit for pre-emption on the 26th July 1910, but did not implead the second vendees until the 20th January 1911. On these facts, the learned Divisional Judge has held that the plaintiffs' suit was barred by limitation against the

subsequent vendees and, as the transaction was an indivisible one, it was also barred against the original vendees. He has also found that the plaintiffs did not fulfil the requirements of the second part of the proviso to section 11 of the Pre-emption Act. These are the only two points which require determination in the appeal, and after hearing arguments on both sides we are of opinion that the vew taken by the Divisional Judge is incorrect and that this appeal must succeed.

The question of limitation is concluded by a Full Bench judgment of this Court reported as *Karam Dad* v. *Ali Muhammad* (1), which lays down that the period of limitation in a suit against the subsequent vendees is six years from the date of the sale in their favour. The present suit is, therefore, clearly within time and in this view of the case, the question as to the applicability of the rule against the splitting up of a bargain does not arise.

The second point which we have to decide is whether the plaintiffs have fulfilled the two conditions prescribed by the proviso to section 11. It is clear that they and the vendor are both *Aroras* and are consequently members of the same tribe. It is true that the plaintiffs do not reside in the village of the vendor, but the law does not make residence in the same village a *sine qua non* for success in a pre-emption suit. The observations in *Mangha Ram* v. *Mengha Ram* (2), relied upon by Counsel for the respondents, do not, in our opinion, lay down the rule that, in the case of a sale by one *Arora*, another *Arora* residing in a different village cannot be regarded a member of the same tribe with the vendor. The language of the section is perfectly plain and unambiguous and we cannot import into it words which are not to be found there. We must, therefore, agree with the Divisional Judge that the pre-emptors and the vendor are members of the same tribe.

As regards the second part of the proviso, the learned Divisional Judge has decided that the plaintiffs have failed to satisfy the twenty years' rule contained in that proviso. We think this finding is entirely erroneous. It is clear that the plaintiffs' father, Wasu Ram, purchased a plot of land in this village and that mutation in his favour was attested on the 9th September 1889, more than twenty years prior to the date of the sale. A mutation register is certainly a record within the meaning of the proviso and the plaintiffs' father was, therefore, recorded as an owner in 1889. The *jamabandis* of 1889-90 have been destroyed but we have no hesitation in presuming, under section 114 of the Indian Evidence Act, that proper entries in pursuance of the mutation order must have been made in the *jamabandi*. The sole reason why the learned Divisional Judge has decided against the plaintiffs is that they have not proved the allegation that the *jamabandi* of 1889-90 has been destroyed. We, however, see no difficulty in believing the statement of the plaintiffs on this point. There is no motive on their part for withholding the document if it was in existence, and the defendants have not shown that it does exist and contains no entry in favour of Wasu Ram. We must, therefore, hold that the plaintiffs had, in the name of their father, been recorded as owners for twenty years prior to the sale and that they have satisfied the requirements of the proviso. It is not disputed that they have been recorded as owners since the date of the sale.

The result is that we accept the appeal, set aside the decrees of the Courts below, and remand the case under Order XLI, rule 23, for decision on other issues which have not been disposed of by both the Courts. The Court-fee on the memorandum of appeal in this Court shall be refunded, and other costs shall be costs in the cause.

Appeal accepted.

(1) 18 Ind. Cas. 70; 31 P. R. 1913; 28 P. W. R. 1913; 6' P L R. 1913 (F. B.)

(2) 2 Ind. Cas. 938; 62 P. R. 1909; 63 P. L. R 1909; 83 P. W. R. 1909.

KALANIAPPA CHETTY *v.* RANGACHARIAR.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 628 OF 1913.

SEPTEMBER 30, 1914.

Present:—Mr. Justice Hannay.

PALANIAPPA CHETTY *alias* KUSALAVAN CHETTY—PLAINTIFF—PETITIONER

versus

RANGACHARIAR—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 69, 70—Purchaser of equity of redemption, payment by, of amount not charged on mortgaged property—Contribution, right of—Liability when arises—Benefit—Opportunity to accept or reject benefit.

A purchaser of the equity of redemption who pays off at the time of redemption of the mortgage the amount of a bond not charged on the mortgaged property, cannot be said to be interested in the payment of that amount within the meaning of section 69 of the Contract Act so as to be entitled to recover the amount from the mortgagor. [p. 698, col. 1.]

In order to enable a party to recover money paid by him to another under section 70 of the Contract Act, it is necessary that the party sought to be made liable must not only have benefited by the payment but must also have had the opportunity of accepting or rejecting such benefit. [p. 698, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High to revise the decree of the Court of the Subordinate Judge of Tanjore, in Small Cause Suit No. 1816 of 1912.

FACTS appear from the following extract (para. 4) from the judgment of the lower Appellate Court:

The defendant and his brother had executed a registered *othi* for their lands to one Ramaswami Thevan on 7th August 1892 for Rs. 882. Exhibit B (7). On the 6th April 1901, the defendant executed a bond, Exhibit A, for Rs. 200 to Ramaswami Thevan agreeing to discharge the debt due thereunder when the *othi* was redeemed. Defendant and his brother sold the equity of redemption to the plaintiff's father on the 16th May 1909 (Exhibit C) In it they directed the vendee to pay the *othi* amount to the mortgagee. Nothing was stated in it about the payment of the debt due under the bond (Exhibit A). It appears, from the evidence that when the plaintiff's mother offered to redeem the *othi*, Ramaswami Thevan refused to receive the *othi* amount unless the amount of Exhibit A also were paid to him. She paid both the *othi* amount and also the amount due under Exhibit A to. Ramaswami Thevan on the 18th November 1909. (See endorsements, Exhibits A (1) and B.) The plaint alleges that when representation was made to defendant he asked plaintiff's mother to pay the amount of Exhibit A also to Ramaswami Thevan agreeing to re-pay the same with interest. There is no satisfactory and reliable evidence on record to show that the defendant requested plaintiff's mother to pay the amount of Exhibit A to Ramaswami Thevan agreeing to re-pay the same to her. The notice (Exhibit I) given by plaintiff's mother's power-of-attorney agent (plaintiff's 2nd witness) does not make mention of the defendant's request to plaintiff's mother to pay this amount of Exhibit A to Ramaswami Thevan and of his agreement to re-pay the same to her. In the bond, Exhibit A, it is only stated that the amount thereof will be paid when the *othi* is redeemed. There are no words in it to show that the *othi* should not be redeemed unless the amount of Exhibit A also was paid. Even if the bond, Exhibit A, had contained such a stipulation, it would not have prevented the plaintiff's mother from redeeming the *othi*. [See *Rugad Singh* v. *Sat Narain Singh* (1), *Rajmal Motiram* v. *Shivaji Anandrau* (2)]. It cannot, therefore, be said that the plaintiff's mother was interested in the payment of the amount of Exhibit A within the meaning of section 69 of the Contract Act; section 70 of the Contract Act also does not, in my opinion, apply. In the case reported as *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (3) it is laid down "in order to enable a party to recover money paid by him from another under section 70 of the Indian Contract Act, it is necessary that the party sought to be made liable must not only have benefited by the payment but must also have had the opportunity of accepting or rejecting such benefit. Where no such option is left to him and the circumstances do not show that he intended to take such benefit, he cannot be said to have 'enjoyed such benefit' within the meaning of the section" and there are no circumstances in this case to bring it within the purview of that section. I find the 2nd point in the negative and against the plaintiff. On the 3rd point, I find that the plaintiff is not

(1) 27 A. 178; A. W. N. (1904) 208; 1 A. L. J. 579.
(2) 27 B. 154; 4 Bom. L. R. 966.
(3) 3 Ind. Cas. 110: 33 M. 15; 19 M. L. J. 489; 6 M. L. T. 162.

entitled to recover from the defendant the amount paid by plaintiff's mother to Ramaswami Thevan in discharge of the bond, Exhibit A.

In the result, I dismiss the suit. In the circumstances of the case, I make no order about defendant's costs.

Mr. *G. S. Ramachandra Aiyar*, for the Petitioner.

Mr. *K. R. Rangasami Aiyangar*, for the Respondent.

JUDGMENT.—Upon the facts, which are set out in paragraph 4 of the lower Court's judgment, I think the Subordinate Judge is right in holding that the plaintiff could not recover the amount sued for under section 69 of the Indian Contract Act. The amount due under Exhibit A was not a charge upon the land which the plaintiff's mother redeemed. There was nothing in Exhibit A to prevent the redemption of the land by the plaintiff's mother without payment of the amount of Exhibit A to the mortgagee, Ramaswami Thevan. In these circumstances the plaintiff's mother cannot be said to have been interested in the payment of the amount due under Exhibit A, within the meaning of section 69 of the Indian Contract Act, so as to enable the plaintiff to recover the amount.

The Subordinate Judge also held that the plaintiff could not recover the amount in suit under section 70 of the Indian Contract Act and relied upon *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (3). This contention was relied upon as an alternative after the plaintiff had failed to make out that was an agreement by the defendant to re-pay the amount paid by the plaintiff's mother. The finding of the Subordinate Judge is, I take it, that the defendant is not liable as he is not shown to have "enjoyed the benefit" of the payment by the plaintiff's mother as that phrase is interpreted in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (3) because he is not shown to have had the opportunity of accepting or rejecting such benefit nor to have intended to take such benefit. The Subordinate Judge does not believe the evidence of the agreement to re-pay and there is no other evidence to show that the defendant had any opportunity of accepting or rejecting the benefit of the payment by the plaintiff's mother or that he had any intention to take such benefit.

It is pointed out, however, that the decision in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (3) has been dissented from in *Gajapathi Kristna Chendra Deo Garu* v. *Srinivasa Charlu* (4) by Sadasiva Aiyar, J. The observation of Miller, J., in that case "I do not think it can be held under section 70 of the Indian Contract Act that the defendant must have an option of declining the benefit if that means that before the benefit is conferred he must be given the choice of accepting or declining it" does not, I think, amount to an expression of dissent as the decision in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (3) does not in fact lay down the rule that opportunity must be given before the benefit is conferred. The decision *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (3) has recently been followed and re-affirmed by Sankaran Nair and Spencer, JJ. after discussion of the connected decisions (Appeal Suit No. 238 of 1911.) On the other hand Ayling and Seshagiri Aiyar, JJ., would have referred the matter to the Full Bench in another case (Second Appeal No. 1129 of 1912) had they not been able to dispose of that case on another ground. However that may be, the position is that the decision of *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (3) has not been overruled and I think that I am bound by it. Sitting as a single Judge for the disposal of this revision petition I have no power under the rules to refer the matter to a Full Bench. I find, therefore, that the decision of the lower Court is according to law and I dismiss this petition with costs.

Petition dismissed.

(4) 20 Ind. Cas 445; (1914) M. W. N. 99 14 M. L. T. 20; 25 M. L. J. 483.

RAVANESHWAR PRASAD SINGH *v.* BAIJNATH RAM GOENKA.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

January 19, 1915.

Present: —Lord Dunedin Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Maharajah Sir RAVANESHWAR PRASAD SINGH *Bahadur* AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAIJNATH RAM GOENKA AND OTHERS—DEFENDANTS—RESPONDENTS.

Revenue Sale Law (Act XI of 1859), ss. 5, 6, 10, 11, 13, 33—Ijmali or joint share—Separate accounts, existence of—Arrear of revenue, sale for—Proclamation of sale, when sufficient—Specification of property, requisites regarding, if complied with by a general exclusion of 'all other shares' - Gazette notification, object of—Substantial injury.

Act XI of 1859 being a stringent enactment for the realisation of arrears of revenue, certain safeguards are provided therein for the protection of the interests of the defaulter, so that he may not be unnecessarily prejudiced. Some of those are mentioned in sections 5 and 6 of the Act, *viz.*, the notification of sales specifying the properties to be sold and their due publication in accordance with law. A compliance with the requirements of the said sections is imperative and it is in view of that, that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or sharers of estates advertised for sale. The object of the law and the rules being to enable likely purchasers among the public to know exactly what was going to be sold and thereby ensure reasonable competition. [p. 701, cols. 1 & 2.]

There can be no difficulty in specifying an estate advertised for sale but in the case of shares of estates, the work of specification requires care and attention. No hard and fast rule can be laid down with regard to its sufficiency as it must vary according to the facts of each particular case. What has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale. [p. 701, col. 2.]

The publication of the notice in the *Calcutta Gazette* is prescribed with the object of inviting purchasers from other quarters and not confining the bidding to speculative money-lenders and *Mukhtears* of the neighbourhood. [p. 702, col. 1.]

Where, in the case of a sale for arrears of revenue of an *ijmali* or joint share, being the residue of a *mahal* wherein 148 owners of specific but undivided shares had obtained separation of account, the notification under sections 6 and 13 of the Revenue Sale Law (Act XI of 1859), which was published in the *Calcutta Gazette*, specified the property advertised for sale as the "*ijmali* share which cannot be specified excluding the separate accounts numbers" whose list was given and wound-up by stating that "all other shares besides that specified are excluded from the sale" and the one affixed in the Collector's Office was similarly worded and an adjournment to postpone the sale being refused, the sale was held and the properties were purchased by the defendant-respondent:

Held, that the object of the law in prescribing the notifications had been frustrated, inasmuch as they gave little or no particulars in respect of the property advertised for sale and the intending purchaser was left to gather for himself, by an elaborate process of elimination, what the property which was advertised for sale and which he was expected to bid was, that the absence of such specification of property in the notification vitiated the sale and had resulted in a paucity of genuine or substantial bidders with the consequence that the property was knocked down for about a third of its real value and the owners of the *ijmali* share had suffered substantial injury and, that, therefore, the sale ought to be annulled. [p. 702, col. 1.]

Appeal from the decree and judgment of the High Court of Judicature at Fort William in Bengal, dated 1st May 1907, reversing those of the Subordinate Judge of Monghyr.

FACTS.—The suit out of which the present appeal arose was to set aside a sale, for arrears of revenue of a residuary *ijmali* or joint share in a *mahal* wherein 148 owners of specific or undivided shares had obtained separation of accounts. The points urged against the validity of the sale were that the notifications of sale were not in accordance with law as not containing a proper specification of the properties advertised for sale and that by reason of such irregularity the plaintiffs had sustained substantial injury. The Subordinate Judge of Monghyr decreed the plaintiffs' suit but on appeal the High Court of Calcutta reversed that decree. The plaintiffs thereupon preferred this appeal to His Majesty in Council.

Sir Erle Richards, K. C., and Mr. *A. M. Dunne*, for the Appellants :—The sale is illegal and void inasmuch as the imperative provisions of the law regarding specification of property in the proclamation of sale had not been followed. As a consequence of this irregularity and ommission, property was sold for about a third of its real value.

The following cases were referred to *Ismail Khan* v. *Abdul Aziz Khan* (1) *Nanda Lal Goswami* v. *Jajneswar Haldar* (2) and *Ram Narain Koer* v. *Mahabir Pershad Singh* (3).

Messrs. *De Gurytherr, K. C.*, and *Dube*, for

(1) 32 C. 502; 9 C W. N. 343; 1 C. L. J. 14 (F. B).
(2) 6 C W. N. 105 at p. 106.
(3) 13 C. 208.

RAVANESHWAR PRASAD SINGH *v.* BAIJNATH RAM GOENKA.

the Respondents :—Identification being the object aimed at by the requirement as to specification and what was required to be specified by law being only the estate, *i.e.*, the *mahal*, and not the residuary or *ijmali* share, there had been a sufficient compliance with the requirements of the law, as the details given were sufficient to identify the property put up for sale. There is no evidence that any difficulty had been experienced in ascertaining the names and area of the villages advertised for sale. The plaintiffs having failed to prove that substantial injury had resulted to them they were not entitled to any relief.

The following cases were referred to:—*Amirunnessa Khatoon* v. *Secretary of State for India in Council* (4), *Ram Narain Koer* v. *Mahabir Pershad Singh* (3), *Dilchand Mahto* v. *Baijnath Singh* (5) *Ismail Khan* v. *Abdul Aziz Khan* (1), *Ismail Khan* v. *Abdul Aziz Khan* (6).

JUDGMENT.

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Bengal, dated the 1st of May 1907, and the question for determination relates to the validity of a sale for arrears of revenue held under Act XI of 1859 of a share of an estate called Mahal Bisthazari, situated in the district of Monghyr.

The case offers an illustration of the extreme complexity of the land-system existing in Bengal. A 15-annas 6-*dams* share of Mahal Bisthazari seems to have been in existence as an independent fiscal unit for a considerable time. It includes 360 villages, and in the Collector's register is entered as bearing Touzi No. 336, which marks its position as a separate revenue-paying estate.

As is usually the case in Bengal and elsewhere in India, a large number of persons possess proprietary rights in this *mahal*; they own specific shares, some in one village only, others in several villages. Ordinarily the whole estate held in this wise is liable to be put up for sale for default in the payment of Government revenue. But Act XI of 1859, which lays down the rules for the realisation of the revenue payable to the State provides (by section 10) that "a recorded sharer of a joint estate held in common tenancy," or (by section 11), "a recorded sharer of a joint share whose share consists of a specific portion of the land of the estate," may apply to the Collector to open a separate account for the payment of his share of the revenue separately from the others. These separate accounts in respect of separate shares ensure that no share of an estate other than the one in respect of which the default had occurred should be exposed to sale (section 13) until and unless the highest offer for that share does not equal the amount of the arrear (section 14), when the whole estate becomes liable to be put up to sale.

In accordance with the provisions of sections 10 and 11 of Act XI of 1859, 148 owners of specific but undivided shares in Mahal Bisthazari applied for and obtained from the Collector separation of accounts. This left, however, a large residue, commonly called the *ijmali* or joint share, the owners of which remained jointly liable for the revenue due in respect thereof.

In August 1901, this *ijmali* share was found to be in arrears for the March and June *kist* or instalment of Government revenue, amounting to Rs. 604, and it was advertised for sale on the 9th of September 1901. An application appears to have been made to the Collector for postponement of the sale, which, however, was refused, and the sale was held on the advertised date, when the property was purchased by the defendant-respondent, Baijnath Goenka, for a sum of Rs. 33,500.

An appeal to the Commissioner of the Division, preferred by the owners of the *ijmali* share, under section 25 of the Act, having been dismissed, the plaintiffs brought their suit in the Court of the Subordinate Judge of Monghyr for the annulment of the sale. The grounds on which they base their action are exactly the same as those they urged before the Commissioner. These grounds are set forth with sufficient distinctness in the 18th paragraph of the plaint, sub-clause (*e*), which is in these terms:—

"That the description of the *ijmali* share given in column 5 of the said notification was incorrect, insufficient, and misleading, and, having regard to the nature of the

(4) 10 C. 63; 13 C. L. R. 131.
(5) 8 C. W. N. 337.
(6) 32 C. 509; 9 C. W. N. 348; 1 C. L. J. 91.

interests included in the said *ijmali* account and to that fact that it was constantly fluctuating, a fuller and more specific description thereof, with particular reference to the villages and the diverse interests making it up, should have been given, all materials for the same being available to the Collector in his office. The omission to give such detailed description of the *ijmali* account has largely affected the sale and value of the property sold."

Shortly stated, the points at issue resolve themselves into two questions—one of law and the other of fact: (1) whether, having regard to the purpose in view, the specification of the property in the sale-notification was in accordance with the provisions of the law; and (2) whether, in case the requirements of the the law had not been complied with, the plaintiffs, by reason of the irregularity, had sustained substantial injury.

The Trial Judge found both questions in favour of the plaintiffs. He held in effect that the specification was insufficient and defective, and that in consequence thereof the property was sold at a gross undervalue. He accordingly made a decree annulling the sale. The High Court, on appeal, came to a directly opposite conclusion on both points, and reversing his judgment, have dismissed the plaintiffs' action.

In these circumstances it becomes necessary, in their Lordships' opinion, to consider carefully the description or specification which the Trial Judge holds to be insufficient and irregular, and which the High Court, on the other hand, regard as sufficiently complying with the requirements of the law.

Act XI of 1859 is a stringent enactment for the realisation of arrears of revenue; at the same time it provides certain safeguards for the protection of the interests of the defaulter so that he may not be unnecessarily prejudiced. Among these safeguards are the provisions of sections 5 and 6 for the issue of notifications of sales specifying the properties to be sold, and their due publication in accordance with the law. And an exact compliance with its requirements is considered so important by the Government that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or shares of estates advertised for sale. The object of the law as well as of the Board's rules requiring specification of the properties to be sold is clearly to enable likely purchasers among the public to know exactly what was going to be sold, and to ensure thereby reasonable competition. When an estate is advertised for sale it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard and fast rule can be laid down with regard to its sufficiency, for it must vary according to the facts of each particular case.

In the present case the notification under sections 6 and 13 of the Act was affixed in the Collector's Office and in the Court of the Judge of the District; and as the revenue payable in respect of the *ijmali* share exceeded Rs. 500, it was also published in the *Calcutta Gazette*, which is the official gazette prescribed in the Act. In this notification, which bears date the 7th of August 1901, what purports to be a specification of the share to be sold is in these terms: "*Ijmali* share which cannot be specified excluding the separate accounts number." Then follows a long list of the 148 separate accounts already referred to. And at the end the following words occur: "All other shares besides that specified are excluded from the sale."

In the sale notification issued on the 6th of August 1901, which was apparently the one affixed in the Collector's Office, the entry in column 5 (the specification column) is as follows:—

"The *ijmali* share cannot be particularised owing to separate accounts having been opened. The share to be sold are those (*sic*) given in a separate sheet after excluding the share in respect of which the separate accounts have been opened."

The learned Judges of the High Court have given in their judgment a translation of the vernacular words in the notice. It is not necessary to consider whether their rendering is quite correct. For the fact remains that admittedy there was no specification of the share to be sold beyond what has already been stated. The intending purchaser was left to gather for himself by going through an elaborate

process of elimination the property that was advertised for sale, and for which he was expected to bid. It is to be observed that the publication of the notice in the *Calcutta Gazette* is prescribed with the object of inviting purchasers from other quarters and thus not confusing the bidding to speculative money-lenders and *Mukhtears* of the neighbourhood, which is hardly likely where the notification gives little or no particulars, as in this instance, in respect of property advertised for sale.

The cases to which their Lordships' attention has been invited give, in their opinion, no assistance in the determination of the point at issue here. As already observed each case must depend on its own particular facts; what has to be considered is whether having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale. It is not enough that they may go and obtain the requisite information from the Collector's Office. In their Lordships' opinion the particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for

Their Lordships, therefore, have no hesitation in agreeing with the Trial Judge that the notification on this case was insufficient and irregular and not in compliance with the requirements of the law.

Section 33 provides that no sale should be set aside on the ground that it was made contrary to the provisions of the Act, unless the plaintiff proves that he has sustained "substantial injury" by reason of the irregularity complained of. The Trial Judge found that the property was worth a lakh of rupees, and that in consequence of irregularity in the sale notification the defendant was enabled to buy it for one-third of its value

The learned Judges of the High Court, after an elaborate calculation, thought that, considering the mortgages on the property, it had fetched at the sale a fair value. In view of this divergence of opinion their Lordships have examined the evidence for themselves, and they have come to the conclusion that the view of the Trial Judge, both as regards the value and the fact that the lowness of the price was due to the defectiveness of the notice, was well-founded. With respect to the value, the weight of evidence is clearly on the side of the plaintiffs; whilst a reference to the bid-sheet and the testimony of Balmakand and Korban Ali leave little room for doubt that the low figure at which the property was knocked down was directly due to the paucity of genuine or substantial bidders in consequence of the absence of proper specification in the sale-notification.

Their Lordships cannot help regretting that the Commissioner did not annul the sale on the appeal preferred to him, which would have saved a long and harassing litigation extending over 12 years.

Their Lordships are of opinion that the judgment and decree of the High Court ought to be set aside and the decree of the Subordinate Judge restored, save and except as to villages Matasi and Mirzaganj, in regard to which the claim is permitted to be withdrawn, with liberty to the appellants to institute a fresh suit in respect thereof, if so advised. The respondents must pay the cost of this appeal and of the appeal in the High Court. And their Lordships will humbly advise His Majesty accordingly.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Watkins and Hunter.*

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1282 OF 1913.

January 27, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

YADAVALLI APPAVADHANULU—PLAINTIFF—APPELLANT

versus

KODALI VENKIAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraudulent transfer—Mortgagor and mortgagee—Benami transaction—Mortgage executed to defraud creditors—Claim petitions filed by mortgagee dismissed—Subsequent suit upon mortgage—Mortgagor if can

BASIR SHEIKH *v.* FAZLE KARIM BISWAS.

plead invalidity of mortgage for want of consideration—Estoppel.

Where, in order to defraud his creditors, a person executed a mortgage *benami* and set up the mortgagee to prefer claim petitions based on such mortgage and where those petitions had been dismissed by the Court:

Held, that he was not estopped from afterwards setting up the fraudulent nature of the mortgage and questioning it on the ground of want of consideration.

Kondeti Kama Row v. *Nukamma*, 31 M. 485; 4 M. L. T. 331; 8 M. L. J. 576 and *Varadarajulu Naidu* v. *Srinivasulu Naidu*, 20 M. 333, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge of Masulipatam, in Appeal Suit No. 38 of 1913, preferred against that of the Court of the Principal District Munsif of Masulipatam, in Original Suit No. 447 of 1910.

FACTS.—The suit was upon a mortgage-bond executed by the 1st defendant in favour of the plaintiff, the other defendants being the sons of the 1st defendant. The main defence was that the mortgage was not supported by consideration but was executed to shield the property from the creditors of the 1st defendant. Prior to this suit the properties comprised in the mortgage having been attached by certain creditors of the 1st defendant, the latter caused the plaintiff to file claim petitions based on the mortgage but the said petition was dismissed. The Court of first instance found that the bond was supported by consideration and decreed the suit, but on appeal that decree was reversed, and the suit was dismissed, the Court holding that there was no consideration for the deed. The plaintiff thereupon preferred this second appeal.

Mr. *P. Nagabhushanam*, for the Appellant:—The 1st defendant has admitted in his written statement that the mortgage was collusive and intended to shield the property from his creditors. The deed had been acted upon and the 1st defendant had caused the mortgagee to prefer a claim petition in a Court of law. It is an established principle that when a party to a deed presents it in a Court and asks the Court to act upon it, he cannot afterwards be allowed to ignore such invitation and plead that the document was a sham transaction. It is now too late for the 1st defendant to go back and question the validity of the mortgage. The question whether the Court gave effect to the document or not, is quite immaterial. *Kondeti Kama Row* v. *Nukamma* (1). and *Varadarajulu Naidu* v. *Srinivasulu Naidu* (2).

Mr. *V. Ramesam*, for the Respondent, was not called upon.

JUDGMENT.—It is argued on behalf of appellant that the 1st defendant having, as admitted in his written statement, executed a collusive mortgage-deed intended to defraud his creditors and set up the mortgagee to file in Court claim petitions based thereupon, is precluded from pleading in the present suit that the said mortgage is void for want of consideration.

We can find no authority in support of this view. The two cases relied on by the appellant [*Kondeti Kama Row* v. *Nukamma* (1) and *Varadarajulu Naidu* v. *Srinivasulu Naidu* (2)] are clearly distinguishable on the ground that in the present case the attempted fraud was unsuccessful and the claim petitions were dismissed. In *Varadarajulu Naidu* v. *Srinivasulu Naidu* (2) the learned Judges were unable to say that the fraudulent purpose had not been carried into effect and in *Kondeti Kama Row* v. *Nukamma* (1) the genuine nature of the transactions had been declared by a Court in proceedings in which both parties to the fraud were represented.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 31 M. 485; 4 M. L. T. 331; 18 M. L. J. 576.
(2) 20 M. 333.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 3134 OF 1911.
May 13, 1914.

Present—Justice Sir Asutosh Mukerjee, KT., and Mr. Justice Beachcroft.

BASIR SHEIKH AND OTHERS—DEFENDANTS—APPELLANTS

versus

FAZLE KARIM BISWAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Decree for joint possession in favour of several plaintiffs—Appeal dismissed against some plaintiffs—Appeal, whether can be heard.

An appeal against a decree for joint possession passed in favour of several plaintiffs cannot be heard

if on failure to serve notice on some of the plaintiffs-respondents the appeal is dismissed as against such plaintiffs-respondents, as the decree being for joint possession can be executed by such plaintiffs whatever view may be taken by the High Court on merits.

Bejoy Gopal Bose v. *Umesh Chandra Bose*, 6 C. W. N. 196; and *Tarip Dafadar* v. *Khotejannessa Bibi*, 10 C. W. N. 981, referred to and followed.

Appeal against the decree of the Officiating Subordinate Judge, Khulna, dated the 5th of June 1911, reversing that of the Munsif, third Court, at Bagirhat, dated the 8th October 1909.

Babus *Sasi Sekhar Bose* and *Joges Chandra Bose*, for the Appellants.

Babu *Surendra Chandra Sen*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for possession of land. The decree is one for joint possession in favour of five plaintiffs. All these plaintiffs were joined as respondents to the appeal. The appellants, however, failed to serve notices of the appeal on two of them and the result was that this Court directed the appeal to be dismissed in so far as those two plaintiffs-respondents were concerned. The appeal has now come before us for disposal in so far as it is directed against the remaining three plaintiffs-respondents.

A preliminary objection has been taken that the appeal should not be heard, because, as the decree was one for joint possession of land, whatever view may be taken by this Court on the merits, the entire decree can be executed by the two plaintiffs against whom the appeal has been dismissed. In our opinion this objection is fatal and must be allowed. The view we take is supported by the decision of this Court in the cases of *Bejoy Gopal Bose* v. *Umesh Chandra Bose* (1) and *Tarip Dafadar* v. *Khotejannessa Bibi* (2).

The result is that this appeal is dismissed with costs.

Appeal dismissed.

(1) 6 C. W. N. 196.
(2) 10 C. W. N. 981.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1630 OF 1913.

January 22, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

KOPPARTI SURYANARAYANA—PLAINTIFF—APPELLANT

versus

CHIKKALA NARAYANASWAMY AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 44, 144, applicability of—Hindu Law - Minority—Alienation by guardian of minor's property—Suit for possession of alienated property by ward on attaining majority.

A suit brought by a ward, who has attained majority, for possession of properties alienated by his guardian during his minority is governed by Article 44 of the Limitation Act, 1908, and not by Article 144 [p. 705, col. 1.]

Madugula Latchiah v. *Paly Mukkalinga*, 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 350; and *Siravadivelu* v. *Ponnammal*, 15 Ind. Cas. 365; 22 M. L. J. 404; 11 M. L. T. 198; (1912) M. W. N. 383, followed.

Such a sale does not become void merely by reason of inadequacy of consideration. [p. 705, col. 1.]

Second appeal against the decree of the District Court of Ganjam at Berhampore, in Appeal Suit No. 578 of 1912, preferred against that of the District Munsif of Sompeta, in Original Suit No. 350 of 1911.

FACTS.—Certain properties belonging to the plaintiff, having, during his minority, been alienated by his guardian, the plaintiff, more than three years after his attaining majority and less than 12 years of the alienation, sued to set aside the same and for possession of the properties alienated. Both the lower Courts held that the suit was barred by limitation. The plaintiff then preferred this second appeal.

Mr. *B. Narasimha Row*, for the Appellant:—The consideration for the sale is grossly inadequate as property admittedly worth Rs. 500 was transferred for Rs. 130. The transaction is, therefore, void. It is, therefore, unnecessary to sue for a declaration. Treating it as a suit for possession it is not barred. The decisions relied upon by the lower Courts have no application. Both of them are based on certain observations of the Judicial Committee in the case in *Madugula Latchiah* v. *Pally Mukkalinga* (1) which, however, do not support them.

(1) 30 M. 393; 17 M. L. J. 220; 2 M. L. T. 350

Dr. *Swaminathan* for the Respondents, was not called upon.

JUDGMENT.—We must hold, following *Madugula Latchiah* v. *Palli Mukhalinga* (1) and *Sivavadivelu* v. *Poonnammal* (2), that Article 44 of the Limitation Act applies and that the suit is time-barred.

It is contended that the sale is void, as being for an inadequate consideration, and hence no declaration to set it aside is necessary, and the suit may be treated as one for possession governed by Article 144. But no authority is shown us for holding the sale to be void on this ground.

The second appeal is dismissed with costs.

Appeal dismissed.

(2) 15 Ind. Cas. 365; 22 M. L. J. 404; 11 M. L. T. 198; (1912) M. W. N. 383.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 303 OF 1912.

July 28, 1914.

Present:—Justice Sir Asutosh Mukerjee, Kt., and Mr. Justice Beachcroft.

GANGA RAM AGARWALLA AND ANOTHER —DEFENDANTS—APPELLANTS

versus

LACHI RAM KISHEN DYAL—PLAINTIFF —RESPONDENT.

Evidence Act (I of 1872), ss. 9, 11 - Account book, entry in, relevancy of—Signature of a document, place and manner of, immaterial—Document to be authenticated—Signature anywhere to be put—Insertion of name validates document in handwriting of party—Document, when operates as release.

The absence of an entry in a book of account is regarded as a relevant fact not under section 34, but under sections 9 and 11 of the Indian Evidence Act, to prove that an alleged payment was not made; but the weight to be given to such absence depends upon the circumstances of each case. [p. 706, col. 2]

Imrit Chamar v. *Sridhar Pandey*, 13 Ind. Cas. 120; 15 C. L. J. 7; 17 C. W. N. 108 and *Ali Nasir Khan* v. *Manik Chand*, 25 A. 90 at p. 92 (F. B.); A. W. N. (1902) 207, referred to.

The place and manner of signature of a document are immaterial, provided that the signature is inserted in such a manner as to authenticate the document; and where an instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at the commencement. [p. 707, col. 1.]

Holmes v. *Mackrell*, (1885) 3 C. B. (N. S.) 789; 140 E. R. 953; 111 R. R. 837, referred to.

Hence, a document giving a co-debtor release from all liabilities is operative as such though not signed by the executant, and is a valid agreement although it may not operate to the prejudice of the other debtor, should a question of contribution arise, as between them. [p. 707, col. 1.]

Appeal against the decree of the Subordinate Judge of Shibsagar, dated the 26th June 1912.

Mr. *N. C. Bardaloi*, for the Appellants.

Babu *Manmohan Dutt*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit for recovery of money due on a settlement of accounts. It appears that there were sale and purchase transactions between the firms of the plaintiff and defendants. The case for the plaintiff is that upon adjustment of accounts to the end of the year 1964 (*Sambat*) Rs. 10,049-15 were found due from the firm of the defendants (Ganga Ram and Moti Ram) to the firm of the plaintiff (Luchi Ram Kishen Dyal), and that thereafter payments were made, with the result that at the date of the institution of the suit, a sum of Rs. 7,900 was payable to the plaintiff by the defendants jointly. The defendants, who are brothers, filed separate written statements. The first defendant stated that he had separated from his brother and had made, on his own account, a payment of Rs. 1,200 to the father of the plaintiff on the 15th July 1908, in consideration whereof the latter had agreed to release him from all liability on account of the transactions mentioned. His defence in substance was that there was no cause of action against him. The second defendant admitted liability to the extent of Rs. 4,669-9-9. The first defendant in support of the defence taken by him produced a document, called a *farkati*, which he asserted was in the handwriting of the father of the plaintiff. The document is in these terms: "Ram Ram of Luchi Ram Kishen Dyal to honoured Ganga Ram Chota Ram. There was money due to this firm, out of that I have received Rs. 1,200. Out of the amount due from his firm, I received Rs. 1,200 from him and struck out his name. I have no business left with Ganga Ram Chota Ram I shall realise from Moti Ram Sheo Ram. No claim against Ganga Ram Chota Ram remains. Whatever is found due in my *khata*, I shall take from Moti Ram. I have no complaint against Ganga Ram.

If I do, I shall be held a liar in Court. *Sambat* 1965, month *Saon Badi* 2=15th July." This document, it will be observed, does not bear the signature of the alleged executant. The plaintiff repudiated the document as a forgery. The Subordinate Judge has held upon the evidence on the record that the document is genuine, and that the whole of it was written by Luchi Ram, the father of the plaintiff, Kishen Dyal. But he has held that the document is not operative in law, because it was never signed by the executant, in his opinion, the document was in substance little more than a draft which Luchi Ram might have intended to execute. In this view the Subordinate Judge has refused to give effect to the contention of the first defendant that upon payment of Rs. 1,200 to the creditor, he had secured a release from all liability in connection with the transactions mentioned. The result has been that the Subordinate Judge has made a joint decree against the defendants for the entire sum claimed, but he has made it payable in 12 monthly instalments.

In the present appeal by both the defendants, it has been urged that the document was valid and operative though not signed by the executant, and, was in any view, admissible in proof of the payment of Rs. 1,200. On behalf of the plaintiff-respondent, it has been argued that the document is not genuine and that the alleged payment was never made. The first question for consideration consequently is whether the document is genuine. In our opinion there is no room for reasonable doubt that, as found by the Subordinate Judge, the document is genuine.

The document was shown to one Gobind Ram Maheswari, who was examined as a witness on behalf of the plaintiff. He was first asked whether he knew the handwriting of Luchi Ram. He answered in the affirmative and then stated that the document was in the handwriting of Luchi Ram. The Pleader for the plaintiff then alleged that the witness had been gained over; but beyond a mere assertion there is nothing tangible to show that the witness was hostile to the plaintiff. There is also the testimony of Mr. Hardless, the handwriting expert, who states affirmatively that the document in question was written by the same person as the executant of seven other documents which were admittedly written by Luchi Ram. The expert is positive in his assertion that the writer of all these documents was the same person. We have in addition the testimony of Tarakeshwar Sarma and Ganga Ram that Rs. 1,200 was actually paid. Reliance, however, has been placed by the plaintiff upon the circumstance that the payment is not entered in the books of the firm represented by the plaintiff. The absence of an entry in a book of account has no doubt been regarded as a relevant fact, not under section 34, but under sections 9 and 11 of the Indian Evidence Act, to prove that an alleged payment was not made [*Imrit Chamar* v. *Sridhar Panday* (1), see also *Ali Nasir Khan* v. *Manik Chand* (2)]. But the question remains, what weight should be attached to this circumstance in the present case. The books of the firm, which the plaintiff represents, were, it may be assumed, even during the life-time of his father, written by himself. But as the payment was made in the shop of the defendants where the creditor had called to receive the money, it is conceivable that if the fact of payment was not mentioned by the father of the plaintiff to him, no entry would be made in the account books. We must hold in concurrence with the Subordinate Judge that the document was written by Luchi Ram and was made over to the first defendant on receipt of Rs. 1,200 from him.

The question next arises, whether the document, though not signed by the creditor, is operative as a release. It is worthy of notes that the document is produced by the first defendant, and that there is no suggestion that he obtained possession of it by unfair and fraudulent means. Consequently the theory, which found favour with the Subordinate Judge, that the document was incomplete and was little more than a draft which Luchi Ram might have intended to execute, cannot be

(1) 13 Ind. Cas. 120; 15 C. L. J. 7; 17 C. W. N. 108
(2) 25 A. 90 at p. 92 (F. B.); A. W. N. (1902) 207.

accepted as well founded. Does the circumstance then that the document does not bear the signature of Luchi Ram affect its legal operation as a release? It has not been disputed that the document was not required to be signed or executed in any particular manner under any statutory provision. Consequently the well-settled principle applies that the place and manner of signature of a document are immaterial, provided that the signature is inserted in such a manner as to authenticate the document; and where an instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at the commencement. Lord St. Leonards in his Classical Treatise on 'Vendors and Purchasers' states the rule in the following terms (14th Edition, page 142): "The signing of the name at the beginning of an agreement, which is required to be signed under the Statute of Frauds, will take it out of the Statute, as if a person write an agreement himself and begins '*A B* agrees to sell;' and such a signature will be sufficient, although space be left for signature at the bottom of the instrument." This statement is borne out by cases of the highest authority, amongst which we may mention those of *Ogilvie* v. *Foljambe* (3), *Propert* v. *Parker* (4), *Lobb* v. *Stanley* (5) and *Holmes* v. *Mackrell* (6). We are of opinion that the document in this case was operative as a release though not signed by the executant. The position consequently is that the creditor received Rs. 1,200 from the first defendant and released him from all liability under his claim. This was a valid agreement, although it might not operate to the prejudice of the other debtor, should a question of contribution arise as between them. But it is plain that the plaintiff, as representative of Luchi Ram, cannot recede from the position deliberately assumed by his father and impose a liability upon the first defendant in contravention of the terms of the release.

The result is that this appeal is allowed and the decree of the Subordinate Judge discharged. The suit will stand dismissed with costs in both the Courts as against the first defendant. The suit will, however, be decreed as against the second defendant for a sum of Rs. 6,466. This amount is obtained by a deduction of Rs. 1,200 together with interest thereon at the rate of 9 per cent. per annum, from the 15th July 1908 (date of payment) to the 22nd September 1910 (date of the institution of the suit), from the sum of Rs. 7,900 claimed by the plaintiff as the sum due to him. The plaintiff will be entitled to his costs on the sum now decreed as against the second defendant only in the Court of first instance. As between the plaintiff and the second defendant, there will be no order for costs in this appeal. The order for payment by instalments made by the Subordinate Judge will stand cancelled. A self contained decree will be drawn up in this Court.

Appeal partly allowed.

(3) (1817) 3 Mer. 53 at p. 62; 17 R.R. 13; 36 E.R. 21.
(4) (1830) 1 Russ. & M. 625; 39 E. R. 240.
(5) (1844) 5 Q. B. 574; Dav. & M. 635; 13 L. J. Q. B. 117; 8 Jur. 462; 114 E. R. 1366.
(6) (1885) 3 C. B. (N. S.). 789; 140 E. R. 953; 111 R. R. 837.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 627 OF 1912.
February 25, 1915.
Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.
SREENIVASA AIYAR—PETITIONER
versus
NATARAJA AIYAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XLVII, r. 7 Review, order granting, when appealable —Grounds stated in r. 7, exhaustive—Appeal, entertainment of, without jurisdiction—Revision.

An order granting a review is not appealable except on the three grounds specified in Order XLVII, rule 7, Civil Procedure Code. [p. 708, col. 1.]

Where a District Judge entertained an appeal against an order granting a review and set aside the order upon grounds other than those mentioned in Order XLVII, rule 7:

Held, that he had no jurisdiction to dispose of the appeal and his order could be interfered with by the High Court under section 115, Civil Procedure Code. [p. 708, col. 1.]

Hari Charan Saha v. *Baran Khan*, 25 Ind. Cas. 903; 41 C. 746, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise

the decree of the District Court of South Arcot, in Civil Miscellaneous Appeal No. 1 of 1912, preferred against that of the Court of the District Munsif of Chidambaram, in Interlocutory Application No. 772 of 1911, in Original Suit No. 1203 of 1910.

FACTS.—The petitioner's application for a review having been granted by the District Munsif, the respondent appealed to the District Judge, who set aside the order of the District Munsif even though none of the grounds specified in Order XLVII, rule 7, existed in the case. Against the latter order, the petitioner filed this civil revision petition under section 115, Civil Procedure Code.

Mr. *K. Jagannatha Iyer* (with Mr. *K. Balamukunda Iyer*), for the Petitioner:—The District Judge had no jurisdiction to interfere with the order of the District Munsif, as it did not fall within any of the three grounds specified in Order XLVII, rule 7. *Vide* Appeal against Order No. 195 of 1910 (unreported) and *Hari Charan Saha* v. *Baran Khan* (1).

Mr. *G. S. Ramachandra Iyer*, for the Respondent:—Order XLVII, rule 7, is not exhaustive. There is no question of jurisdiction involved. The District Judge had jurisdiction to entertain an appeal against the order granting review. There was only an error of law and so his order is not revisable. Vide *Amir Hassan Khan* v. *Sheo Baksh Singh* (2).

JUDGMENT.—The District Munsif's order granting the review was not appealable except on the three grounds specified in Order XLVII, rule 7, of the Code of Civil Procedure. None of these grounds apply to this case. The District Judge, therefore, had no jurisdiction to dispose of the appeal on the grounds mentioned by him [*vide* the decision in Appeal against Order No. 195 of 1910 on the file of the High Court, Madras, unreported, and the decision in *Hari Charan Saha* v. *Baran Khan* (1)]. We must set aside his order and restore that of the District Munsif. Parties will bear their own costs throughout.

Petition allowed.

(1) 25 Ind. Cas. 903; 41 C. 746.

(2) 11 C. 6 11 I. A. 237; 4 Sar. P. C. J. 559, Rafique and Jackson's P. C. No. 83.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1213 OF 1912.

June 4, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

PANCHKARI CHATTAPADHYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAHARAJ BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Ejectment—Non-transferable holding, purchaser of—Limitation Act (IX of 1908), s. 18, scope of.

A plaintiff suing in ejectment a purchaser of a non-transferable occupancy holding cannot succeed, unless he makes out a case under section 18 of the Indian Limitation Act, where his right to possession accrued long before 12 years of the commencement of the suit. [p. 709, col. 1.]

Probhabati Dasi v. *Taibaturinessa Chaudhurani*, 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C.L.J. 62, followed.

Appeal against the decree of the District Judge, Murshidabad, dated the 10th of April 1912, reversing that of the Subordinate Judge at Murshidabad, dated the 28th of April 1911.

Dr. *Rash Behary Ghose* and Babu *Bepin Behary Ghosh*, for the Appellants.

Babus *Mohendra Nath Roy* and *Sarat Coomar Mitra*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant in a suit for ejectment. The case for the plaintiff is that the disputed holding was non-transferable and was held by one Poresh Kotal as tenant. The latter transferred the holding to the defendants on the 30th December 1894. From that date, the defendant came into occupation and has ever since paid rent to the officers of the landlord, who have granted him receipts in which he is described as *guzaratdar*. On the 14th April 1910, the plaintiff instituted this suit to eject the defendant on the allegation that it was only in 1905 that he became aware of the purchase by the defendant. The Court of first instance held that the suit was clearly barred by limitation, inasmuch as the defendant had been in occupation for more than 12 years, and that it was immaterial that the plaintiff became aware of the transfer in his favour by the original tenant quite recently. On appeal the District Judge has reversed that decision. He has held that the claim is not barred by limitation as the defendant is not shown to have been in occupation as transferee to the knowledge of the plaintiff for more than

12 years before suit. In our opinion this view cannot possibly be maintained.

It was pointed out by this Court in the case of *Probhabati Dasi* v. *Taibaturinessa Chaudhurani* (1) that a plaintiff suing in ejectment a purchaser of a non-transferable occupancy holding cannot succeed, unless he makes out a case under section 18 of the Indian Limitation Act, where his right to possession accrued long before 12 years of the commencement of the suit. Here the defendant has been openly in possession of the land ever since his purchase. It has not been suggested that circumstances exist such as would attract the operation of section 18 of the Limitation Act. The plaintiff has consequently to make his choice of one of two possible alternatives, either the defendant has held as a tenant or has been in adverse possession as trespasser for a longer time than the statutory period; in either view, he is protected from ejectment.

The result is that this appeal is allowed and the decree of the District Judge set aside. The defendant has expressed his readiness to acknowledge the plaintiff as his landlord and to pay him rent. We accordingly dismiss the claim for ejectment, but give the plaintiff a declaration that the defendant holds as his tenant. The plaintiff must pay the defendant his costs in all the Courts.

Appeal allowed.

(1) 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 153 OF 1913.

March 4, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

NAGALINGA THEVAN—APPELLANT

versus

THE MUNICIPAL COUNCIL, KUMBAKONAM—RESPONDENT.

Madras District Municipalities Act (IV of 1884), s. 196 (3)—Private market—License, application for—Discretion, whether absolute.

Under section 196 (3) of the Madras District Municipalities Act, IV of 1884, a Municipality has absolute discretion to refuse to grant a license.

Somu Pillai v. *Municipal Council of Mayavaram*, 28 M. 520, doubted.

Appeal against the judgment of the Hon'ble Mr. Justice Tyabji, in Civil Revision Petition No. 768 of 1917, dated 27th October 1913 (Small Cause Suit No. 4[illegible]0 of 1911 on the file of the Court of the Subordinate Judge of Kumbakonam).

FACTS.—The suit was for damages for illegal refusal to grant a license. The Subordinate Judge of Kumbakonam held that the Municipality had absolute power to refuse a license and dismissed the suit. The plaintiff then preferred a Civil Revision Petition (No. 768 of 1911) to the High Court and Tyabji, J., who heard the petition, dismissed the same. The present appeal is under section 15 of the Letters Patent against that order of dismissal.

Mr. *C. R. Subramaniya Iyer*, for the Appellant:—The Municipality has no absolute discretion to refuse to grant a license. Such a refusal must be based on proper grounds. Arbitrary refusals will be interfered with by the Court. See *Somu Pillai* v. *Municipal Council of Mayavaram* (1).

Mr. *V. S. Govindachariar*, for the Respondent, was not called on.

JUDGMENT.—The Municipality has absolute discretion under section 196 of the District Municipalities Act to refuse to grant a license. *Somu Pillai* v. *Municipal Council of Mayavaram* (1), which was decided with reference to section 191, does not affect the present case.

In this latter section words enabling the Municipality to refuse an application are not to be found. We feel some doubt about the correctness of the decision in *Somu Pillai* v. *Municipal Council of Mayavaram* (1), but it is not necessary to consider it any further as the present case is not governed by it.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 28 M. 520.

AHMED MUSAJI *v.* HASHIM EBRAHIM.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

January 19, 1914.

Present:—Lord Dunedin, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

AHMED MUSAJI SALEJI AND OTHERS—APPELLANTS

versus

HASHIM EBRAHIM SALEJI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2, 97—Decree, whether Code contemplates the existence of adjudications which are both decrees and orders or which are neither decrees nor orders—Partnership, suit for accounts of—Illegal direction as to inquiry by Assistant Referee embodied in preliminary decree—Appeal—Whether such direction can be objected to in an appeal against final decree—Contract Act (IX of 1872), s. 254—Partnership, dissolution of—One partner keeping funds and employing them for his own benefit—Interest, liability for, misconduct or fraud if essential—Direction to pay into Court in a partnership suit, if discretionary and when interfered with in appeal—Party taking the chance of success, if can be permitted to question jurisdiction of Court in case of failure.

In a suit to have partnership accounts taken, the Trial Judge declared that the partnership was dissolved from a particular date and then ordered and decreed that the Assistant Referee should enquire into and ascertain who the partners were that were entitled to share in the assets and good will of the said partnership business and take an account of the dealings of the parties with the assets of the said partnership business. No appeal was preferred against the said adjudication, the Assistant Referee held the inquiries directed and submitted his report to the Trial Judge, who adopted it after hearing objections thereto. In an appeal against the latter decree the appellant raised the question whether the inquiry as to who the partners were that were entitled to share in the assets and good will of the partnership was rightly included in the adjudication by the Judge or whether the enquiry was not one which ought to have been made by the Judge himself:

Held, that the Code of Civil Procedure made no provision for something which was neither a decree nor an order, nor for anything which was both, neither did it provide that one adjudication by the Court could be resolved into diverse elements, some of which were decrees and some orders; that the adjudication began by settling *in limine* the rights between the parties and declaring that the partnership was dissolved; that the said declaration was the foundation of all subsequent accounts and proceedings which were merely incidental thereto and consequential thereon; that it did not matter whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio*; that the declaration when made became in substance a decree; that it did not cease to be such, because a subordinate part of it, if correctly made, might have been made separately as an order; that it conclusively determined the rights of the parties in regard to certain essential matters involved in the suit; that the expression 'matters in controversy' occurring in the definition of 'decree' in section 2 (2) of the Civil Procedure Code could not be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided if any question had arisen and were the foundation of the whole decision; that accordingly section 97 of the Civil Procedure Code applied to the case; and that, therefore, the objection was too late. [p. 712, cols. 1 & 2.]

Khadem Hossain v *Emdad Hossain*, 29 C. 758; 5 C. W. N. 617, followed.

Where, on a dissolution of a firm, one of the partners retains the assets of the firm and applies them in continuing the business for his own benefit he will be ordered to account for these assets with interest thereon, even though there may be no fraud or misconduct amounting to fraud. [p. 712, col. 2.]

An order directing one of the parties in a suit for dissolution of partnership to bring into Court certain sums alleged to be partnership funds, is one purely in the discretion of the Court and will not be interfered with unless exercised on some wrong principle. [p. 712, col. 2.]

It would be deplorable to allow a party to take his chance of success before a Court and then, when he had lost the day, to contend that the matter should not have been adjudicated upon at all. [p. 712, col. 1.]

Appeal from the decree and judgment of the High Court of Judicature at Fort William in Bengal, dated 1st September 1913, confirming the decrees and orders passed by Fletcher, J., dated 30th August 1909, 26th January 1912, 27th March 1912 and 22nd April 1912.

FACTS.—The suit was for accounts of a dissolved partnership. The Trial Judge declared the partnership dissolved from a date prior to the suit and referred the question of determination of the partners, who were entitled to share in the assets and good will of the partnership business, and that of accounts to the Assistant Official Referee. There was no appeal against the said adjudication. The Assistant Referee held the inquiries ordered and submitted his report to the Trial Judge. Objections were put in and argued and the Judge finally adopted the report. In an appeal against this latter decree, which was the final decree in the case, it was objected that the Court itself ought to have determined the question as to who the partners were that were entitled to share in the assets and good will of the partnership and that referring it to the Assistant Referee was improper and consequently the decree which was

based on it was illegal. The High Court held that, though the inquiry ought not to have been directed, yet inasmuch as the direction had been embodied in a preliminary decree and as the latter had not been appealed against, the propriety of that decree could not, under section 97, Civil Procedure Code, be questioned in an appeal against the final decree. Hence this appeal to His Majesty in Council.

Sir *Robert Finlay*, *K. C.*, and Mr. *Dunne*, for the Appellants :—The High Court having conceded that the inquiry was wrongly ordered, it ought to have set aside the decree. Section 97 of the Civil Procedure Code has been misconstrued. There is no decree in this case, as there was no adjudication. There is only an order as defined in section 2, clause (14), in so far as the same goes further than declaring rights, and is not appealable. *Vide* section 104, Civil Procedure Code. *Vide* also *Khadem Hossain* v. *Emdad Hossain* (1). In the absence of any finding as to misconduct or fraud, the lower Court erred in allowing interest, especially as the same was not claimed in the plaint. To find a liability for interest fraudulent retention or improper application must be proved, as also the time when such fraudulent retention commenced. There is absolutely no such proof in this case. *Johnson* v. *Rex* (2), *Burland* v. *Earle & Sons* (3). The order as to deposit of the money is clearly illegal, inasmuch as the appellants are themselves entitled to more than half the share in the partnership assets.

Messrs. *Upjohn* and *Cozens Hardy*, *K. C.*, and *Lowndes*, for the Respondents : Even in the absence of misconduct, a partner, who after dissolution gets possession of partnership assets and uses them for his own benefit, is liable at the option of the other partners either to pay interest or to make good the profits made out of the employment of such assets. The finding in this case, however, amounts to one of misconduct. *Vide* Lindley on Partnership, Bk. IV, Ch. II, section 2, page 677; *Clements* v. *Hall*(4) and *Yates* v. *Finn*(5). The claim for interest need not be contained in the plaint; *Burland* v. *Earle & Sons* (3). In any event the matter was one for the discretion of the lower Court. The direction to pay money is quite proper as the action was a species of administration, and such directions are also given when Receivers are appointed.

(1) 29 C. 758; 5 C. W. N. 617.

(2) (1904) A. C. 817; 73 L. J. P. C. 113; 20 T. L. R. 697; 53 W. R. 207.

(3) (1905) A. C. 590 at p. 592; 93 L. T. 313.

(4) (1857) 2 De G. & J. 73 at p. 186; 27 L. J. Ch. 349; 4 Jur. (N. S.) 494; 6 W. R. 358; 44 E. R. 954; 119 R. R. 74.

(5) (1880) 13 Ch. D. 839; 49 L. J. Ch. 188; 28 W. R. 387

JUDGMENT.

LORD SUMNER.—This was an action to have partnership accounts taken, and for that purpose to have various matters decided by the Courts. Three questions only were raised before their Lordships on the present appeal.

The circumstances raising the first question were as follows. The membership of the firm was in dispute. Certain persons were alleged, on one side, to have been partners, and, on the other, to have been only employees remunerated by a share of annual profits. The suit was begun on 30th June 1908, and on 30th August 1909 the Trial Judge, Fletcher, J., by his formal adjudication (to use a neutral term) "declared" that the partnership in question was dissolved as from 1st July 1907, and then "ordered and decreed" that —

"It is referred to the Assistant Referee of this Court to take the following account and to make the following inquiries, that is to say :—

1. To inquire who were the partners who were entitled to share in the assets and good will of the said partnership business ;

2. To take an account of the dealings of the parties with the assets of the said partnership business ;"

and, further, certain other mattere not now material.

This adjudication was immediately appealable, but was not appealed. The Assistant Referee duly held the inquiries directed, and all matters were gone into at a great expenditure of time and money. His report on inquiry No. 1 was adverse to the appellants, and being excepted to by them was confirmed by Fletcher, J.

The appellants then, by memorandum of appeal, dated 23rd May 1912, raised the question whether inquiry No. 1 was rightly included in the adjudication dated 30th August 1909, or whether it was not one which should have been made by the learned Judge himself. This at once and for the

first time raised the question, which is the first and chief issue in the present appeal, whether the above-mentioned determination of Fletcher, J., was a "decree" or an "order" within the meaning of those terms in the Civil Procedure Code, Act V of 1908. If it was a decree it was a preliminary decree within section 97, and any appeal was incompetent and barred thereby; if it was an order it was appealable still. Their Lordships would unfeignedly deplore a state of procedure which enabled the appellants to take their chance of success before the Assistant Referee at such a cost in time and money and then, after they had lost the day, to contend that the matter never should have gone before him at all; yet it must be so if such be the meaning of the Code.

The High Court, while thinking that the inquiry in dispute should not have been directed, decided at the same time that the adjudication of Fletcher, J., which included this direction, was itself a decree and, therefore, being a preliminary decree, could not under section 97 of the Code be questioned on the final appeal. Their Lordships are in accord with the learned Judges of the High Court.

The adjudication itself began by declaring that the partnership was dissolved as from a certain date, and thus *in limine* settled rights between the parties. This declaration was the foundation for all subsequent accounts and proceedings, which were merely incidental thereto and consequential thereon. It matters not whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began, or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court, or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio*. The declaration when so made was what the Court's adjudication, and indeed the appellants' own case, call it, a decree. The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders. This was in substance a decree: it did not cease to be such, because a subordinate part of it, if correctly made, might have been made separately as an order. It conclusively determined the rights of the parties in regard to certain, and those essential, matters involved in the suit, and the expression "matters in controversy," in section 2 (2) (the definition of "decree"), cannot, in their Lordships' opinion, be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided if any question had arisen and were the foundation of the whole determination. The Code has got rid of such doubts as were debated in *Khudem Hossain* v. *Emdad Hossain* (1). Accordingly section 97 of the Code applies: the appellants took their objection too late and the High Court rightly decided against them.

The residue of the case may be shortly disposed of. The appellants were ordered to bring certain money into Court and to pay interest as from a certain date. The contention on the former point, namely, that the amount was excessive, was not raised below at all and but faintly before their Lordships. In any case the amount ordered to be brought into Court was a matter of discretion and that discretion does not appear to have been exercised on any wrong principle. No more need be said as to this. The other point is equally short. It is well settled that in certain cases, when on the dissolution of a firm, one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud. The report of the Assistant Referee disclosed conduct of this sort on the appellants' part falling within the decided cases, even if it did not amount to fraud, as probably the Referee meant to find that it did. Both Courts below adopted this report and, therefore, there are concurrent findings of fact against the appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Burton, Yeates* and *Hart*.

Solicitors for the Respondents: Messrs. *Watkins* and *Hunter*.

AMJADNESSA BIBI *v.* RAHIM BAKAS SIKDAR.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 97 OF 1912.
May 28, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
Srimati AMJADNESSA BIBI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RAHIM BAKAS SIKDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 65, application of—Agreement not to prosecute, whether given under undue influence or pressure—Transaction, set aside—Consideration, suit to refund, maintainability of.

If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transatcion will be set aside and the money or security ordered to be returned.

Jones v. *Merionethshire Permanent Benefit Building Society*, (1892) 1 Ch. 173 at p. 186; 61 L. J. Ch. 138; 65 L. T. 685; 40 W. R 273; 17 Cox. C. C. 389, referred to.

But in every case of illegal composition of a non-compoundable criminal offence, a refund cannot be demanded at law.

Section 65 of the Indian Contract Act does not apply to such cases of refund of money.

Appeal against the decree of the officiating Sub-Judge, third Court Tipperah, dated the 30th of May 1911, affirming that of the Munsif, third Court, at Chandpur, dated the 28th of April 1910.

Babu *Rajindra Chandra Guha*, for the Appellants.

Babu *Satis Chandra Ghose*, for the Respondents.

JUDGMENT.—The only point raised in rhis second appeal is that the agreement ceally having been *in invito* a refund suit tan be maintained in Court. We have only to point out that neither the pleadings nor any issue nor any finding of the lower Courts nor apparently any evidence appears in support of the question of fact that there was any pressure upon t e plaintiff to pay this money in consideration for not being prosecuted. The so called admission of the defendants in their written statement goes directly to the contrary.

It is urged that in every case the fear of punishment is an undue influence and that if the defendant accepts money to screen the plaintiff from punishment he thereby exerts this undue influence. The exceptions given by Pollock on one of which alone reliance is placed is "unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable at the option of the party seeking relief." It is obviously not voidable under section 19 inasmuch as there was no coercion whatever, and we are unwilling to read into section 16 a fictitious use of the dominant position of the defendant. The law says that not only the defendant must have a dominant position but he must use it, and this has been carefully guarded against in all the cases in England to a number of which we have been rather unnecessarily referred. The rule derivable from these cases can be thus stated :—If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security ordered to be returned. There is one rather doubtful passage in the judgment of Lord Justice Bowen in the case of *Jones* v. *Merionethshire Permanent Benefit Building Society*, (1) which might be taken to extend the principle further; but the learned Judge expressed himself with extreme hesitation and abstained from expressing any opinion on it. Were we to extend the principle in the way which we are asked to do by the learned Vakil for the appellants, it is perfectly clear that in every case of illegal composition of a non-compoundable criminal offence a refund can be demanded at law. We have no desire and no intention to extend the law to any such result. It has been held that section 65 does not apply to a case of this kind.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) (1892) 1 Ch. 173 at p. 186; 61 L. J. Ch. 138; 65 L. T. 685; 40 W. R. 273; 17 Cox., C. C. 389.

RABIA BI *v.* ANGAPPAN.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 560 OF 1914.

February 26, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

RABIA BI—PLAINTIFF—APPELLANT

versus

ANGAPPAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Minor—Father-in-law, whether legal guardian of his minor daughter-in-law - De facto guardian, power of, to mortgage minor's property to purchase other properties for her—Purchase beneficial —Mortgage, whether binding on minor—Minor, whether can retain property and avoid attendant liability to pay mortgage amount.

Under the Muhammadan Law, a father-in-law is not a legal guardian of his minor daughter-in-law.

A *de facto* guardian of a Muhammadan minor is not entitled to mortgage the minor's properties for purchasing other properties for her, even though the same may be beneficial to her.

Therefore a mortgage so executed is not binding on her but if she disclaims liability to pay the mortgage amount, she must give up her rights to the property purchased.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly, in Appeal Suit No. 535 of 1912, preferred against that of the Court of the District Munsif of Srirangam, in Original Suit No. 165 of 1911.

FACTS.—Suit by a Muhammadan lady for setting aside a mortgage of her properties executed by her father-in-law during her minority and for possession of the same. The lower Appellate Court dismissed the suit holding that as the mortgage had been executed by the father-in-law (who, though not the legal guardian of the plaintiff, was managing her affairs) for purchasing a house for her, and as the purchase was beneficial to her, it was binding upon her. Against this decree the plaintiff preferred this second appeal.

Mr. *Muhammad Ibrahim Sahib*, for the Appellant:—The father-in-law of a Muhammadan minor, who is only a *de facto* guardian, has no authority to mortgage her estate to purchase other properties for her.

Mr. *S. Parthasarathi Iyer*, for the Respondents:—The lower Appellate Court has found that the purchase was beneficial to the plaintiff. She being a *gosha* lady, it is really convenient for her to have more space to move about without being observed by strangers. In any event, she cannot retain the property and disclaim liability.

JUDGMENT.—The plaintiff sues to set aside a mortgage of her properties effected by her father-in-law. Her suit was dismissed on the ground that the mortgage was effected for necessary purposes.

The Subordinate Judge finds that the father-in-law was not her guardian under the Muhammadan Law, but he was really managing her affairs: we agree with his finding. He also finds that he purchased certain properties under Exhibit IV for the plaintiff. The purchase was in his opinion beneficial to her, as she is a *gosha* lady. To raise money for the purchase the father-in-law executed the mortgage now sought to be set aside.

We are of opinion that a person who is not a minor's guardian in law but only a *de facto* guardian, is not entitled to mortgage the minor's property to purchase a house for her for the purpose alleged. It is true that it might be more convenient to her to have more space to move about without being observed by strangers. But for this purpose her guardian cannot charge the minor's property.

At the same time it is clear that she cannot retain the property purchased out of the funds so raised, and she says she lays no claim to it and is prepared to execute any conveyance if necessary. The mortgagee is willing to take a conveyance. We, therefore, set aside the decree of the lower Appellate Court and declare that the mortgages, Exhibits I and II, are not binding on the plaintiff and she is entitled to recover possession of the property in schedule II with mesne profits past and future at Rs. 25 a year from 1908. We further direct the plaintiff to execute a conveyance of the properties purchased under Exhibit IV in favour of the 12th defendant and if in possession, to surrender the property to the 12th defendant. The appellant will get her costs in this Court. In the lower Courts the parties will bear their own costs.

Appeal allowed.

GOPAL LALJI *v.* GIRDHAR LALJI.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 329 OF 1913.
February 25, 1915.
Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.
Goswami Sri GOPAL LALJI *Maharaj*
PLAINTIFF—APPELLANT
versus
Goswami Sri GIRDHAR LALJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law Ballavacharya *sect—Custom—Right of transfer in property held by* goswamis—*Gift, validity of.*

A *goswami* of the *Ballavacharya* section has specific interest, capable of being partitioned and transfered, in the property held by him, including even the temple and idol. Hence a gift made by one *goswami* of his interest in the property held by him to another *goswami* and his successors-in-office is lawful and not contrary to the customs and usages of the cult. [p. 719, col. 1.]

First appeal from the decision of the Subordinate Judge of Muttra, dated 27th August 1913.

Dr. *S. N. Ser*, with him the Hon'ble *Dr. Sunder Lal* and Dr. *S. C. Banerji*, for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru* (with him Messrs. *D. C. Banerji, Jawahir Lal, L. M. Banerji, Benode Bihari* and *R. K. Malvaiya*), for the Respondent.

JUDGMENT.—The suit out of which this appeal arises relates to certain disputes between *Ballavacharya Goshains.* A case relating to the customs of this sect lately came before their Lordships of the Privy Council in the case of *Mohan Lalji* v. *Gordhan Lalji Maharaj* (1). The principal defendant in the present suit was the respondent in that case their Lordships in referring to the history of the sect made the following observations:

"The *Ballvacharya* cult, in reality an offshoot of *Vaishnavism*, was founded in the sixteenth century of the Christian era by one Ballavacharya, who is usually designated among his followers and disciples as *Maha Pirbhuji.* He and his descendants, who constitute the *Ballavacharya Goshain kul*, are held in great veneration by the members of the sect and regarded as the incarnation of the famous and favourite Hindu deity, Krishna, whom in common with other Vaishnavs (Vishnuvites) they worship. The cult established by Ballavacharya differed in several particulars from the practices in vogue among other votaries of Krishna, the principal point of difference consisting in the fact that he repudiated the practice of celibacy and asceticism practised by the other *gossains.*

"The *Ballavacharya Goshains*, in other words, the descendants of Ballav, possess several principal temples, each of which is presided over by a member of his *kul* or family, who is styled a *tikait.*

"The defendent Gordhan Lalji is in possession of one of the most important of these temples, if not the most important, which is situated at Nathdwara in the Odeypore State".

The sect possesses a number of temples in different parts in India; including a considerable amount of immoveable property. Large offerings are made from time to time by the votaries of the sect. In the present case it would seem that there are or were offerings coming even from Zanzibar.

The immediate cause of the present suit was a deed of gift, dated the 2nd of April 1910. The document is in the form of an indenture and is made between Goswami *Shri* Girdhari Lalji Maharaj (the first defendant) of the one part and "Goswami Tikayet Sri 108 Sri Goverdhan Lalji Girdharji Maharaj of Sri Nathdwara" of the other part. This document, after reciting the title of the grantor to "one-fourth part or share in all the hereditaments and premises in the schedule hereto more particularly described" and mentioned, granted, conveyed and assured in absolute gift to the grantee and his successors in office to the *gaddi* of Sri Nathji all that one fourth undivided equal share and interest of the grantor in all these pieces or parcels of lands *et cetera* more particularly described in schedule A thereunder written, to hold the said lands, hereditaments and premises and all and singular the other premises thereby granted and assured, or intended so to be, with their and every of their members and appurtenances into the use of the grantee and his successors to the *gaddi* of Sri Nathji to the only proper use and benefit of the grantee and his successors in office for ever. The *first* item in the schedule is "one temple

(1) 19 Ind. Cas. 337; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L. J. 612; 15 Bom. L R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 40 I. A. 97.

building of Shri Naunit Priyaji Maharaj *altas* Raja Thakur, with all the images including Shri Raja Thakur installed therein." The *second* item is "one temple building of Shri Dauji Maharaj." The *third* and *fourth* items are *baithaks*. The *fifth* item is "the *zamindari* and *muafi* rights of the whole village of Gokul consisting of two *mahals*, that is, old and new Gokul and all the *abadi* rights to tanks, grounds, habitation, ghats, the river, *et cetera*, and all sorts of income from Mandi Bazar Tolai Sewai, and all other rights whatsoever relating to the Sri Raja Thakur". There are two items of property in all in the schedule the twentieth and last item being images in the temple of Shri Naunit Priyaji Maharaj.

The present suit has been instituted for the purpose of obtaining a declaration from the Court that this deed of gift is ineffectual, null and void. In the plaint the plaintiff alleged that he was the sole manager and *gaddinashin* of the temple and as such solely entitled to the property, one-fourth of which purported to be granted by the deed in question. The contention in this Court was that the plaintiff, the defendant No. 1 and the defendant No. 2 constituted a corporate body of trustees of the temple and its property and that accordingly the defendant Girdhar Lalji had no specific interest in the temple or the property, and no right to make the deed of gift.

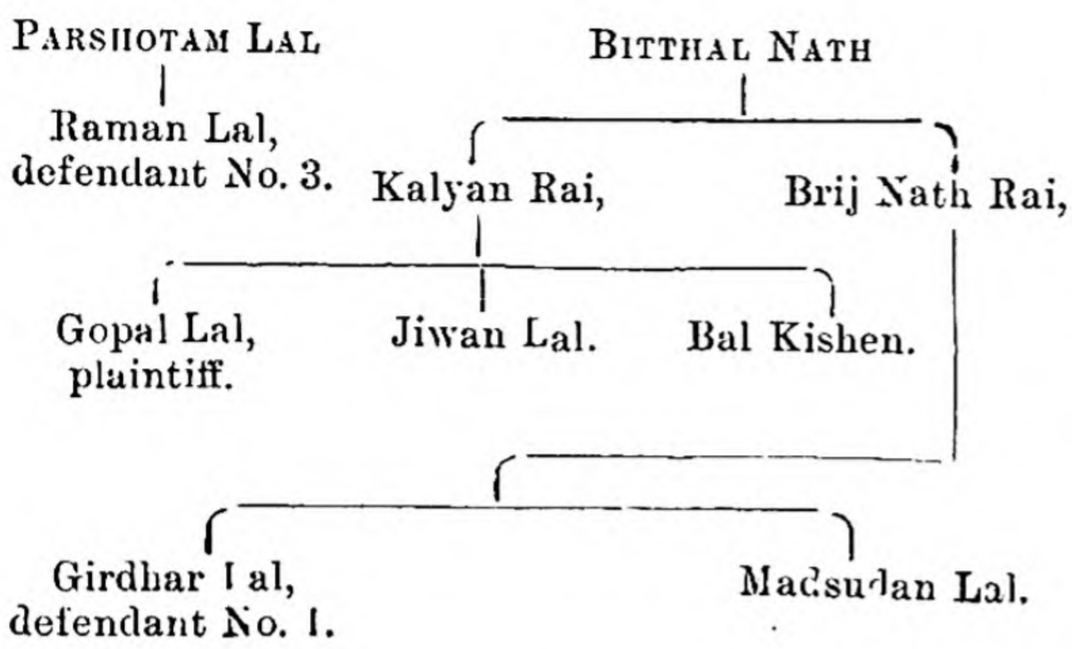
There can be no doubt that if we must regard the property as "trust" property in the strict sense, dedicated for a charitable or religious purpose in the hands of duly constituted trustees of the charitable or religious object, one or more of such trustees would have no power to alienate the trust property or delegate their powers and duties contrary to the trust. In the present case the plaintiff has endeavoured to show that such a trust existed and that Goswami Sri Girdhar Lalji occupied the position of one of three joint trustees on whom, according to custom and Hindu law, the trust had devolved. He contends that even if numerous transfers and alienations are proved to have taken place in the past, such alienations and transfers were breaches of trust. The defendants on the other hand contends that the transfer complained of could legally be made, that there was nothing in it contrary to law or to the usages and the customs of the sect. They have adduced a large amount of evidence showing how this property and other property of a similar nature (as they allege) have been dealt within the past by members of the sect including the plaintiff himself. They say that these dealings were not and have never been considered by the sect as contrary to law or to their customs and usages. In considering the evidence and the inference to be drawn from such evidence, we think that we should bear in mind that the cult hold the theory that they are incarnations of the deity and the fact that the transfer complained of was made in favour of a member of the cult, holding a very exalted position therein.

The first transactions dealing with the property is a deed executed in the year 1852 by a lady named Janki Bahuji Maharaj, widow of Goswami Sri Govinaji Maharaj. The opening clause is as follows: "I now having become old have made Goswami Bitthal Nathji and Parshotamji, who are my sister's son's sons, the proprietors of my house, that is of the following." Then follows a description of the property commencing with "Sri Thakurji Sri Naunit Lal Priyaji with temple". The property includes *zemindari* and *muafi laga* in Zanzibar, income from Jodhpore, etc., etc. It is evident from this document that the lady had no sons. She had a daughter's son for whom she made some provision, but the idol, temple, etc., were given to Goswamis Bitthal Nathji and Parshotam Lalji. The explanation of the exclusion of the daughter's son was probably the custom of the sect. The daughter's son would be a *bhat* and incapable of performing *puja* (See the decision of their Lordships in the case already referred to). The important part of the deed is that the lady treats the property as her own and makes the donees "proprietors".

The validity of this document was challenged first by Ranchhore Lal (the donor's daughter's son) and afterwards by persons alleging themselves to be reversioners of Goswami Sri Govindji, the husband of the donor. The deed was upheld and the property or at least the temple from that time remained in the hands of Bitthal Nathji and Parshotamji and their decendants up to the time of the transfer complained of in the present suit.

GOPAL LALJI *v.* GIRDHAR LALJI.

We here give a short pedigrce of the family:—



The next transaction of importance took place in March 1888. Sri Kalyanji, Sri Brij Nathji (the sons of Bitthalji) and Raman Lalji (the son of Parshotam Lal) partitioned certain property between them. The partition was carried out by means of a submission to arbitration and an award. The property partitioned included 16 temples. Clause 2 of the award says: "the property, a detail of which has been ascertained up to this time, has been divided. The parties will be *owners by halves* of any other property which may be found to exist in addition to the said property." Clause 3: "besides the property divided mentioned above, the parties are *owners by halves* of (1) the temple of Thakur Sri Dauji Maharaj, (2) the temple of Madan Mohanji Maharaj situate in the city of Muttra, and (3) the temple of Thakur Sri Naunit Lalji Maharaj, known as Raja Thakur, situate in Kasba Gokul. The parties will be the owners of and responsible for the expenses connected with the money dealings carried on at the temples of Thakur Dauji, Madan Mohanji Maharaj and Sri Naunit Lalji Maharaj *by halves.*" This partition seems to indicate that the parties to it (influential members of the cult) considered that there was nothing wrong or contrary to the usages of the sect in partitioning their temples and property held in connection with the temples. It is contended on behalf of the plaintiff that the temple of (1) Thakur Sri Dauji (2) Madan Mohanji and (3) Naunit Lalji (the temple now in dispute) were not partitioned. This is not quite correct, because clause (3) provides that the parties should be owners of these three temples *by halves*; besides there is no thing to show that these temples and the property connected therewith differed in any way in their nature and origin from the rest of the property which was more completely partitioned. The probabilities are that all the property including the property in dispute was acquired in the same way. In May 1888 Kalian and Brij Nath mortgaged to an outsider some of the property allotted to them under the award. By deed, dated the 18th of October 1894, Madhsudan (the son of Raman, son of Parshotam) after reciting the arbitration award and that he had acquired a *gaddi* and properties in Ahmedabad, relinquished his $\frac{1}{4}$th share in favour of his brother, Sri Girdhar Lalji (the interest in the temple of Naunit Lalji is included in this relinquishment).

On March 23rd 1895, Sri Raman Lal made a gift of four *bighas* odd to his Pandit, one Damodarji. It is not quite clear whether this plot was or was not part of the property granted by Janki Bahu in 1852. In January 1899 the plaintiff (Sri Gopal Lalji) sued Girdhar Lalji for contribution to the expenses of the temples. In the plaint he set forth the deed of relinquishment, ahead mentioned, by Madhsudan in favour of Girdhar Lalji, thereby recognizing the right of Madhsudan to make the relinquishment and the title of Girdhar Lalji to a specified share. Girdhar confessed judgment and the plaintiff got his decree. In March 1899 an outsider sued Girdhar Lalji and obtained a decree; his property was attached and the plaintiff purchased it.

By a sale-deed, dated 2nd July 1902, after reciting the arbitration award and reciting the deed of relinquishment and reciting the purchase at auction-sale of the interest of Girdhar Lalji, the plaintiff, Gopal Lalji, sold to a person, who was not a member of the sect, part of the property partitioned in 1888. Another somewhat similar sale was made by the plaintiff in March 1903. There were other similar sales. On the 16th of September 1906 the plaintiff executed a *sanad.* This *sanad* recited the arbitration award of 1888 and the titles of the plaintiff and Girdhar Lalji to specified shares in the temples at Muttra and Gokul are therein fully recog-

nised. By this *sanad* the plaintiff agreed to the partition of the temple in dispute (*inter alia*). The plaintiff corresponded with the defendant, Tikait Gobardhan Lalji, with regard to this proposed partition. No one suggested that there was anything wrong in partitioning the property. The letters will be found at pages 91 and 92 of the respondents' book. This was long before the transfer now complained of, and it is significant that the plaintiff communicated to a person holding the position of Tikait Gobardhan the proposed partition. In 1904 Raman Lalji, Brij Pal Lalji (a son of Raman Lalji) and Ghanshiam Lalji (another son of Raman Lalji) made a partition between them. This partition was also carried out in the shape of an arbitration award, dated the 20th of January 1904, a copy of which will be found at page 2 of the supplementary book of evidence of the respondents. The award sets forth that the party to whom a particular temple has been awarded 'shall be the *owner* in *possession* of that temple and also of every kind of property appurtenant thereto as a proprietor, *competent to make* all sorts of transfers. In this award the temples were partitioned, including even the idols, that is to say, some idols were allotted to one party and some to another.

In 1908 another partition of much the same nature, also carried into effect by an arbitration award, was made. The award is dated the 27th of March 1908. The parties to the partition were Raman Lalji and the plaintiff, Gopal Lalji.

A suit was brought by Ghanashiam Lalji to set aside this last-mentioned award. Gopal Lalji was made a defendant to that suit and he filed a written statement on the 19th of May 1912, in which he pleaded that the temples and property were not a public *waqf*, that according to the practice of the Ballab cult the awards were valid and enforceable. He further pleaded that the temples of Madan Mohanji and Dauji were the *devater* of a peculiar kind.

The plaintiff's own evidence given in the present suit seems to indicate that even now he recognises and considers that particular temples and idols are the private property of individual *gossains*. He was asked the following question: "Do the temples of Dauji and Madan Mohanji at Muttra and the property appertaining thereto which are in your and your family's possession form endowed property?" An objection was taken by the plaintiff's Pleader to this question, on the ground that it was not relevant. The plaintiff answered the question in the following way: "They do not form endowed property. They are my private property." He was asked what he meant by "private property" and the answer he gave was: "A property is said to be endowed when it is entirely recorded in the name of the Thakurji and is not brought to private use, nor is it given or sold or transferred in any way. A property is said to be private when it is used by the owner in any way he likes." He was asked if any of the five *gaddis* were endowed and he said "none of them".

The plaintiff relies on certain evidence which goes to show that part of the property was revenue-free at a very early date and further, that some of the property was released from attachment in execution of decrees on the ground that it was "trust" property. We can attach very little importance to the fact that some of the property has been revenue free. The sect is no doubt a religious sect and it is not surprising that part of the property was allowed to remain free of revenue, nor can we attach much importance to the release of the property from attachment in the face of the evidence to which we have already referred which shows that property, which we think was exactly of the same nature, was attached and sold in execution of decrees, purchased by the plaintiff himself and subsequently sold to strangers. The evidence which the plaintiff's learned Advocate relied upon more than any other was a judgment of the High Court, dated the 15th of April 1897. That was a suit by Raman Lalji against Gopal Lalji and his side of the family. The claim was that the Court should decree that one side should perform worship in the temples for a fixed period and that then the other side should have a like fixed period. The Court dismissed the suit. In the judgment of this Court the learned Judges made the following observations: "The parties here are the joint managing trustees of the temples whose duty it is as such to manage the affairs to the best of their united abilities, a duty which

they undertook to perform when they accepted the trust. They have no rights of property or any personal pecuniary interest in the subject-matter of the trust. Is one of such trustees entitled to ask a Court to partition the duties of the trust between himself and his co-trustees, and, for example, to give him the exclusive management of and possession of the trust property for say six months in each year, putting the other trustees entirely aside during his period of management"? Before this case came before the High Court there had been a statement made by the Pleaders as to the *goshains* having no pecuniary interest in the temples, and this no doubt led largely if not entirely to the remarks of the learned Judges quoted above. If we regard these statements merely as admissions as to how the property was held, they do not seem of much importance having regard to the large volume of evidence to which we have already referred, proving that the sect recognised that the property and temples were capable of being partitioned, though perhaps not in the particular way the then plaintiffs sought to partition them. The statements were apparently made by the Pleaders for the purpose of the particular case before the Court.

It is said that the decision operates as *res judicata.* Having regard to the nature of the claim in that litigation and the claim in the present litigation, we certainly cannot regard the decision as *res judicata.* The plaintiff in the present suit and Girdhar Lalji, the donor, in the deed of gift complained of were arrayed as parties on the same side. No issue was decided between them which would decide the present case. After considering the evidence we think there can be no doubt that this sect always regarded themselves as having specific interests capable of being partitioned in the property held by them including even the temple and idol. It is unnecessary for us in the present case to decide how far the whole or any particular part of the property could be validly alienated to strangers. All that we have to decide in the present case is whether or not the alienation complained of, made as it was in favour of a very exalted member of the cult and his *successors in office, is unlawful* or contrary to the customs and usages of the cult. In our opinion the plaintiff has wholly failed to establish this. We think that the decree of the Court below is correct and ought to be affirmed. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 855 OF 1913.

December 22, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Tyabji.

ABDUL RAZAK SAHIB AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF SOUTH CANARA, AND OTHERS—DEFENDANTS—RESPONDENTS.

Grant of land under darkhast *rules—Land submerged under water not struck out of* patta*—Such land included in grant—Grant, right to cancel.*

A grant of land once made under *darkhast* rules by an officer competent to make it can be set aside by superior officers only for fraud, mistake of fact or want of jurisdiction. An assignment of a *warg* once made under the impression that it included also submerged lands, cannot subsequently be cancelled on the ground that it did not. [p. 720, cols. 1 & 2.]

Land submerged under water is still the property of the former owner, unless struck out from his *patta* and the assessment proportionately reduced. [p. 720, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suits Nos. 465 and 477 of 1910, preferred against that of the Court of the District Munsif of Kundapore, in Original Suit No. 555 of 1909.

Mr. *B. Sitarama Rao,* for the Appellants.

Dr. *S. Swaminadhan,* for the Government.

JUDGMENT.

TYABJI, J.—The Subordinate Judge has dismissed the plaintiffs' suit on a construction of Exhibit C which cannot be accepted. Under it the plaintiffs became entitled to be considered the owners of "re-formed" lands at their option.

The Subordinate Judge's reasoning that the lands in question did not form part of *warg* number 32 is based on the ground that the plaintiffs' predecessor-in-title got on *darkhast* a specific extent of land for a specified amount of assessment. But the

warg number was continued and the unit purported to be granted on *darkhast* was same as the original *warg* number 32. The extent of land correctly represented the extent of the *warg* number for the time being. There is nothing to show that any portion of the land forming part of the original *warg* number 32 was "struck out of the *patta*." The indication is rather the other way.

It is next contended on behalf of the 1st defendant that the *patta* and the order (Exhibits E and F) on which the plaintiffs' rely were cancelled. Though there is such an allegation in the written statement no issue was framed on the point, the order (if there was any) by which Exhibits E and F were cancelled is not in evidence; still less is there any material, on which it can be held that there was either any mistake of fact or fraud or that public interests were so affected by Exhibits E and F as to permit of their being validly cancelled. It was suggested that an opportunity should now be given to the 1st defendant to prove all these matters. It is too late, however, to permit of this being done now: the written statement does not contain any particulars of fraud or mistake or any allegation that Exhibits E and F prejudicially affected public interests and were, therefore, validly cancelled.

The appeal must, therefore, be allowed and the decree of the District Munsif restored with costs throughout. Under section 82 of the Civil Procedure Code six weeks are specified for the time within which the the decree shall be satisfied.

It follows that the memorandum of objections should be dismissed with costs.

SANKARAN NAIR, J.—I agree. *Warg* No. 32 had *taram* assessment of Rs. 64. In *Fasli* 1270 an order was passed to collect an assessment of Rs 38-12-2. A widow, Sridevi, who was then the *wargdar* presented a petition (Exhibit X) that the land has been yielding her only 8 annas a year and that she paid this heavy assessment for 10 years at great loss to herself. She had to relinquish the *warg*. The relinquishment was accepted in 1870 (Exhibit IX). Thereupon Subraya Naik applied for it, claiming it as his "ancient land" (Exhibit XXXVI). It was given to him with a reduced assessment (Exhibit XXXVII). One of the questions for decision is whether the entire *warg* number 32, including part of it which was under water, was given to him or only the land as it then remained available for cultivation. In the revenue accounts the land, *warg*, was given the old number entered under the name of the old *wargdar* even after these reductions in the assessment (Exhibits O and XII). The *taram* assessment, Rs. 64, was entered though the amount entered as leviable for collection was the reduced amount. It was still classed *khambarti*. For these reasons the probability is that the entire *warg* number 32 was granted to Subraya. This is placed beyond doubt by what subsequently took place. In 1893 an order was issued that in cases of lands submerged and re-formed the rights of former owners cannot be considered as extinguished unless the *pattadars* relinquished and got such land struck out of their *pattas* (Exhibit C) and if not so done, the *pattadar* was to continue liable for full assessment even for land under water. In accordance with this the *pattadar* elected to receive the *patta* for the entire land and a *patta* was granted in the name of the old *wargdar* for the entire land bearing the full assessment (Exhibit E) by the Head Assistant Collector. It is said that this *patta* has been set aside by the superior authorities. That order is not before us. It is not denied that the Head Assistant Collector was competent to issue the *patta*. No mistake or fraud is alleged or proved. As I have already pointed out, the Head Assistant Collector was right in granting the *patta*; the land submerged not having been struck out of the *patta*. But assuming that he committed an error of judgment, in the absence of any invalidating circumstance like want of jurisdiction, mistake or fraud, etc., the *patta* is valid and not liable to be set aside by any superior authority.

It is also assumed by the lower Appellate Court that when Sridevi, a Hindu widow, relinquished the *warg*, it was at the absolute disposal of Government. In the absence of any statutory provision to the contrary, a relinquishment by her can only affect her interest.

I concur in the proposed decree.

Appeal allowed.

MAHALA v. EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL REVISION PETITION No. 1274 OF 1913.
November 21, 1913.
Present:—Mr. Justice Johnstone.
MAHALA—CONVICT—PETITIONER
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 110, 123—Security for good behaviour, object of—Surety, rejection of—Grounds—Enquiry, whether can be delegated—Reference to Sessions Court.

The petitioner was ordered to give security for good behaviour for a term of three years and in default to suffer imprisonment for one year. The Magistrate ordered a security bond to be given for Rs. 1,000 and four sureties to bind themselves. Four sureties were offered. The Magistrate on the report of Police rejected one of them on the ground that he was a boy and another as a bad character and the remaining two for they were relatives. Financially it was admitted that each of these persons was fit to be surety for Rs. 1,000. The appeal against the order was rejected summarily:

Held, that since the order did not state whether each and all of the sureties required were liable for Rs. 1,000 on occasion arising or Rs. 1,000 between them the order was bad in law; [p. 721, col. 2.]

that to prevent misunderstanding particulars like these should always be stated; [p. 721, col. 2.]

that mere relationship is no reason for refusing a surety, on the contrary relationship is a recommendation; [p. 721, col. 2.]

Emperor v. *Shib Singh*, 25 A. 131; A. W. N. (1902) 197, followed.

that a Magistrate should inquire himself into the question of eligibility of a person as surety and not delegate such inquiry to any one else; [p. 721, col. 2.]

that the District Magistrate should not have rejected the appeal summarily merely because it did not contain just the particulars he wanted and that he was bound by law to examine the facts and see whether the order of the Magistrate required amendment; [p. 722, col. 1.]

that under section 123 (2) of the Criminal Procedure Code, inasmuch as the order for security specified a term exceeding one year during which accused was to be of good behaviour, the Magistrate in ordering detention of the accused should have referred the case to the Sessions Court and that the fact that the Magistrate ordered imprisonment for one year only did not affect the question of jurisdiction; [p. 722, col. 1.]

that a delegation of the power to inquire into questions of the eligibility of surety to the Sub-Inspector who was the same who had challaned the case was peculiarly objectionable. [p. 721, col. 2.]

Petition for revision of an order of the Magistrate, first Class, Sargodha, District Shahpur, dated the 5th March 1913.

JUDGMENT.—No one has appeared, but nevertheless in my opinion the case is one that should not be dismissed for default The order of the Magistrate was that petitioner should give a bond under section 110, Criminal Procedure Code, to be of good behaviour for three years for Rs. 1,000 with respectable sureties. He does not say whether each and all are liable for Rs. 1,000 on occasion arising or Rs. 1,000 between them. Particulars like this should always be stated so as to prevent misunderstandings later. In his preliminary order the Magistrate included the condition that the sureties should be residents of places so near to accused that they could control him; but this is not to be found in the final order.

Petitioner offered as sureties two descendants of his own great-grandfather (Husain and Qaim), one Dara and one Bagri The last named is rejected as being a boy, the first two as relatives and Dara as bad character himself. Financially it is admitted that each of these persons is fit to be surety for Rs. 1,000. Now I would like to point out that mere relationship is no reason for refusing a surety. A very little reflection will show that a relation is more likely than any other person to have influence over a man and to be able to keep an eye on him; in short relationship is a recommendation. In this view I am supported by *Emperor* v. *Shib Singh* (1). Therefore Husain and Qaim should have been accepted. As regards Bagri, who is said to be a boy and so to be ineligible, and as to Dara said to have been twice convicted, I can find on the record no proof of the alleged facts. It is true that the Sub-Inspector of Police who challaned the case reported that Dara had two convictions against him; but in *Emperor* v. *Kaim Khan* (2) it was laid down that a Magistrate should inquire into such matters himself and not delegate such an inquiry to any one. In the present case such delegation was peculiarly objectionable, for the Sub-Inspector, who reported as to Dara, was the same who challaned the case. Dara was never asked if he admitted his previous convictions, nor was petitioner allowed any say in the matter. I am further unable to find any

(1) 25 A. 131; A. W. N. (1902) 197.
(2) 18 P.R. 1906 Cr.; 14 P.L.R. 1907; 5 Cr.L.J. 148.

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verification of the assertion that Bagri is a boy.

It has frequently been pointed out by authority that the object of the law as to security for good behaviour is not to fill thejails with bad characters, but to bring reasonable pressure to bear on such persons to respect the law. In my opinion it is not reasonable in the present case to insist upon four sureties at all. Two sureties are ample in such a sum as Rs. 1,000 *i.e.* Rs. 500 each. The Magistrate should for future guidance carefully study the law and such rulings as those noted above, to which may be added *Wasaya* v. *Emperor* (3) and the rulings relied on in these cases.

So much for the Magistrate, first Class. The District Magistrate when the case came before him took up an attitude it is impossible to commend. The petition to him was quite explicit enough ; and it was extremely hard on his part, merely because it did not contain just the particulars he wanted, to dismiss it summarily. He was bound by law to examine the facts and see whether the order of the Magistrate, first Class, required amendment ; and the Pleaders who appeared for the petitioner could have answered any questions.

In conclusion, I must point out another grave irregularity that has been committed under section 123 (2), Criminal Procedure Code. Inasmuch as the order for security specifies a term exceeding one year during which accused is to be of good behaviour, the Magistrate in ordering detention of the accused should have referred the case to the Sessions Court. No doubt the Magistrate ordered imprisonment for one year only, after the failure of the accused to furnish adequate security ; but this does not affect the question, and probably the reduction to one year at that stage was illegal.

In a case dealt with as this one has been, the only satisfactory course for this Court is to set aside the whole of the proceedings, including the orders of both the Courts below and to order re-trial. It is hoped that on re-trial the irregularities noted above will be avoided and the demand for security be reduced to reasonable dimensions.

(3) 28 P. R. 1901 Cr.

I allow the revision and set aside the proceedings and orders of both Courts and order re-trial.

Revision allowed.

PUNJAB CHIEF COURT.

ORIGINAL SIDE CIVIL CASE No. 17 OF 1914.

December 8, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, Mr. Justice Rattigan and Mr. Justice Shadi Lal.

In the matter of LEGAL PRACTITIONERS ACT, XVIII OF 1879, AND OF *Bhai* CHANDA SINGH, PLEADER, CHIEF COURT.

Legal Practitioners Act (XVIII of 1879), s. 13 (f)—Reasonable cause—Scope—Misconduct—Open letter by Pleader concerning Head of District—Its nature and manner of circulating—Improper—Liability of Pleader—Litigation between parties—No excuse—Pleader offering bribe to local Commissioner in a case to secure decision in favour of his client—Evidence Act (I of 1872), s. 47—Opinion as to handwriting of one's clerk—Relevancy.

Section 13 clause (*f*) of the Legal Practitioners Act is not confined to misconduct of a practitioner in his professional capacity. [p. 726, col. 1.]

An open letter containing passages of a highly improper nature concerning the Head of a District (Deputy Commissioner) and addressed to him and circulated to all and sundry is grossly improper at any time, whatever the position of the writer may be, and especially a Pleader cannot be permitted to misconduct himself in this serious manner. [p. 726, col. 2.]

The fact that the Pleader was a litigant against the Deputy Commissioner, will not enable him to escape liability in his capacity as Pleader and there is grave aggravation if the letter is sent to the presiding Officer of the Court in which the suit by the Pleader against the Deputy Commissioner is pending. [p. 726, col. 2.]

Where a Pleader, who had been engaged for the defendant in a case, sent a letter to the local Commissioner appointed therein asking him to report in favour of the dismissal of the plaintiff's claim without fail, and making an alternative suggestion which could not be read as anything else than a direct offer of a bribe:

Held, that the Pleader was guilty of gross misconduct. [p. 726, cols. 1 & 2.]

The opinion of a person as to the identity of handwriting of his clerk is relevant under section 47 of the Evidence Act. [p. 727, col. 2.]

In the matter of CHANDA SINGH.

The *Government Advocate*, for the Crown.

Mr. *Oertel*, for *Bhai* Chanda Singh.

ORDER.—This is an inquiry under clauses (*f*) and (*b*) of section 13, Legal Practitioners Act, XVIII of 1879, into the conduct of Mr. Chanda Singh, Pleader, first grade, with reference to matters which occurred while he was engaged in practice at Ferozepore. Mr. Chanda Singh is aged 54 and has been blind from early infancy, so that he has never learnt to write. He has nevertheless shown remarkable ability in contending with this affliction, and has been a prominent Pleader since 1889. His blindness compels him to trust to agents or clerks for those details of his work which require writing, but his very retentive memory enables him to keep in mind the intricate details of cases which he undertakes, and to dictate applications or other documents which require to be presented in Court.

(2). This is not the first occasion upon which disciplinary action has been taken against Mr. Chanda Singh. On the 16th of March 1908, a Division Bench of the Chief Court found him guilty of grave misconduct "during which he did not hesitate to attain his ends by false swearing," and he was at first dismissed. On an application for review the Court, on the 5th of February 1909, reduced the sentence to one of suspension from practice for three years with effect from the 16th of March 1908. In this final order the learned Judges stated that it was only because Chanda Singh was a blind man, and, therefore, incapacitated altogether from earning his livelihood otherwise, that they were prepared to take a more lenient view after he had expressed "sincere contrition for past lapses and a determination to act in future with probity and uprightness in the exercise of his profession." Mr. Chanda Singh then appealed unsuccessfully to their Lordships of the Privy Council whose final order was passed on the 22nd of February 1910*. As a result he remained under suspension for the three years from March 1908 to March 1911, though in his evidence he has apparently, through error, given the period as running from June to June.

(3). During 1912 and 1913 there was considerable friction between Mr. Chanda Singh and the civil authorities at Ferozepore over matters with which we are not directly concerned. We understand that allegations of impropriety were made by the Deputy Commissioner, Mr. Bosworth Smith, against Mr. Chanda Singh, to both the District and Divisional Judges, but without any definite result. Mr. Chanda Singh on the other hand considered himself aggrieved at the mention of his name by Lala Damodar Das, a highly placed officer in the Provincial Civil Service, in the course of his report made in connection with the conduct of Sirdar Bhagat Singh, a Sub-Registrar of the District. Bhagat Singh had figured somewhat prominently in the previous case through which Mr. Chanda Singh got into trouble before, and he is also a prominent witness in the present inquiry. We consider it unnecessary to go into any detail about Mr. Chanda Singh's grievances, and we could not properly do so as the matter is still *sub judice*. The upshot has been that Mr. Chanda Singh, on the 22nd of April 1914, filed a civil suit for damages, claiming Rs. 10,500 against Mr. Bosworth Smith and Lala Damodar Das. This suit is still pending at Ferozepore and the rights or wrongs of the affair cannot now be discussed. All we need say is that feelings were undoubtedly strained on both sides for the period of about a year ending with April 1914.

(4). It is represented by Mr. Chanda Singh that the service on Mr. Bosworth Smith as a defendant in the civil suit was effected on the 11th of May 1914. On 25th of May 1914, he admittedly addressed Mr. Bosworth Smith in what he has himself described as the 'open letter' printed at pages 1 to 4 of the paper-book. On the 26th of May Mr. Bosworth Smith forwarded a copy of this letter to the Chief Court complaining that it had been publicly circulated in the Ferozepore Barroom, and that copies had been distributed to many persons, naming among others his Head Clerk, Mr. Keelan, Lala Mool Chand, Additional District Magistrate, Munshi Niaz-ud-din, District Judge, Lala Raja Ram, Subordinat Judge, and Mr. Connor, Extra Assistant Commissioner. Mr. Bosworth Smith's complaint was that the publication of this letter containing gross untruths, particularly as a copy had been sent to the District Judge before whom the civil suit against him was pending,

*See 6 Ind. Cas. 269.—*Ed.*

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amounted to grave professional misconduct and constituted a reasonable cause under clause (*f*) of section 13, Legal Practitioners Act, for taking action against the writer.

(5). The Chief Court considered an inquiry necessary and took action appointing the Government Advocate to prefer charges under rule 21, at page 69, Rules and Orders of the Chief Court, Volume III, Edition 1911. The charges in this respect are covered by Nos. 1 to 6 of the statement of charges printed at page 4 of the paper-book, but before the matter came up for hearing a further communication was received by the Government Advocate from Mr. Bosworth Smith in September 1914, in consequence of which charges 7 and 8 were added under clause (*b*) section 13, Legal Practitioners Act, in connection with an alleged grave offence committed by Mr. Chanda Singh on or about the 24th of May 1912, of which the circumstances had only been brought to the Deputy Commissioner's notice by Sardar Bhagat Singh in August 1914. The additional charges 7 and 8 were then framed in connection with this separate matter and the whole statement of charges was communicated to Mr. Chanda Singh in the letter of 8th October 1914, printed at page 6 of the paper-book, which directed him to attend the Chief Court on the 13th of November 1914 and to bring with him all evidence, documentary or other, which he might wish to produce before the Court.

(6). The case has been before us on the 13th, 14th, 21st, 23rd and 30th of November and a considerable amount of evidence has been taken for what may be called both the prosecution and the defence. We have felt some difficulty in conducting the inquiry systematically owing to the piecemeal manner in which Mr. Chanda Singh disclosed his defence to the charges. He confined himself on the 13th of November to a brief oral denial of all charges except that he admitted addressing the open letter to Mr. Bosworth Smith on the 25th of May. He was then reticent as to charges 7 and 8 and we understood that he did not deny that the letter of the 24th of May 1912, referred to therein, was written by a man named Uttam Singh. It was only at a later stage of the inquiry, after Uttam Singh had been examined as witness No. 11 for the Crown, that Mr. Chanda Singh put forward the theory that this letter was not, in fact, written by Uttam Singh at all, and was an absolute forgery by some other person unknown acting on behalf of Sardar Bhagat Singh. We then endeavoured to clear the matter up still further by recalling Uttam Singh, but without success as the man had, in the meanwhile, disappeared leaving no trace. Then again on the 23rd of November after the Government Advocate had addressed the Court in support of the charges, we had to adjourn the case for a week to hear Mr. Chanda Singh's Counsel, but on the date then fixed his Counsel withdrew from the case, saying that his client had taken away his brief and given him to understand that he would make his own arrangements for the reply. As a fact instead of replying orally Mr. Chanda Singh then filed a long statement, described by himself as "his written statement," which purports to be an amplification of the original oral pleas for the defence. We regard this document more as a written argument traversing the whole case, including the evidence produced by the Crown, than as the concise written defence contemplated by rule 22, page 69, Rules and Orders, Volume III. To avoid prejudicing Mr. Chanda Singh we have placed the document on record, and Mr. Chanda Singh then informed us that he had nothing more to say. This method of conducting his case partly through Counsel and partly in person has been exceedingly inconvenient and throughout the inquiry we have felt that Mr. Chanda Singh was desirous of protracting the proceedings to an inordinate extent.

(7). Turning now to the precise charges we will deal first with the open letter. It may be premised that a letter so described was intended by the writer for public circulation and not merely for private use. Mr. Bosworth Smith, witness No. 1 for the Crown, has proved its receipt by him, and all the five persons named by him including Munshi Niaz-ud-Din, District Judge, before whom the civil suit against Mr. Bosworth Smith and Lala Damodar Das was pending, have sworn as witnesses

Nos. 2 to 4, 8 and 10 that the letter was actually sent to them on or about the 25th of May 1914, most of them adding that it was delivered by Mr. Chanda Singh's *munshi* as being sent by Mr. Chanda Singh himself. In addition to this we have the evidence of Gujar Ram, witness No. 6, a section-writer, who says that a copy of the letter was given to him by Mr. Chanda Singh, though at a later date apparently in the first week of June. Further Karm Chand, witness No. 7, proprietor of a local press at Ferozepore, proves that negotiations had been entered into, presumably by Mr. Chanda Singh, to get 100 copies of this letter printed. The negotiations fell through, as the witness declined to undertake the work and he returned his copy of the letter to Mr. Chanda Singh after having had it read out in the Ferozepore Bar room in Mr. Chanda Singh's presence. Then again Barkat Ali, witness No. 9, Editor of the "Observer" newspaper published in Lahore, has stated that he received a copy of the letter and published it in his paper in the issue of the 30th of May 1914. He understood that the letter had been sent to him for publication by Mr. Chanda Singh, though the latter subsequently denied this in a letter of the 6th of November. It is, however, very material to notice that in spite of the publication, Mr. Chanda Singh never wrote to the Editor disclaiming the letter or objecting to its publication. Finally Pundit Girdhari Lal, Pleader, witness No. 5, has proved the fact that the open letter was read out in the Ferozepore Bar room probably soon after its publication in the "Observer" of the 30th of May, in the presence of Mr. Chanda Singh who neither repudiated nor confirmed it.

(8). As against all this Mr. Chanda Singh, who elected under rule 23 to go into the witness-box himself as witness No. 6 for the defence, has sworn that he only made three copies of the letter, one of which was sent to Mr. Bosworth Smith, one to Government, while one was sold on the afternoon of the 25th of May to a Pleader named Ram Lal who has not been called. He has asked us to believe this story on the strength of evidence by another Ram Lal, defence witness No. 4, who has been his *munshi* since August 1913. This witness, who is little more than a boy, aged 18, states that only three copies of the open letter were prepared and Mr. Chanda Singh's insinuation seems to be that after Mr. Bosworth Smith received his copy he placed it in the hands of Lala Kanshi Ram, the present head of the Forozepore Bar, and that it was Mr. Kanshi Ram who circulated copies to Munshi Niaz-ud-Din and others and also sent a copy to the "Observer" newspaper in order to get Mr. Chanda Singh into trouble.

On the evidence before us we have no hesitation in saying that we entirely disbelieve Mr. Chanda Singh's version of the matter. We have no doubt whatever that he did circulate copies to many of Mr. Bosworth Smith's subordinate officials and to the District Judge, on the 25th of May, at the same time as the letter itself was sent to Mr. Bosworth Smith, and probably before he had sold the copy to Ram Lal, Pleader. We reject as impossible and absurd any suggestion that this circulation was contrived by Mr. Bosworth Smith, an officer of the Indian Civil Service of 17 years' standing, through Lala Kanshi Ram, a Pleader in good position at Ferozepore, while it is to our minds inconcievable that so shameful a conspiracy could have been devised and carried through in the very short time available. We observe that Mr. Chanda Singh has not attempted to call Lala Kanshi Ram as a witness and we have nothing but his own word for it that Lala Kanshi Ram is what he is pleased to describe as his 'mortal enemy.' No reasonable explanation of this alleged enmity has been given to us and there is nothing to support it except a bare statement of Jasbir Singh, witness No. 7 for the defence, who has only begun practising as a Pleader in Ferozepore since June 1912.

(9). Our finding is that Mr. Chanda Singh did in fact circulate the letter very widely as stated by various witnesses for the Crown. The letter itself contains much matter open to the strongest possible objection under any circumstances. It was a thoroughly improper letter to send to the

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District Judge in particular, seeing that it attempts to discredit Mr. Bosworth Smith who was at the time a defendant in Mr. Chanda Singh's civil suit pending in that Judge's Court. It contains, among other things, an allegation that Mr. Bosworth Smith had seriously attempted to evade summons as a defendant in the suit. Mr. Chanda Singh has endeavoured to prove this allegation by calling Miran Bakhsh, D. W. No. 5 [clerk of the District Judge's Court, to whom the service of the summons on the Deputy Commissioner had been entrusted. The evidence of this witness does not support the allegation in any way whatever. It appears that on two occasions he was waiting with an envelope containing a summons when Mr. Bosworth Smith was either leaving his Court-house, or entering his private residence. On both occasions Mr. Bosworth Smith, being engaged with other gentlemen, merely told the witness to take the letter to his office without being informed of the nature of its contents. Eventually the summons was served without any difficulty and we are satisfied that Mr. Bosworth Smith did not in fact consciously throw any difficulties in the way of service. Quite apart from this gratuitously insulting paragraph in the open letter there are other passages in it of a highly improper nature considering that the writer was addressing the Head of the District, and that the object evidently was to bring prejudice to bear against, and to show gross disrespect to, the Deputy Commissioner.

(10). It is argued for the defence that granting all this, the sending of this letter by Mr. Chanda Singh in his private capacity does not amount to a reasonable cause for disciplinary action within the meaning of clause (*f*) of section 13 of the Legal Practitioners Act. As to this, the law has not always been construed with uniformity in respect of clause (*f*), but the weight of authority appears to us distinctly in favour of the view that the clause is not confined to misconduct of a practitioner in his professional capacity. We refer to the Full Bench rulings *Le Mesurier v. Wajid Hossain* (1) and *In the matter of Two Second Grade Pleaders* (2), in support of this construction, which is to some extent also recognized by the ruling in *In the matter of a Mukhtar* (3). The words of the clause are so extensive that we do not think them capable of any other interpretation, though it might be possible to regard an offence of the kind as less serious where the misconduct is not directly traceable to an act done in a professional capacity. In the present case, however, there is the grave aggravation that Mr. Chanda Singh sent this letter to the District Judge among others, and throughout the letter there is a total misapprehension on his part of the proper attitude for a responsible Pleader to adopt in his communication with the Chief Civil Officer in charge of a District. We cannot allow the fact that Mr. Chanda Singh was a litigant against the Deputy Commissioner to enable him to escape liability in his capacity of Pleader. A letter of this kind circulated to all and sundry is grossly improper at any time, whatever the position of the writer may be and we cannot permit a Pleader to misconduct himself in this serious manner. We regard the charges 1 to 6 as amply proved and even if they stood alone, we should be disposed to treat them as justifying Mr. Chanda Singh's dismissal, looking to the previous grave misconduct of which he was found guilty in 1908.

(11). There remains the still more serious charge under heads 7 and 8 in respect of the letter, dated about the 24th of May 1912. The question which we have here to determine is one of fact only. If Mr. Chanda Singh sent this letter to Sardar Bhagat Singh, we can hardly conceive a more grave case of flagrant misconduct on the part of a Pleader. The undisputed facts are that a civil suit was proceeding at the time between Pahara Singh and Phuman Singh in the Court of a Munsif at Ferozepure. Mr. Chanda Singh was the Pleader for the defendant, Phuman Singh, and Sardar Bhagat Singh had been appointed local Commissioner. The letter purports to have been sent by Mr. Chanda Singh to the local Commissioner asking him to report in favour of the dismissal of

(1) 29 C. 890; 6 C. W. N. 556.

(2) 6 Ind. Cas. 313; 34 M. 29; (1910) M. W. N. 163; 8 M. L. T. 22; 20 M. L. J. 500; 11 Cr. L. J. 310.

(3) 9 P. R. 1902; 166 P. L. R. 1901.

the plaintiff's claim without fail, and making an alternative suggestion which cannot be read as anything else than a direct offer of a bribe. The record of the case is before us as Exhibit P-14. As a fact the local Commissioner found in the plaintiff's favour for Rs. 600 and the case was eventually decided on compromise in his favour for Rs. 350, though the writer of the letter had urged that the claim should be found to be entirely false.

(12). The case for the Crown is that this letter was written on behalf of Mr. Chanda Singh by Uttam Singh, witness No. 11, who was admittedly in his service as a *munshi* from 1902 to 1908 and again from at least November 1912 till June 1913. These are the dates as alleged by Mr. Chanda Singh and they are to this evtent supported by his register of fees and office expenses (Exhibit D-5). There are no entries in this register as it now stands indicating that Uttam Singh was employed as a *munshi*, or at any rate paid as such, during the period October 1911, till November 1912. Nevertheless Uttam Singh has stated positively that he was in Mr. Chanda Singh's service during that period and that he did write the letter in question at his dictation. It is urged for the defence that the letter does not as usual bear Mr. Chanda Singh's seal, but Sardar Bhagat Singh has produced various post cards or letters, Exhibits P-10 to 13 and 15 to 18, purporting to have come from Mr. Chanda Singh, none of which bear his seal, and we have another letter (Exhibit P-20) admittedly written by Mr. Chanda Singh to the Deputy Registrar of the Chief Court on the 29th of September 1914, which also bears no seal. We consider it sufficiently established that there is no uniform practice among the writers of Mr. Chanda Singh's letters of getting his seal affixed.

(13). Apart from Uttam Singh's positive evidence that he wrote the letter P-3 and addressed the envelope P-2, we have Sardar Bhagat Singh's evidence that he well knew Uttam Singh's writing, many of the post cards referred to having been written by Uttam Singh while in Mr. Chanda Singh's service, and that he had often seen him writing both at his own house and at Mr. Chanda Singh's. His story is that he kept the letter with its envelope and produced them in August 1914' because he knew that Mr. Chanda Singh was under a cloud in connection with the open letter. There is a slight discrepancy in evidence here, as Mr. Bosworth Smith thought that the letter reached him by post shortly before the 17th of August while Bhagat Singh says that he made it over to the Deputy Commissioner through Lala Kanshi Ram, Pleader. We do not regard this discrepancy as of any importance. It is quite obvious that the intention was to communicate the letter to the Deputy Commissioner, and the precise manner in which it reached him is immaterial.

(14). Lala Ram Rakha Mal, Barrister, Ferozepore, witness No. 13 for the Crown, has had Uttam Singh in his service for some four months in 1914, and he also is positive so far as he can give an opinion that the letter in question is in the handwriting of Uttam Singh, having had many occasions for getting documents written by Uttam Singh as his clerk. We accept the fact that neither the witness Bhagat Singh nor Ram Rakha Mal can be treated as experts on the question of handwriting under section 45 of the Indian Evidence Act, but their opinion as to the identity of the writing is relevant under section 47. In *each* case we put their opinion to the test by handing to them without previous warning the record of the civil suit Pahara Singh *against* Phuman Singh to see whether they could identify any documents thereon as written by Uttam Singh. They each picked out with ut difficulty certain applications, written statements, covering lists of documents and written arguments of Mr. Chanda Singh as Pleader for the defendant at pages 21, 29, 43, 45, 105, 109 and 121 of the record. At one time Mr. Chanda Singh asked that the Government expert in handwriting might be called from Calcutta on the point, but this could not be done without excessive expense and delay and the matter was not further pressed in later stages of the hearing. English Judges may well hesitate to put themselves forward as expressing an opinion on a question of vernacular writing in Urdu however confident they may feel, but Mr. Justice Shadi Lal, a member of the Bench holding the inquiry, is thoroughly competent to give an opinion on a point of this sort, and after a minute examination of the handwriting of the letter

post cards and documents referred to in the record of the civil suit, he has no doubt whatever that all these various documents were written by one and the same person. Even Mr. Chanda Singh's own witness No. 2, Sardar Iqbal Singh, a Pleader of Lyallpur and a first cousin of Uttam Singh, has been obliged to say that both the letter P-3 and post cards P-10 to P-13 look as if they were written by Uttam Singh, though he can give no opinion as to the writing of the address on the envelope P-2. Our conclusion is that there is no reasonable doubt that all these various documents really were written by Uttam Singh. He had unfortunately been allowed to leave the Court at a time when we were not aware that this would be denied by Mr. Chanda Singh, and he was, therefore, not asked to dentify his writings in the post cards or in the record of the civil suit. We are satisfied that he really did write the various documents put in on behalf of the defendant, Phuman Singh, in the civil suit, through Mr. Chanda Singh as the defendant's Pleader, and as these documents cover the whole period 6th March to 8th July 1912, we cannot doubt that, whatever Mr. Chanda Singh may say, Uttam Singh really was acting as his *munshi* during this period notwithstanding the fact that he is not so shown in the register D-5. The register itself strikes us as of little importance, quite apart from the possibility that it may have been got up in its present form for the purposes of the inquiry before us. It proves nothing, unless we are to rely on the absence of entries in Uttam Singh's hand from March to November 1912. Considering what an old servant Uttam Singh had been of Mr. Chanda Singh, we think it quite likely that being out of employ at the time he may have assisted his former master or he may have been, as he says, regularly employed from November 1911, though his pay is not shown in the register.

(15). The weak point in the case about this letter is that Uttam Singh undoubtedly when first questioned by a Magistrate denied having written the letter, and that his subsequent admission that he was the writer was made at the time when he was under fear of a criminal prosecution, understood to be still pending, for a relatively trivial offence of disobedience to an order of the District Magistrate. We have taken this matter carefully into account, but we cannot attach much importance to the original hesitating denial by Uttam Singh of his writing as deposed to by Sultan Asad Jan, Magistrate, called as defence witness No. 1. The record of the statement in question is said to have been lost, but even if we take the fact as proved, it only amounts to this that Uttam Singh was at first afraid to identify so incriminating a letter as having been written by him, and this is not very surprising.

(16) As regards Bhagat Singh's connection with the letter in question, the insinuation made by Mr. Chanda Singh is that Bhagat Singh was already in trouble with the Deputy Commissioner about his work as Sub-Registrar, and that he has concocted this letter as a means of getting out of trouble. His previous connection with Mr. Chanda Singh may be not to his credit, but while he was in the witness-box he struck us as giving his evidence without bias and in a straightforward manner, and we see great difficulty in accepting the defence theory. It would be extremely dangerous for Bhagat Singh to attempt to make up a case of this kind, and nearly impossible for him to do so without serious risk of the story breaking down in material particulars. It is true that the letter in question is not itself dated, but it is enclosed in an envelope bearing date the 24th of May 1912, eight days after the appointment of Bhagat Singh as a local Commissioner in the civil case. If we are to accept the defence theory it was necessary for Bhagat Singh not only to get hold of Uttam Singh and induce him to make up a bogus letter, but also to be able to produce an envelope bearing a post mark more than two years old, so as to fit in with the date on which he had been appointed local Commissioner. All this is very much easier said than done, even if we assume that Bhagat Singh is prepared to proceed to such extraordinary lengths in order to recover his good name in the eyes of the Deputy Commissioner. Our finding is that the letter is genuine and was sent by Mr. Chanda Singh to Bhagat Singh at the time, and that it has been now produced by Bhagat Singh in all good faith, whatever his motives may have been.

In the matter of CHANDA SINGH.

(17). We do not think it necessary to say much about the various wild allegations made in Mr. Chanda Singh's final written statement of defence. We totally disbelieve him when he says that he was not employing Uttam Singh in May 1912, and we decline to believe that Lala Kanshi Ram, Pleader, would condescend to anything so disgraceful as assisting in the concoction of a false case against Mr. Chanda Singh. We must, therefore, hold that the charges made under heads 7 and 8 are also clearly established, the inference being that Mr. Chanda Singh when employed as a Pleader is prepared to adopt the most improper methods of endeavouring to secure a verdict in his client's favour.

(18). Our conclusion is that Mr. Chanda Singh is guilty on both charges against him, and that, so far from endeavouring to conduct himself honourably, as promised when he was leniently dealt with on the last occasion, he has now shown that he is a man prepared to disgrace the legal profession in the most flagrant manner possible, and further to have resort to every kind of shift and untruth when endeavouring to clear himself from the charges brought agains him. We consider that any further leniency is entirely out of the question, and the only order we can pass is that he be now permanently dismissed from his position as a Pleader and debarred from ever again acting in that capacity in the Punjab. An order to that effect will be notified by the Registrar of the Chief Court in the Punjab *Government Gazette* under rule 25, at page 70, Rules and Orders, Volume III.

(19). Copies are appended of (1) the open letter referred to in charges 1 to 6 and (2) a translation (the correctness of which has not been challenged) of the letter of about 24th May 1912, referred to in charges 7 and 8. We have not thought it necessary to encumber our order with detailed extracts from these documents, as in our opinion they speak for themselves. We are almost exclusively concerned with the questions of publication and authenticity. After our findings upon these two points we need only add that we regard the letters as a complete exposure of Mr. Chanda Singh's perverse conception of his privileges and responsibilities as a Pleader, and of the lengths to which this thoroughly unscrupulous practitioner has been prepared to go in order to seek his own ends.

Pleader permanently dismissed.

APPENDIX (I).

AN OPEN LETTER TO MR. B. N. BOSWORTH SMITH, I. C. S., DEPUTY COMMISSIONER, DISTRICT MAGISTRATE AND COLLECTOR OF FEROZEPORE.

RESPECTED AND DREADED SIR,

Respected, because it is my bounden duty to respect you in your capacity as representative here of our Gracious Sovereign, which I do with all the feelings of true loyalty and homage to the Crown. It is my duty also to respect and obey all your just orders, legally issued by you as District Magistrate and Collector of the District. You will please admit there is another duty which I owe to myself and that duty is to respect myself also, and to keep my feelings of honour and self-respect intact. Dreaded, because being compelled by feelings of self-respect and honour to vindicate my character before the public, I have had the misfortune of bringing a civil suit against your good self and your coadjutor, Lala Damodar Das, B. A., District Judge, Multan, and I do not know what consequences may ensue as the result of this suit and what calamities I may have to face, you being at the Head of the District in which my suit against you is pending. Sir, I have told you how I both respect and dread you, and what I now pray for is nothing but fair play. I have lodged my suit against you in your private capacity and not as Deputy Commissioner, District Magistrate, or Collector of Ferozepore District. I have described you in my suit as District Magistrate merely because law requires a plaintiff to give the name and full description of his defendant in the plaint. Therefore, I request you to meet me in Court as a private gentleman and not to exercise your official powers in the defence of the suit against you. You have done me wrong by maligning my character and vilifying me in writing, I am a demandant of justice and you are my defendant in the case, Please, fair field and no foul play.

In the matter of CHANDA SINGH.

Yo know full well that my suit was instituted against you on 22nd April last and you will not deny that the news reached you the same evening.

The District Judge appointed the Clerk of his Court, and I admit rightly appointed him, as special messenger to effect the service of the summons upon you with a letter from him conveying a copy of my plaint. Although you sit next door to his Court, the service was not effected upon you till 11th May 1914. The Clerk of the Court found the doors of your Court room closed upon him whenever he went to effect the service of the summons. He vainly asked Superintendent, Vernacular Office, and the Reader of your Court to help in having the service effected, but none of these gentlemen also could there reach you with the summons and a copy of my plaint in his hand. The poor clerk, a duly accredited messenger from the District Judge, went to your house several times and there also he found the doors of your house always banged against him. Such attempts he made many but in these he succeeded not. It was on 10th of May 1914 that you received from the Commissioner an order asking you to explain why you had not informed the Government of the suit brought against you by me which it came to know from newspapers. You wrote to your Head Clerk, to get the summons and the copy of the plaint, for which he wrote to the District Judge and got them for you on 11th May 1914, which were sent to you in camp at Zira. You wrote to your Head Clerk to get pleas for you prepared by Gul Muhammad and Kanshi Ram, Junior, Pleaders.

The moment the news reached our Bar room, both of these two gentlemen, anxious to rise high in your favours, ran in hot haste towards the room of your Head Clerk, each trying his utmost to outstrip the other in order to be the first to be engaged for you. After seeing your letter to the Head Clerk, the former runs to your Court to express his gratitude for your conferring upon him the honour of being your Counsel in the case against me. He deems it his duty to peach and give you the information that in a civil suit pending against me in the Court of Lala Raja Ram, Subordinate Judge, the *hundi*, the basis of the suit, was executed by me on paper two annas shorter of its proper value, for which I could be prosecuted under the Stamp Law. You give him an order addressed to Lala Raja Ram, Subordinate Judge, to hand over to him for you the file of said case. He came to the Court of Lala Raja Ram, Subordinate Judge, shows him your order. Lala Raja Ram refuses, and rightly so, to hand him over the file for you, unless directed by the District Judge. The said Pleader writes a chit in pencil to the District Judge asking him to issue order to Lala Raja Ram, Subordinate Judge, to hand him over for you the required file. The file is taken to you and returned, the said *hundi* being taken out therefrom, they say, with the object of prosecuting me under Stamp Law. The moment Gul Muhammad went to you after seeing your letter to the Head Clerk, Kanshi Ram, Junior, came back to our Barroom and the first expression he used was addressed to me and it was the following "Sardar, I have received the Deputy Commissioner's order to appear for him in your suit." "You cannot dare appear against me in this case as I have already told you more than once," said I. "You having appeared for me in cases against Lashkar and others, out of which the allegations made against me by your client, the basis of the present suit, have been taken. You cannot take advantage of the instructions I gave you in those cases." I had not completed my say in this behalf when he left the room and perhaps went to you to express the effusions of his grateful heart to you for your engaging him against me. People say that in order to be the sole recipient of your favours, he told you that for certain reasons he could not pull on with Gul Muhammad and this he told you in the absence of the latter who had gone to take the file for you from the Court of Lala Raja Ram, Subordinate Judge. When he came back, Gul Muhammed says, you addressed him as follows: "Khawja Sahib I hope you won't mind if I ask Lala Kanshi Ram alone to conduct the case for me." "Thank you Sir," said he, and the poor fellow

having been thrown overboard returned quite dejected and crestfallen to our Bar room to be the victim of all sorts of jeers from the members of the Bar. Sir, all this has had quite enough demoralizing effect upon the minds of those whom I intended to produce as my witnesses in the case or to engage as my Counsel therein. Those who had promised to conduct my case for me when I served you with my notice thought my case against you pretty strong and when I prepared the plaint on 22nd April last. they changed their opinion about the strength of my case and on this ground declined to sign the plaint as my Counsel. Hence up to this day I remain unrepresented in the case, although I could once boast of having good many friends amongst the members of our Bar here. These gentlemen, whom I intended to produce as my witnesses and who gave me the information on which my interrogatories issued to you under Order XI, rule 1, Civil Procedure Code, are based, seem now to choose to be forgetting or to have forgotten what they had told me, on the ground of their memory being very weak. Now, Sir, is this all not due to the fact that you are exercising and are known to be exercising your official powers in the conduct of your defence in my case? These gentlemen may plead the weakness of my case against you or the weakness of their memory, but they cannot escape being arraigned before the Bar of the public, that they are afraid of your wrath as head of the District.

It is no ill wind that does nobody good is a well-known saying and truism and it has happened and proved so to be in my case. Although you have as yet paid nothing to Kanshi Ram, Junior, for the conduct of your defence against me, but the news that he is your intended Counsel having gone abroad, has brought him about rupees 800 and 1,000 since the institution of my suit against you. It has happened thus, people have paid him large sums of money in criminal cases now pending in the Court of Lala Mool Chand, his real brother, who is now exercising section 30 powers under you. Take for instance, he has been paid rupees hundred and seventy-five by one Atma Singh of Ratta Khera in his case of attempted murder against Harnama now pending in the Court of Lala Mool Chand, Magistrate, first Class, Ferozepore, with section 30 powers. They tell him, well, Sir, here is the money for you; this money Lala Kanshi Ram himself has often been heard in our Bar room to say is quiet money. The litigants say "take this money, do not appear for us nor for the other side," but the fact remains that his *munshi* goes in Court when the case is called in the Court of Lala Mool Chand and takes notes of the evidence. He goes there, as the Pleaders and the people here say, to represent his master and to do justice to the salt he has eaten. Sometimes the trick played is something like this, a friend or a junior is also engaged on low payment. The ordinary work is done by the friend or the junior so engaged, but the final argument in the case is prepared in writing and given by Kanshi Ram in the hands of his juniors. Now, Sir, you being at the head of the District must, of course, be aware of all this. But have you informed the Government of this state of affairs existing in your District? Are not the public justified to draw from this the inference that you are conniving at it because he is your intended Counsel to appear for you against me? Has it not highly demoralizing influence, I ask in the name of justice and fair play, on the mind of the party against whom Kanshi Ram is thus employed? I have not a word to say against the integrity and uprightness of Lala Mool Chand whom I can personally testify to be thoroughly honest. But the public know that he and Kanshi Ram are own brothers, are members of the same joint Hindu family, eat from the same plate and what they earn goes to the ancestral joint till. Therefore, Sir, I again repeat the fact that you are exercising an extraordinary influence by your official capacity upon the result of my case against you. I, therefore, do not think it too much to ask you in the name of fair play and justice either to get yourself transferred from this District or to apply to Chief Court for the transfer of this case to some other District.

Although, I know, with thousand and one complaints from the Ferozepore public against you and in spite of your various vagaries here the Government has not already thought it fit to transfer you from this District, but I am sure the sense of a true Briton for fair play will now urge

you to adopt one of the two courses suggested by me.

(*Sd.*) CHANDA SINGH,
Pleader.

Dated 25th May, 1914.

APPENDIX (2).

Translation of the letter from Chanda Singh, Pleader, to Sardar Bhagat Singh Ji.

DEAR SARDAR BHAGAT SINGH,

At this time Phuman Singh has come to me. He says: "Bhagat Singh has had service effected upon me." I, however, told you that there was no need for service upon Phuman Singh, because there was no acquaintance or relation of his in *Mouza* Lambe to give evidence for him. The plaintiff's claim is, as I have already told you, absolutely false. His first wife is alive, as also his son. What need had he to contract a second marriage and give Rs. 600 to such person as was neither the father nor brother of the girl, and, therefore, incompetent to effect her betrothal? No betrothal ceremonies were solemnised. The plaintiff's claim is altogether false. Phuman Singh has paid me a handsome money as my fee: and for this reason I wish plaintiff's claim to be dismissed without fail. Your report should be to the effect that you have made full enquiry in the village, and found the claim to be false and based on enmity. You should make a thorough and careful enquiry. The plaintiff appears to have some relatives in *Mouza* Fattan. It is, therefore, just possible that they may try to bring pressure to bear upon you. If that be the case, you should refuse to submit a report. You will not lose your commission fee of Rs. 10. I will pay you the amount from my own pocket or get it paid to you by the defendant. The report should not be against him. Herein fail not. You had better send your report to me by the 28th and I will myself present it in Court; or you may send the report direct to Court by post and inform me of its contents by means of a letter from Rakha to my address, as was verbally proposed (by you).

(*Sd.*) CHANDA SINGH,
Pleader, Ferozepore.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 635 AND 673 OF 1913
August 27, 1913.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

IN CR. A. NO. 635 OF 1913
DWARKA SINGH—APPELLANT
IN CR. A. NO. 673 OF 1913
UPENDRANATH GHOSE—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 239—Principal offender and abetter, joint or separate trial of—Judicial discretion.

Under section 239, Code of Criminal Procedure, judicial discretion has been given to the Court to try the principal offender and the abetter either jointly or separately; and the manner in which this discretion should be exercised must depend on the facts of each case. [p. 732, col. 2.]

IN CR. A. NO. 635.

Mr. *P. L. Roy*, Counsel, and Mr. *A.K. Fazlul Huq*, for the Appellant.

Mr. *K.N. Chowdhury*, Counsel, Babus *Jyotish Chandra Bhattacharya* and *Hemendra Nath Sen*, for the Crown.

IN CR. A. NO. 673.

Babus *Dasarathi Sanyal* and *Debendra Narain Bhattacharya*, for the Appellants.

Mr. *K. N. Chowdhury*, Counsel, for the Crown.

JUDGMENT.—These are two appeals by two appellants from the same judgment of the learned Sessions Judge who tried their cases together. There were three charges under section 405 and section 408 read with section 109 of the Indian Penal Code against both the appellants. The first charge related to a sum of Rs. 2,500 said to have been defalcated on 26th March 1912; the second charge related to a sum of Rs. 2,150 said to have been defalcated on 29th March 1912, and the third and last charge was with reference to a sum of Rs. 8,620 said to have been defalcated on 8th October 1912.

The first ground taken on behalf of the appellants is that there has been a misjoinder of charges; and the second is that the two appellants should not have been tried jointly. Under section 239, Code of Criminal Procedure, judicial discretion has been given to the Court to try the principal offender and the abetter either jointly or separately; and the manner in which this discretion should be exercised must depend on the facts of each case. We have gone through the judgment of the lower Court and we are of opinion

that the case before the lower Court was of such a nature that the two accused should not have been tried on the charges jointly.

An objection was taken verbally by one of the appellants, namely Dwarka Singh, on 11th June 1913, the date on which the trial began, that he ought not to be tried jointly with Upendra – the other accused, and a written application was put in on his behalf on 12th June 1913, reiterating the prayer made verbally on the first day of the trial that he should be tried separately and not jointly with the other accused: but inspite of this objection, the lower Court tried them together. We find that, by the joint trial of the two accused, complications have arisen and that the trial would have been much simpler if the two accused had been tried separately. We are not prepared to say that the appellants have not been prejudiced by the procedure adopted.

We, therefore, set aside the conviction and the sentences passed on the two appellants and direct that, if the Crown be so advised, the two appellants be re-tried separately on the charges stated in the charge sheet. The Crown may, on the re-trial of the two accused, proceed on three charges mentioned in the charge sheet or confine itself to any one or two of them; and the trial will then proceed in accordance with the directions given.

A verbal application has been made by the learned Counsel on behalf of the appellants that, if there is to be a fresh trial of the two accused separately, the trial in each case should take place before another Sessions Judge. We are told that Bhagalpur is the nearest Sessions Division to Purnea; and we, therefore, direct that the re-trial, if the Crown proceeds against the two accused separately, shall be before the Sessions Court at Bhagalpur.

Pending re-trial the appellants will remain on the same bail.

Conviction and Sentence set aside;
Re-trial ordered.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 373 OF 1914.

February 8, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

NISSANKARA RAO SUBBAYYA AND OTHERS—PETITIONERS—APPELLANTS

versus

COOLA RAMAYYA—RESPONDENT.

Criminal Procedure Code (Act V of 1898), Ch. X, ss. 133, 439 - Order under s. 133—Order in criminal trial—Letters Patent, s. 15—Review by single Judge —Appeal, maintainability of.

The orders passed under Chapter X of the Criminal Procedure Code are orders in a criminal trial within the meaning of section 15 of the Letters Patent and, therefore, no appeal lies from an order of a single Judge reviewing such an order under section 439 of the Criminal Procedure Code. [p. 733, col. 2.]

Hiranandu Ojha v. Emperor, 9 C. W. N. 983; 2 C. L. J. 149; 2 Cr. L. J. 575, distinguished.

Appeal under clause 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Ayling, in Criminal Revision Case No. 427 of 1914, preferred against that of the Sub-Divisional Magistrate of Tenali, in Miscellaneous Case No. 14 of 1913.

Mr. *P. Narayanamurthy*, for the Appellants.

Mr. *V. Ratnasomanadan* for the Respondent.

JUDGMENT.—We are of opinion that no appeal lies in this case against the order passed under section 439 of the Code of Criminal Procedure by a single Judge of this Court.

Orders made under section 133 and connected sections are not excluded from the operation of section 435 and there is no good reason for treating orders passed under this Chapter X, which deals with public nuisances and prescribes that the procedure shall be that of a summons case, as not orders passed in a criminal trial within the words of section 15 of the Letters Patent Act.

It is argued on the authority of *Hiranandu Ojha* v. *Emperor* (1) that cases where the person against whom proceedings are taken can give evidence on his own behalf are cases of a *quasi*-civil nature, but in proceedings under section 488, persons against whom orders of maintenance are applied for are permitted to tender them-

(1) 9 C. W. N. 983; 2 C. L. J. 149; 2 Cr. L. J. 575.

selves as witnesses and yet they are styled accused.' Assuming that a counter-petitioner in proceedings under Chapter X is a competent witness on his own behalf this fact will not, in our opinion, render the proceedings any less a criminal trial.

We dismiss this appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 1202 OF 1914.

January 28, 1915.

Present:—Mr. Justice Piggott.

RAJA SINGH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 106—Second class Magistrate, who is also Sub-Divisional Officer, whether can pass order binding accused to keep peace for over six months.

A Magistrate of the second class, who is also a Sub-Divisional Magistrate, can pass an order under section 106 of the Code of Criminal Procedure binding over a person to keep the peace for a period exceeding six months.

Criminal revision against an order of the Sessions Judge of Azamgarh.

Mr. *R. K. Sorabji*, for the Applicants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—I must take it from the learned Sessions Judge, who had a better opportunity of satisfying himself on the point than this Court can have, that the trying Magistrate, Mr. A. G. Ausan, was a Sub-Divisional Magistrate in the District of Azamgarh at the time when this order was passed. The question raised by this application, therefore, is whether a Magistrate of the second Class, who is also a Sub-Divisional Magistrate, can pass an order under section 106 of the Code of Criminal Procedure binding over a person to keep the peace for a period exceeding six months. The suggestion is that, as such order carries with it an alternative sentence of imprisonment in case security is not filed, the powers of a Magistrate of the second Class, even though he may be a Sub-Divisional Magistrate, are limited as regards the period of imprisonment by the provisions of section 32 of the Code of Criminal Procedure. I am clearly of opinion that the provisions of section 106 of the Code of Criminal Procedure cannot be limited in this way. The powers therein referred to are conferred upon the Court of a Sub-Divisional Magistrate, and all that such Court does under that section is to require the person convicted to execute a bond with or without sureties for keeping the peace during such period, not exceeding three years, as the Court may think fit. If the period in question should exceed one year, the provisions of section 123, clause (2), of the Code of Criminal Procedure necessitate a reference to the Sessions Judge but otherwise detention in prison, until the prescribed period expires or until within such period the required security is furnished, follows under the provisions of clause (1) of the same section, independently of the powers of the Magistrate. So long as the order requiring the applicant in this case to furnish security was passed by a Court which had authority to do so under the provisions of section 106 of the Code of Criminal Procedure, and the period for which security was required did not exceed one year, the liability of the applicant to be detained in prison unless he furnished security is something independent of the powers of the Magistrate in the matter of passing substantive sentences of imprisonment. I dismiss this application.

Application dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 973 OF 1914.

November 21, 1914.

Present:—Mr. Justice Rattigan.

KIRPA RAM—CONVICT—PETITIONER

versus

MUNICIPAL COMMITTEE, AMRITSAR —RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 172, 195, 219—Encroachments upon public street—"Notice within reasonable time" to remove them—Encroachments not recent—Penal sections, construction of.

Where the Municipal Committee of Amritsar filed a complaint under sections 172, 195 and 219 of the

Municipal Act against the petitioner alleging that he had erected certain *chhappars* which encroached upon a public street and had failed to remove them in spite of a notice given by the Committee, it being found as a fact that the alleged obstructions had been in existence for many years:

Held, (1) that section 195 of the Act was inapplicable as it could not be said that the Committee had delivered the notice to the petitioner "within reasonable time" within the meaning of the section; [p. 735, col. 2.]

(2) that section 172 was also inapplicable as it refers to encroachments or overhanging structures newly made and without permission. [p. 736, col. 1.]

The penal sections of the Act must be construed strictly and with due regard to the ordinary meaning of the words used. [p. 736, col. 1.]

Petition for revision of the order of the District Magistrate, Amritsar, dated the 21st April 1914.

Bakhshi *Tek Chand*, for the Petitioner.

Mr. *Sham Das*, for the Respondent.

JUDGMENT.—The Municipal Committee of Amritsar filed a complaint under sections 172, 195 and 219 of the Punjab Municipal Act, 1911, against the petitioner, alleging that he had erected certain *chhappars*, platforms (*tharas*) and other structures which encroached upon a public street; that they had given him notice to remove the same, and that he had disobeyed the said notice. Petitioner pleaded, in answer to the complaint, that the structures in question had been in existence for very many years; that he had not himself erected them, and was not liable to be prosecuted therefor. He called witnesses to support his allegations and the *patwari* (who was a prosecution witness) admitted that the structures had been in existence for some 15 years.

The Honorary Magistrates, who tried the case, themselves inspected the spot and in their judgment state that the structures which they saw at the spot must have been there for eight or ten years. But they found that the structures were built upon a public road and they accordingly convicted petitioner under the said sections and fined him Rs. 5, and in default sentenced him to two days' simple imprisonment. They further directed him to comply with the notice of the Municipal Committee within one month.

Petitioner appealed to the District Magistrate, but his appeal was rejected on the ground that the structures encroached on the public road; that it was immaterial whether petitioner had or had not made the encroachment himself, and that, as the occupier of the building, he was bound to obey the notice issued to him under sections 172 and 195.

An application has now been made to this Court to revise these orders and, after hearing the learned Pleaders who appeared respectively for the petitioner and the Committee, I am satisfied that the conviction was wrong in law and cannot be sustained.

From the judgment of the Honorary Magistrates it is quite clear that the structures, as they now exist, were put up some eight or ten years ago, and the *patwari* (who was called as a witness by the Committee) deposes that they have been there for about 15 years at least. It is also in evidence that the Committee originally took action in 1905 with regard to these structures, but dropped further proceedings on receiving a report from Babu Attar Singh, the Ward Member. In these circumstances section 195 of the Act is obviously inapplicable, as by no stretch of imagination can it be said that the Committee delivered the notice to petitioner "within reasonable time" within the meaning of that section.

Realising this difficulty, Mr. Sham Das for the Committee relies upon the provisions of section 172 of the Act and contends that the petitioner has rightly been convicted under section 219, inasmuch as he disobeyed the notice given to him under sub-section (2) of section 172. I cannot accept this contention. Section 172 runs as follows:—

"(1) Whoever, without the written permission of the Committee, builds or erects any immoveable encroachment upon the ground level of any street.....or builds or makes any immoveable overhanging structure projecting into a street at a point above the said ground level, shall be punishable with a fine which may extend to fifty rupees.

"(2) The Committee may, by notice, require the owner or occupier of any building to remove or alter such immoveable encroachment or overhanging structure as aforesaid, and no compensation shall be

claimable in respect of such removal or alteration."

This section clearly refers to encroachments and overhanging structures *newly* made and without permission, and it is because they are so made, that no compensation is to be allowed. The present tense of the words used "builds or erects" supports this view, and it would be a very strained interpretation of sub-section (1) to hold it applicable to a structure or encroachment that had been built or erected eight years (and more probably fifteen years) prior to the date of notice. Sub-section (2) refers to "*such* immoveable encroachment" and to an "overhanging structure as *aforesaid*" and must, therefore, be taken to apply to encroachments and structures built or erected in contravention of sub-section (1), or, in other words, to recent and unauthorised encroachments and structures.

If the encroachments or structures are not recent or were made with permission, the Committee may nevertheless under section 175 order their removal or alteration by giving notice, but as in such a case the encroachment or structure has been in existence for some time or was built or erected with permission, the section very reasonably provides that the Committee must make reasonable compensation. Admittedly the notice issued to petitioner was not given under section 175 nor was any offer of reasonable compensation made to him, and consequently the conviction cannot be upheld as falling within its purview.

The penal sections of the Act must be construed strictly and with due regard to the ordinary meaning of the words used. So construed, section 172, sub-sections (1) and (2), cannot, in my opinion, justify a Committee in issuing notice to an owner or occupier to remove or alter an encroachment or structure which has been in existence for very many years. To hold otherwise would be tantamount to construing the words "builds or erects" in section 172 as covering cases where the building or erection has been made 50, 60 or 100 years ago, thereby relieving the Committee of liability to make compensation under section 175.

The latter section, no doubt, was intended to include cases where, though permission was originally granted, the Committee is of opinion that the encroachment or structure should be removed or altered, but it also, in my opinion, includes cases where the encroachment or structure is of such long standing that section 172 of the Act cannot reasonably apply, and compensation must be given if its removal or alteration is desired [*Ramdularay* v. *Chhindwara Municipality* (1), *Kala Govind* v. *Municipality of Thana* (2), *Eshan Chunder Mitter* v. *Banku Behari Lal* (3)].

I accordingly accept this petition and set aside the orders of the Courts below. The fine, if paid, will be refunded. I need hardly add that my order will not preclude the Committee, if so advised, from taking action hereafter under section 175 of the Act.

Petition accepted.

(1) 6 Ind. Cas. 431 at p. 435; 6 N. L. R. 53.
(2) 23 B. 248.
(3) 25 C. 160 at p. 166; 1 C. W. N. 660.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 4 OF 1915.
February 9, 1915.
Present:—Mr. Stuart, A. J. C.

TILAK RAM—COMPLAINANT—APPLICANT

versus

BHAGGA SINGH AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—Acquittal, order of, revision of—Practice.

A High Court has power under section 439, Criminal Procedure Code, to revise an order of acquittal, but in practice that power should not ordinarily be exercised because an appeal can always be instituted by the Local Government. [p. 737, col. 1.]

Municipal Committee of Dacca v. *Hingoo Raj*, 8 C. 895; *Queen-Empress* v. *Ala Bakhsh*, 6 A. 484; *Heera Bai* v. *Framji Bhikaji*, 15 B. 349 and *Thandavan* v. *Perianna*, 14 M. 363; 2 Weir 571, referred to.

Application against an order of the District Magistrate, Hardoi, dated 10th September 1914, upholding that of the Magistrate, Hardoi, dated 24th July 1914.

Mr. *C. F. S. Oehme*, for the Applicant.

Mr. *R. F. Bahadurji*, for the Opposite Party.

JUDGMENT.—A High Court has power under section 439 of the Criminal Procedure Code to revise an order of acquittal. But it has been held in practice by every High Court in India that that power should not ordinarily be exercised because an appeal can always be instituted by the Local Government. This is ruled in *Municipal Committee of Dacca* v. *Hingoo Raj* (1) and again in *Queen-Empress* v. *Ala Bakhsh* (2), and again in *Heera Bai* v. *Framji Bhikaji* (3), and again in *Thandavan* v. *Perianna* (4). Thus if I set aside the acquittals and direct a re-trial, I shall be taking a course different to the course which would have been taken by any High Courts in India. I do not see my way to lay down a practice for this Court which would not be followed elsewhere. I, therefore, reject this application.

Application rejected.

(1) 8 C. 895.
(2) 6 A. 484.
(3) 15 B. 349.
(4) 14 M. 363; 2 Weir 571.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 1105 OF 1914.
January 27, 1915.
Present:—Mr. Justice Tudball.
RICHHA AND OTHERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 408 (b)—Assistant Sessions Judge—Some accused sentenced to imprisonment for over four years, others for less period—Accused sentenced to less than four years' imprisonment, whether entitled to appeal to High Court.

Where at a criminal trial held by an Assistant Sessions Judge some of the accused were sentenced to an imprisonment for more than four years and some for less than that period:

Held, that an appeal by the latter would also lie to the High Court under section 408 (*b*) of the Criminal Procedure Code.

Criminal appeal from an order of the Assistant Sessions Judge of Meerut, dated November 21st, 1914.

Mr. *Lalit Mohan Banerji*, Government Pleader, for the Crown.

JUDGMENT.—The four appellants Richha, Daya Ram, Bhagwan and Shera have been convicted under section 304 of the Indian Penal Code. The first three were sentenced to six years' rigorous imprisonment and a fine of Rs. 100 and the fourth to three years' rigorous imprisonment. They have all appealed to this Court. Though the appellant, Shera, has been sentenced to a term of less than four years and the Court which tried and decided the case was the Court of an Assistant Sessions Judge, it is clear that the case is one in which the appeal would lie to this Court in view of the language of section 408, clause (*b*), of the Code of Criminal Procedure. This is clearly a case in which an Assistant Sessions Judge has passed a sentence of imprisonment for a term exceeding four years. As to the actual facts of the case there is clearly no doubt whatsoever. The deceased Bansi had a dispute with the appellants Richha, Bhagwana and Shera in respect of his house. It had fallen down and he was re-building it on certain land and they disputed his right on the ground that he had trespassed on their land. He brought a suit in the Civil Court which was decreed by the Court of first instance, but was dismissed on appeal. Directly the appeal had been allowed, the four appellants, with a labourer named Nehal, proceeded to Bansi's house and began to pull down his wall. He expostulated, whereupon Richha, Daya Ram and Bhagwana beat him with *lathis* and Shera, though an old man, joined in the assault. The son of Bansi appeared upon the scene and he too was beaten. Bansi died because the injury to his chest—two of his ribs were broken—set up septic pneumonia which caused his death four days after. The medical evidence shows that he had received some twelve blows, that his arm as well as his two ribs was broken. No blows were inflicted upon his head. So that it is clear that the appellants did not intend to cause death and probably had no idea that the result of their assault would be death. The evidence in the case is very clear indeed. It was accepted by the Judge and Assessors unanimously as against these four appellants. I fully agree with their view of the evidence. The sentences imposed are meet and proper in view of the facts of the case. I, therefore, confirm the convictions and sentences and dismiss the appeals.

Appeal dismissed.

BALMOKAND v. EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL APPEALS NOS. 851 TO 854, 905 AND 921 TO 924 OF 1914.
CRIMINAL REVISION PETITION NO. 2069 OF 1914.
MURDER REFERENCE NO. 135 OF 1914.
February 10, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Rattigan.

IN NO. 851 OF 1914
BALMOKAND—ACCUSED—APPELLANT
IN NOS. 852 AND 921 OF 1914
ABAD BIHARI—ACCUSED—APPELLANT
IN NOS. 853 AND 922 OF 1914
AMIR CHAND—ACCUSED—APPELLANT
IN NO. 854 OF 1914
HANWANT SAHAI—ACCUSED—APPELLANT
versus
EMPEROR—PROSECUTOR—RESPONDENT
IN NO 905 OF 1914
EMPEROR—PROSECUTOR
versus
CHARAN DAS—ACCUSED
IN NO. 923 OF 1914
BALRAJ—ACCUSED
IN NO. 924 OF 1914
BASANT KUMAR BISWAS—ACCUSED
versus
EMPEROR—PROSECUTOR
IN CR. R. NO. 2069 OF 1914
EMPEROR—PROSECUTOR
versus
BASANT KUMAR BISWAS—ACCUSED
IN MURDER REF. NO. 135 OF 1914.
ABAD BIHARI, BALMOKAND AND AMIR CHAND—ACCUSED.

Penal Code (Act XLV of 1860), ss. 302, 102B, 109, 115 — Conspiracy—Murder—Sedition—Charge not specifying date agreed on to commit murder etc., whether vague—Evidence Act (I of 1872), ss. 10, 114, 133—Scope of s. 10—Illustration to s. 10—Interpretation of Statute—Illustration, whether express provision of law—Acts done by co-conspirators, when evidence against others—Approver, evidence of, value of—Conviction based on such evidence, legality of—Corroboration, necessity of—Criminal Procedure Code (Act V of 1898), ss. 337, 364—Pardon, grant of—Magistrate, power of—Accused charged of one conspiracy, whether can be found guilty of another—Conspiracy, member of, liability of—Conspiracy to commit murder—Offence, nature of—Punishment, considerations in—Members joining before and after murder—Deposition of witness, weight of—Deficiencies, effect of—False denial by accused—Presumption—Confession, recording of—Confession retracted, evidentiary value of—Contempt of Court—Newspaper Article.

Where a charge of criminal conspiracy to commit the offence of murder omits to specify (*a*) the date on which the accused persons are alleged to have agreed *inter se* to commit the murder, (*b*) "the other places" in British India where they are said to have so agreed, and (*c*) the person or persons whom they are alleged to have agreed to murder:

Held, (per *Johnstone, J.*) that the charge is not vague, inasmuch as

(1) it is not necessary for the prosecution to attempt to fix a precise date for the inauguration of the conspiracy; it is sufficient if they state and prove that between certain dates a conspiracy was in existence; [p. 741, col. 1.]

(2) the accused have not been in any way prejudiced by the use of the phrase "other places" and nothing has been unfairly sprung upon them under cover of that phrase; [p. 741, col. 1.]

(3) the omission to specify the person or persons could not in fact mislead the accused and has not occasioned a failure of justice and cannot be regarded at any stage of the case as material. [p. 741, col. 1.]

Held, (per *Rattigan, J.*) that these omissions in no way prejudiced the accused, who were all defended by Counsel, and were fully cognizant of the nature and particulars of the case which each of them had to meet and that even if it be assumed that the particulars referred to should have been set forth in the charge, the defect was cured by sections 225 and 587 of the Criminal Procedure Code; and that it was not incumbent upon the prosecution to specify any such particulars in the charge. [p. 772, col. 1.]

Semble:—It would make it impossible for the prosecution to succeed on a charge of conspiracy if such a charge could not be substantiated without proving the exact date on which each alleged conspirator entered into the conspiracy. [p. 772, col. 1.]

Per *Court*.—Section 10 of the Evidence Act is wider than the English Law and the words "reasonable ground to believe" in the section are not equivalent to proof and where the prosecution have produced *prima facie* proof of a conspiracy to commit murder and where the accused were one and all members of that conspiracy, anything said, done or written by any one of the conspirators, whether accused or not, in reference to the said common intention, after that intention was first entertained by any of them, is a relevant fact under the said section against each and all of the accused, as well for the the purpose of proving the existence of the conspiracy as for the purpose of showing that "any such person" was a party to it. [p. 741, col. 2 p. 742, col. 1.]

The illustration to section 10 of the Evidence Act is inconsistent with the section. The way that the words "and to prove *A*'s complicity in it" come into the illustration are not quite in accordance with common sense or with the section but where the fact from the nature of things cannot of its own force help towards the conviction of *A*, it does not matter much whether it is technically relevant against *A* or not. [p. 742, cols. 1 & 2.]

Per *Rattigan, J.*—In order to decide whether any act done or statement made or thing written by an alleged co-conspirator is admissible in evidence against any of the conspirators, the test

is to see in the first place, whether there is a reasonable ground to believe that a conspiracy existed between him and any such person, and in the second place whether such act, statement or writing had reference to their common intention. [p. 774, col. 1.]

"Illustrations" appended to sections of an Act of the Legislature are not to be taken as express provisions of law or as binding on the Court. [p. 774, col. 2.]

Per *Court.*—Under section 133 of the Evidence Act approvers are competent witnesses against the accused persons, and a conviction based on the uncorroborated evidence of an approver would not be illegal "merely" because of want of corroboration. [p. 743, col. 1, p. 771, col. 2]

Notwithstanding section 4 and illustration (*b*) the Courts are not tied down in any technical way; but it is their duty when deciding (*i*) whether any corroboration of a particular accomplice is required, (*ii*) what amount or kind of corroboration is required, to look at the question as a prudent man, desiring to avoid error and to arrive at the truth, would look at it. As to the extent and nature of such corroboration no hard and fast rule can be stated. [p. 743, cols. 1 & 2; p. 774, col 2.]

Therefore, where the Court while keeping in view the presumption that an accomplice is unworthy of credit unless he is corroborated in material particulars and after making due allowance for the considerations which render the evidence of an accomplice untrustworthy, nevertheless comes to the conclusion that it is true although uncorroborated and that it establishes the guilt of the accused it is its duty to convict. [p. 774, col 2; p. 775, col. 1.]

Per *Rattigan, J.*—It is not necessary that the evidence of an accomplice should be corroborated in every detail, if taken in its entirety, it is found to be confirmed by the testimony of independent witnesses or by circumstantial evidence which strongly supports it. [p. 775, col. 1.]

Per *Court.*—Under the provisions of section 337, Criminal Procedure Code, it is permissible to the Magistrate inquiring into any offence triable exclusively by the Court of Session or High Court to tender a pardon to any person supposed to have been directly or indirectly concerned in, or privy to, such offence. [p. 743, col. 2.]

Where, therefore, the offence in respect of which the accused are tried, is one triable exclusively by the Court of Session or High Court the Magistrate is not precluded from tendering the pardon because at the same time he is inquiring into another offence not so triable. [p. 743, col. 2.]

Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another, and that any accused not shown to be a member of the conspiracy charged is entitled to demand an acquittal, however bad his records may be, and however much he may be suspected of another offence not actually charged. [p 744, col 1.]

But where there was really one conspiracy, though it may have had two objects, *viz.*, to commit murder and to cause disaffection by circulation of seditious literature, the conviction of the person accused for different offences committed in pursuance of the conspiracy at one trial is not illegal. [p. 744, col. 1.]

A member of the conspiracy cannot be allowed to escape responsibility merely because an act, fully in keeping with the aims of the conspiracy was done in his absence. [p. 761, col 1]

A conspiracy to commit murder was an offence under the law of abetment before the passing of section 120B, Indian Penal Code. The new section was enacted merely to make the law clear or and more readily available in all possible circumstances [p. 761, col. 2, p. 762, col. 1.]

Per *Rattigan, J.*—In a case where the prosecution allege that there was an agreement between the accused persons and others to commit murder and to abet the commission of murder but being unable to give direct proof of any such agreement, ask the Court to deduce the existence and nature of the agreement from the facts that certain members of the conspiracy actually did commit a murder:

Held, that if the facts alleged are established it would be a fair and justifiable inference that the alleged agreement between the parties accused did in fact exist, that each and every member of the conspiracy is responsible for an offence committed in pursuance of the conspiracy and that it is not necessary to show that a particular member actually concerted the offence with the member who committed it. [p 782, col 2.]

In inflicting punishment a distinction must be drawn between the case of a person who joins a conspiracy before the actual crime which is the object of the conspiracy, is committed, and the case of a person who joins it subsequently to the commission of such a crime. [p. 782, col. 2.]

Therefore, where two persons *A* and *B* conspire to commit murder, and *B* subsequently does commit murder, *A* is punishable as if he had abetted that murder but if *B* has already committed a murder before *A* conspires with him to commit murder, *A* is liable to be punished only to the extent provided in section 115, Indian Penal Code. But in every such case the offence committed by a member or members of the conspiracy prior to the entry of *A* into the conspiracy would be a relevant fact as indicating the nature and objects of the conspiracy. [p 783, col. 1.]

The fact that a member of the conspiracy was not admitted to the full dignity of membership of the committee but was treated more as a tool than as a colleague is no ground for showing leniency in punishment to that member. [p. 794, col. 1.]

Per *Court.*—There is a kind of falsehood that damns the whole deposition and there is a kind that does not. The mere omission by an approver of names of persons upon whom he does not want to bring possible trouble is not such a falsehood as to damn the whole deposition. [p. 745, col. 2.]

The mere deficiencies in the statement of an approver, made at an early stage unexamined by an advocate, are not specially important. [p. 746, col. 1.]

Where an accused falsely denies a fact, the inference is that the object of the denial is to hide something extremely unfavorable to himself. [p 750, col 1.]

In recording a confession the important thing is not the formal writing down by the Magistrate that the confession was voluntarily made but it should be made clear to a Court using a confession

as evidence that the recording Magistrate applied his mind to the question whether it was being voluntarily made and decided that question in the affirmative. [p 769, col. 2.]

The procedure of section 364, Criminal Procedure Code, of recording questions and answers in full is of no great importance and a confession is not vitiated by this informality. [p.769, col. 2.]

Per *Rattigan, J.*—A confession though subsequently retracted, if found to be true and voluntarily made is admissible in evidence. [p. 794, col. 2.]

Per *Court.*—The publication of a letter in a newspaper adversely criticising the findings of a Judge while the case is still *sub judice*, amounts to a gross violation of the accepted canons of respectable journalist and is a very bad case of contempt of Court. [p. 771, col. 2: p. 794, col. 1.]

Criminal appeals, reference and revision against the orders of the Sessions Judge, Delhi, dated the 5th October 1914.

Messrs. *Beechey, Tek Chand, Nanak Chand Sen* and *Raghunath Sahai*, for the Accused.

Messrs. *Alston* and *Broadway*, for the Crown.

JUDGMENT.

JOHNSTONE, J.—The Sessions Court, Delhi, in Trial No. 6 of 1914, had before it eleven accused persons, the charge against them, as amended by the learned Sessions Judge on 11th July 1914, in the course of the trial, being as follows:—

That you between 27th day of March 1913 and 3 st March 1914, both at Delhi and Lahore and other places in British India. did agree with one another and other persons, to wit, Dina Nath, Sultan Chand, Rash Bihari Bose, Hardayal, Arjan Lal Sethi, Hari Ram Sethi and other persons unknown, to commit the offence of murder under section 302, Indian Penal Code, and that you were thereby parties to a criminal conspiracy to commit the offence of murder; in pursuance of which conspiracy a murder, to wit the murder of Ram Padarath, was committed at Lahore on 17th May 1913 and that you thereby committed offences punishable under sections 302/102-B and 302/109 of the Indian Penal Code and within my cognizance.

After a long and patient trial lasting continuously from 21st May 1914 to 1st September, the learned Judge took time to consider the case, and on 5th October passed orders, acquitting five of the accused persons, namely, Chhote Lal* *alias* Ram Lal, Charan Das, Mannu Lal, Raghebar Sharma and Khushi Ram and convicting the other six, *viz.*, Basant Kumar Biswas, Abad Bihari, Amir Chand, Balmokand, Balraj and Hanwant Sahai under section 302/102-B, Indian Penal Code, the following sentences being meted out:—Abad Bihari, Amir Chand, Balmokand, death; Basant Kumar Biswas, Balraj, Hanwant Sahai, transportation for life.

Called Ram Lal in the rest of this judgment.

Pari passu, with the above case the Court tried Abad Bihari and Amir Chand aforesaid on a charge under sections 4, 5 and 6 of Act VI of 1908 (Explosive Substances Act) in connection with a bomb cap said to have been found in their possession on 16th February 1914, and (again on 5th October) found them guilty, and under section 4 of the Act sentenced them to transportation for 20 years. Though the finding of the cap comes into the other case and will have to be discussed by us in connection with it, we have not yet heard it argued upon *qua* the charge under the Explosives Act; and in view of the findings at which we have arrived in the more important case, it will probably be unnecessary for us to deal at all with the appeals in the minor case at the present time. What we have to do now is to deal with† the six appeals of the six convicted men, to consider under section 374, Criminal Procedure Code, the cases of the three sentenced to death, and to deal with an appeal and an application for revision put in on behalf of Government, namely, appeal against the acquittal of Charan Das and application for enhancement of the sentence of Basant Kumar Biswas. We have heard these seven appeals and this application fully and ably argued, and we wish to express here our indebtendness to the learned Counsel on both sides for the valuable assistance they have, one and all, rendered to us.

†Numbers 852, 853, 923, 851, 854, 924, Reference 35 of 1914, Appeal No. 905 and Revision No. 2069 of 1914.

At this point it is convenient to deal finally with one or two matters connected with the wording of the charge. It has been argued that the charge is vague, inasmuch as (*a*) it states no definite date on which the accused did "agree," (*b*) it does not specify the "other places," (*c*) it does not say *whom* the conspirators agreed to murder. I am not pressed by this contention. As regards (*a*) I note that in the original charge the *terminus a quo* was 1st October 1910, which

was altered to 27th March 1913 by way of somewhat meticulous precaution, because the latter was the date of the coming into force of the new law contained in section 120-B, Indian Penal Code. I would rule without hesitation that it is not necessary for the prosecution to attempt to fix a precise date for the inauguration of the conspiracy: it is sufficient if they state and prove that between certain dates a conspiracy was in existence. Similarly, I cannot see that the accused have been in any way prejudiced by the use of the phrase "other places": nothing has been unfairly sprung upon them under cover of that phrase. Lastly, it is clear, as regards (c), from the evidence produced in Court that the conspiracy charged was an agreement to murder Europeans (especially Britons) and officials serving the British Government. Therefore, even if it would have been more in accordance with the requirements of law—section 221 (3) and section 222 (1), Criminal Procedure Code—to add some such words as the above, one has only to turn to section 225 of the same Code to see that such an omission, which could not "in fact" mislead the accused and has certainly not "occasioned a failure of justice," cannot be "regarded at any stage of the case as material."

Again, two or three questions of law have been debated before us, which touch the cases of most of the accused persons and I find it convenient to discuss those questions now. Each of the accused is entitled to an independent examination of the evidence bearing upon him, and it is, therefore, important to start with clear ideas as to what is and what is not relevant of the evidence, oral and documentary, on the record, and as to the value of the testimony of accomplices, and as to the amount and nature of the corroborations required of such testimony. The first question raised is as to the meaning and effect of section 10 of the Indian Evidence Act, which I give *in extenso* thus:-

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

"*Illustration.*—Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen.

"The facts that *B* procured arms in Europe for the purpose of the conspiracy *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra, and *F* transmitted from Dehli, to *G* at Kabul, the money which *C* had collected at Calcutta, and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove *A*'s complicity in it although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it. Mr. Beechey's chief points in connection with this section are (1) that the words "reasonable ground to believe" in the first line are equivalent to "proof"; (2) that the Illustration to the section is inconsistent with the section; (3) that to interpret and apply the section we should have recourse to English Law. As to the last point all I need say is that I am aware of no authority in support of it. On the other hand, the learned authors of Ameer Ali and Woodroffe's "Law of Evidence applicable to British India" give the opinion that section 10 aforesaid is "wider" than the English Law; and it seems to me clear that the India Legislature intentionally departed from the English Law, for otherwise, to take one test, why should it have used the phrase "*in reference to* their common intention" instead of "in execution or furtherance" of the common purpose? I intend, therefore, to interpret the section upon its own plain phraseology and upon the *dicta* of Indian authorities expressly dealing with it. Incidentally Mr. Beechey tried to make us see how much more fair and just the English Law on the subject is, but it is obvious that this is not a matter on which we are called upon to give an opinion. As regards (1)

above, I do not agree with Mr. Beechey, for I perceive a difference between reasonable ground to believe a thing and proof of that thing. In the present case, however, I need not pursue the matter because it is to me clear, as will be seen later, that the prosecution has produced *prima facie* proof of a conspiracy to commit murder and that the six appellants were one and all members of that conspiracy, and thus, under section 10 anything said, done or written by any one of the conspirators, whether accused or not, in reference to the said common intention, *after that intention was first entertained by any of them*, is a relevant fact against each and all of the accused, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that "any such person" was a party to it. I am, however, inclined to agree with Mr. Beechey as to point (2), in support of which he quoted *Barindra Kumar* v. *Emperor*(1). The way that the words "and to prove *A*'s complicity in it" come into the illustration are not quite in accordance with common sense or with the section as I read it. I am unable to see how what *B* did in Europe and *C* in Calcutta and so forth can *per se* possibly touch the question of *A*'s *complicity*. *A*'s *complicity* can, from the nature of things, only be shown by *A*'s acts, or, *A* being otherwise shown to be a member of the conspiracy, by acts of *B*, *C* and so forth implicating him. *Other* acts of *B*, *C* and the rest seem to me capable as regards *A* only of adding proof of the existence and nature of the conspiracy. At the risk of being tedious I must give an illustration to explain my view. In the case given in the illustration, if *B* in ordering arms in Europe tells the manufacturers to send the bill to *A*, or to consign the arms to him, this, if *A* is otherwise *prima facie* shown to be a member of the conspiracy, would be relevant both as to the nature of the conspiracy and as to *A*'s complicity; but if *B* does not mention *A* and *A*'s name in no way comes into the business of ordering arms in Europe, how can it be said that *B*'s ordering of arms there can produce in the mind of the Judge any added conviction that *A* was a member of the conspiracy? Of course, in framing a law the Legislature *can* lay it down that any given thing is "relevant" for the purpose of proving such and such; but I think I am justified in rejecting the idea that the Legislature intended, by a provision of the law of evidence, to create a barren, useless and merely nominal relevancy. Anyhow one sees, after an analysis of this kind, that the question is not very important; it seems not to matter much whether a thing is technically "relevant" against *A* or not, if, as a matter of fact, from the nature of things, it cannot of its own force help towards the conviction of *A*.

The above remarks contain all the rules and principles I wish to lay down as to section 10. Mr. Beechey *per contra* quotes Russell on Crimes, 6th Edition, Volume 1, page 528 paragraph last, and Taylor on Evidence, 10th Edition, Volume 1, page 420, paragraph 594. I have no quarrel with these statements of the law of England, but section 10, Indian Evidence Act, deliberately parts from that law. He then refers us to the well-known case of *Pulin Behari Das* v. *Emperor* (2) and especially certain *dicta* of Mookerjee, J., at page 1152 *et seq.* After reading those passages I am unable to see that the learned Judge's views really differ from mine. I quote two important *dicta* with which I fully agree, the first especially though indirectly supporting me in my earlier remarks regarding contents of indictment, namely:—

"It is, of course, not necessary to establish by direct evidence that the accused persons did enter into such agreement" (*i. e.* agreement to commit an offence) page 1151; and

"Hence, as soon as it is shown with regard to an individual accused that he was in privity with the combination and its object and had adopted the acts already performed, he as a conspirator becomes bound by the antecedent and the consequent acts of his conspirators."

Mr. Beechey's next citation is *Kadambini Dassi* v. *Kumudini Dassi* (3), a ruling with which also I am in accord but which hardly helps one way or another here, the Court finding that there was no issue before it

(1) 7 Ind. Cas. 359; 14 C. W. N. 1114; 11 Cr. L. J. 453; 37 C. 467.

(2) 16 Ind. Cas. 257; 15 C. L. J. 517; 13 Cr. L. J. 609; 16 C. W. N. 1105.

(3) 30 C. 983; 7 C. W. N. 808.

as to the existence of a conspiracy and no "reasonable ground" for believing that either of the persons concerned was a party to it.

I now turn to the question of the value of an accomplice's evidence and the amount and nature of the corroboration the law expects of such evidence. No lengthy discussion is necessary: I take my stand upon section 133, Indian Evidence Act, and section 114, Illustration (*b*), and the provisos to that Illustration. In this case, under section 133, the approvers Dina Nath and Sultan Chand, of whom we shall hear more later, are "competent" witnesses against the accused persons, and a conviction based on the uncorroborated evidence of either of them would not be illegal "merely" because of want of corroboration. As to section 114 the important point for us here is that the section says "may presume," as to which see section 4 of the Act. Notwithstanding section 114 and Illustration (*b*) the Courts are not tied down in any technical way, but it is their duty, when deciding (*i*) whether any corroboration of a particular accomplice is required, (*ii*) what amount or kind of corroboration is required, to look at the question as a prudent man, desiring to avoid error and to arrive at the truth, would look at it. In the present case, as I hope to make quite clear later on, a prudent man should have no difficulty in finding that Dina Nath's story and Sultan Chand's story are substantially true, though necessarily in many points uncorroborated.

These questions have been very frequently argued before Benches of this Court, but in order to refresh my memory of the case-law on the subject and to ponder well the reasoning adopted by Mr. Sen (for accused Basant Kumar Biswas) and other Counsel, I have carefully studied the authorities they have cited—see margin. Of all these, in my opinion, the first is most valuable, see especially the paragraph beginning at bottom of page 44. The head-note in 36 P. W. R. 1910 Cr. is misleading, as it goes far beyond the judgment and sets aside section 133, Indian Evidence Act, altogether: and the dictum in *Lal Khan* v. *Emperor* (4) must be read as applying to the peculiar facts of the case. In many of these cases stress is laid upon the *practice* of the Courts according to which corroboration is *always* required; but the *law* is, as I have stated it, though of course in 999 cases of 1,000, prudence does require that there shall be corroboration. As to the extent and nature of such corroboration no hard and fast rule can be stated.

Mamun v. *Queen-Empress*, 14 P.R. 1894 Cr., *Wazir Khan* v. *Emperor*, 5 P. R. 1902 Cr.; 57 P L. R. 1902; *Chet Singh* v. *Emperor*, 28 P. W. R. 1907 Cr.; 7 Cr. L. J. 227; *Amar Das* v. *Emperor*, 8 Ind. Cas. 193; 11 Cr. L. J. 580; 36 P. W. R. 1910, Cr., *Lal Khan* v. *Emperor*, 13 Ind. Cas 998; 11 P. L. R. 1912; 13 Cr. L. J. 182; 19 P. W. R. 1912 Cr., *Hira* v. *Emperor*, 9 Ind. Cas. 39; 1 P. W. R. 1911, Cr.; 12 Cr. L. J. 5; 19 P. L. R. 1911; *Jamiruddin Masalli* v. *Emperor*, 29 C. 782 at p. 787, 6 C. V. N. 553; *Queen-Empress* v. *Bepin Biswas*, 10 C. 970 at pp. 973, 975; 17 W. R. 47 Cr.

It is convenient here, even at the expense of still further postponing statement of the facts of the case and discussion of the evidence, to dispose of various minor points of law raised before us. Mr. Raghunath Sahai (for Amir Chand) contends that the pardon granted to Dina Nath approver was illegal and, therefore, his deposition is not admissible in evidence. I have no hesitation in rejecting this contention. The learned gentleman refers us to section 124A, Indian Penal Code, section 337, Criminal Procedure Code, and section 124A, Indian Penal Code in Schedule II of the latter Code, and argues that as the Committing Magistrate, at the time of the offer of pardon, was enquiring into an offence under section 124A aforesaid, which is not "triable exclusively" by the Court of Session or High Court, section 337, Criminal Procedure Code, could not be used at all. It is sufficient to point out that the Magistrate was also dealing (admittedly) with an offence under section 302 and section 120B, Indian Penal Code, and that the case as a whole was undoubtedly

(4) 13 Ind. Cas. 998; 11 P. L. R. 1912; 13 Cr. L. J. 182; 19 P. W. R. 1912 Cr.

one exclusively for a Sessions or High Court. The use of section 337, Criminal Procedure Code, was, therefore, not illegal.

Next, the same Counsel suggests that, as in reality the evidence, if it proves anything, proves a conspiracy to wage war against the King (section 121-A, Indian Penal Code), therefore, the sanction of Government was necessary before prosecution and this had not been obtained. This suggestion I repel with confidence. The Sessions Judge has not "taken cognizance" of any charge under section 121-A, Indian Penal Code and this disposes of the objection.

Again, the same Counsel argues that the evidence purports to prove the existence of one conspiracy to murder and another for the dissemination of seditious literature, and also that there was one Lahore conspiracy and another Delhi conspiracy, and that in the present trial only those accused can be convicted who are proved to have joined that conspiracy *to murder* in pursuance of which Ram Padarath was murdered at Lahore. The case of *Emperor* v. *Noni Gopal Gupta* (5) is cited in support, especially the *dictum* that where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another and that any accused not shown to be a member of the conspiracy charged is entitled to demand an acquittal, however bad his record may be and however much he may be suspected of another offence not actually charged. The contention is that Amir Chand at least is not directly shown, even if all the evidence against him is believed, to have conspired to do anything more than disseminate seditious literature. It will be seen, however, when I go into the facts, that there was really only one conspiracy, though it may have had two objects, *viz.*, to commit murder and to cause disaffection by circulation of seditious literature; and thus the argument falls to the ground.

Here I may notice another contention, in support of which another passage (at page 606) in the the same judgment of Jenkins, C. J., is relied upon, that the murder of Ram Padarath, unfortunate victim of the Lahore bomb, said to have been thrown or placed by accused Basant Kumar Biswas, should not have been imported into this case as it should form the subject of a distinct trial of that accused under section 302, Indian Penal Code. This contention seems to me not only unsound, but to be based on a misapprehension of what the learned Chief Justice meant. What he described as inexpedient and not to be commended was the attempt of the prosecution in that case to prejudice the Court against accused persons and *to protract enormously the proceedings** by compelling the Court to hear over again, in the conspiracy case, several cases of dacoities, said to be due to these same conspirators, which had been already severally heard and disposed of previously. Whether the remarks made by the learned Judge are sound or not, I leave the matter with the two observations that evidence of the murder of Ram Padarath being clearly relevant, the Sessions Judge *could* not exclude it, and that there is no question here of hearing over again a case of murder already adjudicated upon.

*This is apparently what vexed the Court most.—D. C. J.

Turning to the merits of the case one cannot help seeing that the most important matter for consideration is the evidence of Dina Nath, P. W. No. 3, the approver, and the questions that here arise are—Is his story substantially true? Is it materially corroborated? Apart from corroboration by independent evidence, does it contain in itself intrinsic indications of its truth? How much of it can be safely and properly taken as true against this or that accused person and so be used as part of the material for the conviction of that person? It should be noted here that Dina Nath has nothing to say against Hanwant Sahai, appellant, and practically nothing against Charan Das, respondent.

I will first consider the question of the value of Dina Nath's evidence taken by itself apart from direct corroborative evidence. We have heard this argued repeatedly during the proceedings and it has been constantly present in our thoughts; and for myself I can say that the more I have studied the deposition of this man and compared it with the statements made before Mr. Tollinton, Deputy Commissioner, Lahore, on 24th February 1914, *i.e.*, eight days after the arrest, and before the Committing

(5) 10 Ind. Cas. 582; 15 C. W. N. 593; 38 C. 559; 12 Cr. L. J. 286

Magistrate, the more has the conviction been forced upon me that the man, unsatisfactory though his character may be, suspect though his word as the word of a self-confessed conspirator and traitor may be, did really try to give a truthful account of the whole of his dealings with his fellow-conspirators. The tale is so long and deals with such a variety of incidents and persons spread over so long a period of time that one would have to credit him with an almost superhuman power of memory and mental concentration before one could hold that he was repeating a concocted story. His unsuccessful scholastic record shows that there is no ground whatever for supposing him possessed of unusual intellect or memory, and it is safer to attribute to him an ordinary brain and an ordinary retentiveness of memory, sufficient to enable him, under the stimulus of danger—for he knew his pardon depended on his telling the truth—to tell with substantial accuracy *things present to his consciousness as having really occurred*, but hardly sufficient to enable him to keep arranged in his brain, under the stress of examination and very strenuous cross-examination, the enormous mass of details we find in his evidence, *if those details were fabrications.*

It is difficult to decide what passages in his deposition to select in order to illustrate the above observations, for the greater part of it affects my mind in this way; but I may perhaps fairly refer to the first half of page 13 of the "Proceedings of the Sessions Court," the last half of page 14, the first half of page 15, the middle of page 17, and so on.

Another thing that strikes one, in reading the deposition of Dina Nath, is the *restraint* of the man in his statements against his fellows. Time after time in his story he *could*, and we may fairly assume *would*, if he had been telling a tale manufactured in consultation with the Police, have said damning things about them, where he has not done so. One instance is at page 16, lines 30—32, and another at page 14, lines 45—54, and these could be multiplied. The latter instance prompts a few words. Balraj, appellant, is a man against whom, as regards events before the murder of 17th May 1913, the prosecution have admittedly little to go upon. If Dina Nath had been an unscrupulous Police witness, would he had been content to say Rash Bihari introduced him and Balraj to each other as "good men" and that there was only an "ordinary conversation"?

But it is said that comparison of Dina Nath's three recorded statements shows such discrepancies as point to a clear attempt to "improve" the story. We have listened patiently and carefully to much argument on this point; but on the whole I find myself in agreement with the lower Court that none of the discrepancies is really of importance except when Dina Nath attempted in his earlier statements to screen his cousin, Ram Sarn Das, and his distant kinsman Jagannath, of Kapurthala, who he says printed the May "Liberty" leaflets. Now there are falsehoods and falsehoods. There is a kind of falsehood that damns a whole deposition and there is a kind that does not; and this is one of the latter kind. Indeed, it was not a *positive* falsehood at all, but merely the omission of names of persons upon whom Dina Nath naturally did not want to bring possible trouble; and I wish here to advert to some acute observations of Mr. Ross Alston's, namely, that the defence theory that Dina Nath only named his kinsmen when the Police discovery of them forced him to do so, is refuted by the facts, for the Police did not go to Kapurthala in search of those men until after he had told Mr. Stead. Dina Nath says he told Stead and the latter was not cross-examined about it. As to this see statement of Dina Nath to Committing Magistrate *on 27th March*, page 40, and to Sessions Judge, foot of page 36, and P. W. No. 37 in Sessions Court; showing Sessions Judge is wrong, page 12 of judgment, when he says Police first knew on 28th. On 27th March Dina Nath had given names to Police, but was kept off giving them in open Court lest warning should reach Kapurthala. I will now note some of the so-called discrepancies on which appellants' Counsel have laid stress and show how insignificant they really are.

To Mr. Tollinton Dina Nath said, page 2, he went to the station in October 1912 to meet Rash Bihari but arrived too late. To Sessions Judge, page 15, he said, lines

20—22, that he did not go, and he confirmed this in cross-examination, page 35, lines 15—19, and my own view is that in all probability Mr. Tollinton misunderstood. Incidentally I may remark that this detail of *not* meeting Rash Bihari at the station, having been asked to do so, is another of those details which go to show the good faith of the narrator.

Next, Dina Nath does not describe in exactly the same way how many days after Rash Bihari in October 1912 came to Lahore Dina Nath first saw him. There is no real contradiction and the matter is infinitesimal.

Thirdly, before Mr. Tollinton Dina Nath said nothing about Abad Bihari *writing* the leaflet, but introduced this before the Committing Magistrate on 27th March 1914. This is true, see Committing Magistrate's printed Proceedings, page 40. This is certainly a fair point; but it must be remembered that before Mr. Tollinton Dina Nath was making a statement unexamined, while on 27th March 1914 the examination was being conducted by an Advocate. Mere *deficiencies* in the earlier statement, therefore, are not specially important. Apparently nobody asked him on 24th February 1914 if he knew who composed the leaflet: if the question had been put and he had said he did not know or had given a name other than Abad Bihari, the matter would have been different. Further, he was never asked in the Sessions why he had not mentioned the matter to Mr. Tollinton.

Omitting infinitesimal points such as the non-mention before Mr. Tollinton of wrapper round the leaflets, *fourthly*, it is pointed out that before Mr. Tollinton, pages 3 and 4, Dina Nath did not mention Basant Kumar Biswas as taking part in the distribution of the May leaflets, while in Sessions Court, page 17, lines 51 and 59, he brought him into this affair. One can only repeat the remark under "*thirdly*" above. The part assigned to Basant Kumar was insignificant and this, with the absence of questioning, fully accounts for the difference. To Committing Magistrate Dina Nath did mention Basant Kumar.

Fifthly, it is said that Dina Nath told Mr. Tollinton that Abad Bihari said he and Basant Kumar fitted up the bomb in the gardens, while in Sessions Court he said Abad Bihari alone did the fitting up. In reality to Mr. Tollinton he said, repeating Abad Bihari's story, "They had gone to a dark spot under the trees and fitted the bomb together." This does not mean that Basant Kumar actually joined with his own hands in the work of fitting up the bomb, and so there is no discrepancy at all.

Sixthly, to Mr. Tollinton Dina Nath said Abad Bihari and Basant Kumar were to meet at 7 at the gardens; to Sessions Judge he said between 7 and 8. Is this a serious discrepancy? I say unhesitatingly no.

Seventhly, Dina Nath made no mention of the July leaflets to Mr. Tollinton. This is natural, see page 20, line 19, Sessions printed Proceedings, for Dina Nath had nothing to do with their distribution.

Eighthly, there are certainly differences between Dina Nath's different statements as to when Abad Bihari came to Lahore in October 1913, but I think the learned Sessions Judge's way of looking at the matter is reasonable.

Ninthly, to Mr. Tollinton nothing was said about the Kali Bari meeting with Rash Bihari in end of 1910, page 14 top. The explanation is that nothing turns on this meeting, no accused having been present at it and nothing of importance occurred at it; and similarly the omission before Mr. Tollinton to mention a certain meeting with Amir Chand, page 13, line 47, has no importance whatever, likewise the omission of mention before Mr. Tollinton of his seeing Basant Kumar at Dehra Dun at Christmas 1911, page 15, line 12.

Tenthly, much is made of the fact that at the Agarwal Ashram meeting in October 1912 Dina Nath says to Mr. Tollinton, page 2, towards bottom, that Rash Bihari said the terrorist movement of Bengal should be instituted in the Punjab, while to Sessions Judge he said, page 15, lines 36 to 45, that the words "terrorist" and "anarchist" were not used but "advanced propaganda." This is a good illustration of the straits to which the defence is reduced for arguments. To Sessions Judge Dina Nath, line 50, goes on to say—"we began discussing it at once, that a man for throw-

ing bombs must be selected and tested," etc. To Mr. Tollinton Dina Nath merely said *in a compendious way*, "terrorist movement of Bengal," the two statements are, therefore, the same.

Eleventhly, it is said that Dina Nath and Chatterjee contradict each other about the *letter* of introduction of Rash Bihari to Dina Nath. They do, but not about the introduction itself; and in my opinion comparison of Chatterjee's deposition (P. W. No. 199) with Dina Nath's very strongly confirms the latter's good faith.

Many more such points were raised before us, but I am not called upon to mention them all in detail. I have mentioned a large number to show how trivial the objections raised really are, and their triviality and easy refutation are a strong confirmation of the view that Dina Nath has made these long and detailed statements so substantially in conformity with each other that his good faith is thereby much confirmed. If we add to this the circumstance that Dina Nath, arrested on 18th February 1914, made his statement to Mr. Tollinton on 24th and that in it he told very many things that could not then have been known to the Police but were afterwards verified; if we also reflect that, notwithstanding the strenuous efforts of ingenious Counsel, it is fairly clear that in no instance has Dina Nath attributed to any one of these conspirators, who seem to have led somewhat peripatetic lives, presence in Lahore or elsewhere at times when they were elsewhere, I think it is a fair deduction that it is proved *primâ facie* that Dina Nath's story bears the stamp of truth. No doubt according to the authorities corroboration is required, but the case must now be treated on the basis that *primâ facie* the statements of Dina Nath are not suspect in themselves.

I will now touch upon one other main feature of the defence, which affects practically all the accused, though it was argued in detail only by Mr. Sen, namely, the contention that Rash Bihari was a Police spy and an *agent provocateur* and that a good deal of the documentary evidence against the accused, especially such of it as came into existence shortly before the arrests, was deposited by him with this or that accused by way of manufacture of evidence against them. I have carefully considered this defence and so has my learned colleague, and, as he is making it an important part of his judgment, in the statements and views expressed in which I heartily concur, I will refrain from discussing it at length and will merely note here that I reject the theory put forward as unproved and inherently improbable to the verge of impossibility.

I will now discuss separately, always bearing in mind what I have already written, the case against each accused individually. I will take them in the order in which they were discussed before us. The learned Sessions Judge has treated more or less together the cases of (*i*) Abad Bihari and Amir Chand, (*ii*) Balraj and Balmokand. I do not think in doing so he has been unfair to any of them; but, as Mr. Beechey has complained of the method as prejudicially affecting his client Balraj, I will take each accused separately, though this may involve some repetition.

ABAD BIHARI.

As to this man the learned Sessions Judge, page 59 of judgment, after marshalling against him eleven "facts"* holds it,

*Sessions Judge says 12 facts, but he has counted the matter of leaflets twice.

"Conclusively proved that he was not only one of the managing committee of the conspiracy, but the most active member in every department, that he arranged and superintended the throwing of the Lahore bomb and organised the work from the beginning."

Later, in deciding the appropriate punishment for this man, page 74, the Sessions Judge sums up again thus:

"Abad Bihari is only 25 years of age, but he is a highly educated and intelligent man who was used as no man's tool. From the beginning he was an active member of the committee, and, in fact, the most active. He arranged, and was consulted in, everything. Though he did not himself place the bomb, preferring to employ Basant Kumar Biswas for this dangerous feat, he put it together and then directed his agent what to do. He organised the campaign of leaflets, which was meant to bear fruit in murders and crimes. He was in possession of the Poison Manual, to mention one document only. He was an accessory to the presence of the bomb cap in Amir Chand's house. If any man ever earned the full penalty which the law prescribes, it is he."

With every word of the above quotations I am in full accord. They are based on 11 "facts," which I may summarise as follows:

(1) Intimate acquaintance admitted between Abad Bihari and Amir Ghand: *cf.* Abad Bihari's own written statement, page. 306, lines 24 *et seq.*

(2) Intimate acquaintance between these two and the firebrand, Hardayal, and the latter's cousin, Hanwant Sahai, accused.

(3) The unfortunate youths Sultan Chand and Ram Lal were being brought up by these men as seditionists and "patriots."

(4) Intimate acquaintance with Ganeshi Lal Kaistha, ex-Editor of the "Akash" (proscribed paper), whose works they studied.

(5) Connection with issue of leaflets.

(6) Amir Chand, proved friend and guide of Abad Bihari, wrote revolutionary and criminal pamphlets, etc.

(7) Bomb cap found in Amir Chand's house, where Abad Bihari lived and kept his belongings.

(8) These two used same press as the Raja Bazar conspirators and the same type-writer.

(9) Stage management of Lahore bomb outrage.

(10) Abad Bihari's visit to Lahore in October 1913 to fetch away one of two bombs in possession of Basant Kumar.

(11) Intimate friendship with Rash Bihari, who put up with him in Delhi, left his property with him for custody and by his invitation took all his meals with him at Amir Chand's house.

Abad Bihari appears on the scene first at Amir Chand's house in 1908, see Dina Nath, page 13, line 36, as a guest along with Dina Nath, Chatterjee and others. Before this Hardayal had completed his evil work in India and had made over his disciples to Amir Chand. Then we have the Agarwal Ashram meeting in October 1912, page 15, at which were present Rash Bihari, Dina Nath, Balmokand and Abad Bihari, and at which the secret society for sedition and murder was organised, Abad Bihari to be head for United Provinces and Punjab, and Balmokand and Dina Nath for Punjab and especially Lahore. There is no corroboration of direct kind of this meeting and framing of organisation; but there is ample proof that Rash Bihari did come to Lahore about that time, see Exhibit P-108H, letter from Rash Bihari of 27th September 1912 to Charan Das, paragraph 7; P-108 of 5th October 1912, ditto; P-108G. of 17th October 1912, ditto; reply to last named letter P-154L, dated 20th October 1912 (which was never despatched and was found on search of Charan Das's house); P. W. No. 79, Jagdish Ram, page 169; P. W. No. 80, Manni Ram, page 170. We have heard a good deal of controversy as to the dates of Rash Behari's visit: but examination of the materials available makes it clear that he arrived in Lahore on 13th October 1912 and left on 17th.

This is a convenient place for consideration of the question of the nature of the secret society to which the accused belonged. As

stated earlier in this judgment it has been urged that, if there was conspiracy at all, there was one conspiracy to disseminate seditious literature—not charged specifically in this case—and another to commit murder and that this and that accused can at most only be found guilty of belonging to the former. But a review of the whole of the evidence refutes this contention. Hardayal, said to be a brilliant student, busied himself in 1907 and 1908 with spreading propaganda for the independence of India. There is no direct evidence that at this early stage he advocated assassination: but we can fairly look at his whole record—see margin*—and at the evidence of Mr. Isemonger, P. W. No. 177, as to his connection with the *Ghadr* in order to see what his ideas and ambitions were; and I think that it is not unfair to infer from the subsequent actions of his followers—Amir Chand, Abad Bihari, Rash Behari and others—that he also was never averse to employing even murderous methods to overawe the Government of India. In my opinion the copies of the *Ghadr* paper on the record show that his ideas frankly included murder among the means the "patriots" should employ to attain their ends, as the passages in them noted in the margin show. Then Dina Nath's evidence shows clearly enough that bomb throwing was plainly discussed in October 1912, and I believe his evidence. The persons then present clearly joined, or had already joined, a conspiracy with two objects, one of which was murder. Then we come to the "Liberty" leaflets, of which there were four—see margin—and no one can possibly read them without seeing that they openly advocate assassination of Europeans and Government officials. There is in them, as in most of the literature on the record, much wild and whirling talk; but their real purpose is clear from the praises lavished on miscreants such as Kanhaya Lal Dutt, Madan Lal Dhingra and Khudi Ram Bose—see Exhibit P-85A, P-13B, and P-13C especially—and from the suggestion that the abominable outrages of Delhi, College Square (murder of a Head Constable,) and Mymensingh (murder of a Police Inspector)—see page 299 of the Sessions printed Record, evidence of Mr. Denham—were worthy of imitation. Many other pieces of evidence might be here appealed to, but the above are sufficient.

EVIDENCE IN RE HARDYAL

1. Dina Nath, pages 12, 13, 31 (top), 32 and 33 (*passim*), 47 and 48 (cross-examination by Mr. Rauf Ali):—
2. Ex. P-23A 1.
3. „ P-23D.
4. „ „ E 1.
5. „ „ L.
6. „ P-240 3.
7. „ P-240 4.
8. „ P-32C.
9. „ P-32H 1.
10. „ „ K 1.
11. „ „ L 1.
12. „ „ L 2.
13. „ „ M.
14. „ „ M 1.
15. „ „ M 2.
16. „ „ M 3.
17. „ „ N 2.
18. „ „ O 1.
19. „ „ P.
20. „ „ S 2.
21. „ P-47 A.
22. „ P- 76 A.
23. „ P-177.
24. „ „ A.
25. „ P-178.
26. „ „ A.

Only (1) to (10), (17), (18), (20), (21) and (23) are strictly in point here. Nos. (6), (7) and (23) are copies of the *Ghadr*. See page 3 of (6) questions 4th and 8th, and of (23) page 2 bottom, page 5 middle, etc.

Ex. P-85A.
„ 13A.
„ 13B.
„ 13C.

In pursuance of this conspiracy the murder of 17th May 1913 was certainly effected, whether the Delhi outrage was so or not. As to Delhi all we have to go upon is that Abad Bihari, a Delhi man, who in those days belonged to the Lahore Central Training College, was in Delhi when the Viceroy's life was attempted, and that Basant Kumar, employed in Lahore in the "Popular Dispensary," had left Lahore, according to Dina Nath and according to his own admission for an unknown destination a few days before; and also that, on Abad Bihari's return to Lahore early in January 1913, Dina Nath had with him a conversation, Abad Bihari's part in which lays him open to most injurious suspicions. However, I do not wish to lay stress on this, for the Delhi outrage is not charged and the matter is merely one of suspicion. But as regards the Lahore outrage Abad Bihari is up to the neck in it. I will discuss it at length in connection with Basant Kumar, and it will be seen how strong the case is. It follows, then, that there was a conspiracy to commit murder, and that in pursuance of it a murder was actually committed. All persons proved to have been members of that conspiracy on or before 17th May 1913

have, therefore, rendered themselves liable to the extreme penalty of the law.

But this is not all the evidence against Abad Bihari, for he was undoubtedly mixed up with the concoction and distribution of the "Liberty" leaflets. Dina Nath says the original of the May leaflet was in Abad Bihari's own hand, and I see no reason to doubt this statement. He tells the whole story at page 17 of the printed Sessions Record, and it carries conviction with it. It has been attacked in various ways, but I am firmly of this opinion. Then we have the July leaflets, on which not much need be said, the conversations about Mr. Gordon, Sir James Meston and the proposal to kill the Viceroy at Kapurthala. I see no reason to doubt the substantial correctness of Dina Nath's evidence on these subjects, but I do not wish to lay much stress on them as the case against Abad Bihari is otherwise sufficiently established. But I must insist upon the importance of the evidence regarding Abad Bihari's visit to Lahore in October 1913 to fetch away one of the bombs Basant Kumar had been keeping. This story I hold clearly proved, and I adopt generally the learned Sessions Judge's views regarding it—see his judgment, page 49, last column, and pages 58 (bottom) and 59 (top). Of course, no witness but Dina Nath can speak of the actual handing over of the bombs by Basant Kumar to Dina Nath and by him to Balmokand or of the visit to the sick Balmokand, after Abad Bihari's arrival, to get a bomb from him. Conspirators of this kind do not call in outsiders to witness their acts; but the coincidence of Balmokand's illness—he admits he was ill at the time this visit is said to have taken place—and the matter of the purchase of books by Abad Bihari from Rama Krishna in those days are to my mind confirmation strong as Holy Writ. Abad Bihari denies visiting Lahore at all then, and therefore, as I hold he did visit Lahore, he is precluded from pretending that he was there for some innocent purpose. The prosecution is fully justified in asking us to draw from his false denial the inference that the object of the denial was to hide something extremely unfavourable to himself. No lengthy argument is required to show that the matter of the prescription as the cause of the handing over of the bombs is adequate reason for the act; and it is extraordinary confirmation that Dina Nath should have hit off the very day of the trouble about the prescription.

Again, we have the November leaflets, the conversation regarding the proposed throwing of a bomb in a Christmas dance in Lahore, and what was found in Abad Bihari's house (P-3 and P-39 and P-45) in Delhi by the Police on 16th February 1914 and in his box in Amir Chand's house (P-53). I do not wish to enlarge upon the first two of these matters; but a few words as to the last are necessary. The incriminating documents mentioned in P-53 were found in a box placed on the first floor of Amir Chand's house on a balcony (*chajja*) some 14 feet from the ground, access to which was possible only by ladder or climbing or through the house. The box was unlocked, and we are asked by accused's Counsel to hold it possible, and even probable, that Abad Bihari was not aware of the presence of the papers there and that they must have been placed there by the Police, or Rash Bihari (in the character of a Police agent), or by some enemy. I reject all these solutions These papers are quite in keeping with Abad Bihari's views and with other literature owned and even written by him; the search was carefully made by responsible officers and I decline to believe in their conniving and substitution or any sort of trickery; and I have already disposed of the theory of Rash Bihari as a Police spy.

Lastly, I advert to Sessions Judge's "facts" (1), (2), (3) and (11), regarding which there can be no doubt. In Abad Bihari's house was found an atrocious document—P-4—in the handwriting of Ram Lal, lying openly on a table and apparently written there.

I repeat that the charge against Abad Bihari is proved to the hilt. I have carefully weighed each and all of the arguments of Counsel touching him and find them all wanting. It is obviously impossible in a case like this to notice in the judgment and to refute each and every contention, or to describe each and every document produced;

but I will now deal with a few objections which were most strongly pressed, by way of showing how strong the case for the prosecution against this man is.

First, it is pointed out that Manni Ram, P. W. No. 80, pages 170, 171, Sessions printed Record, says he saw Raghbar Sharma, accused, and the original of the photograph P-118 (Rash Bihari) and a few more holding a conference at the Agarwal Ashram and none of the other accused was there. He cannot apparently fix the date better than "in October 1912", and it may well be that there was more than one conference. Again, evidently Dina Nath, who clearly knows of a conference there in October 1912, was not at this one, for Manni Ram does not mention him. There is, therefore, no contradiction.

Secondly, see page 15, lines 24-27 and page 35, line 51: it is said that this Daulat Ram is a myth, but see what Dina Nath really says: "*He* (Balmokand) *said* that a friend of mine Rash Bihari Bose had come and wanted to meet me and told me where he was stopping, *i. e.*, in the house of a boy whose name was, *I think*, Daulat Ram." I can see nothing suspicious in the circumstance that Dina Nath could not recognise any Daulat Ram—he had apparently not *seen* the real Daulat Ram at all.

Thirdly, as to the posting up of leaflets Dina Nath says: page 17, line 27, that Abad Bihari was to do the posting in the Training College and yet none were found there, showing Dina Nath is lying; but the only inference that can logically be deduced from this is really that no responsible person found leaflets there and forwarded them to the authorities.

Fourthly, it is suggested that Dina Nath, in the first instance, anxious to keep out Ram Sarn Das's name entirely, substituted Abad Bihari for him, and that really Ram Sarn Das did not only the printing but the writing and distribution of the May leaflets the suggestion being strengthened by the circumstance that Ram Sarn Das in those days was working at the Dyal Singh College in Lahore—Dina Nath, page 51, bottom, and Puran Chand, P. W. N. 197, page 288. All I need say is that there is not a particle of proof of the suggestion.

Fifthly, four copies of the May leaflet were found on 4th May 1913 in the Dyal Singh College compound; suggestion is that Ram Sarn Das was the most likely person to put them there. It is posible that he *had* kept a few copies and used them unknown to Dina Nath. This does not help Abad Bihari Nor do I think the fact that a few leaflets got out before the date Dina Nath gives as fixed for the publication at all important. It may well have happened through another conspirator without Dina Nath's knowledge.

Sixthly, a difficulty has been raised by Mr. Nanak Chand about fitting in dates for Dina Nath's story of the May leaflets and the Lahore bomb outrage. He says that distribution took place on 10th and 11th May that then Dina Nath says he wrote and told Rash Bihari at Dehra Dun who replied, that he again wrote and received a reply, after which he and Abad Bihari fixed 16th May at 5 P. M. for meeting to concert the outrage; and he contends that all this correspondence could not have been crowded into so few days. There were two letters and two replies. But Dina Nath says 9th *or* 10th May was fixed for distribution, therefore, he may have written to Rash Bihari on 10th, or even on afternoon of 9th. Anyhow he says he got the first reply on 11th or 12th. After that there was ample time for another letter and another reply before the 14th or 15th—see page 18 top. The difficulty vanishes.

Seventhly, Dina Nath says (page 19, line 7) Abad Bihari told him to took half an hour at the gardens on 17th May 1913 to get the bomb ready, whereas Major Turner P. W. No. 12, page 95, line 33, says: the bomb cap could be fixed on in a minute. But how do we know there was not much more adjustment to be done than the mere fixing on of a bomb cap?

Eighthly, Mr. Nanak Chand asks why Abad Bihari should go to the gardens at all when Basant Kumar knew himself how to fix up bombs—Dina Nath page 22, line 20; but he overlooks the fact that Basant Kumar may have learnt by December 1913 what he did not know in the previous May.

Ninthly, Mr. Nanak Chand argues that there is hopeless discrepancy as to the

dates on which in October 1913 Basant Kumar is said to have handed the two bombs to Dina Nath and on which Abad Bihari is said to have come to Lahore to fetch one and to have left Lahore, *re infecta*. He fixes 9th October as first date because Dina Nath says "at Dussehra time," that being the big Dussehra day that year. To Mr. Tollinton Dina Nath said—page 6, 12 lines from foot—that it was 15 days later that Abad Bihari *came* to Lahore: this would make it 24th October. To Committing Magistrate Dina Nath said—page 46 of *his* printed proceedings—he took the bombs from Basant Kumar, kept them three or four days, and six or seven days later Abad Bihari came and went: this would work up to 18th, 19th or 20th October. To Sessions Judge—page 21, lines 40 and 55—he said he gave them to Balmokand after keeping them three or four days, and five days later Abad Bihari came and went: this works up to 17th or 18th. I am unable to see any importance in all this: Dina Nath, speaking four months afterwards, was vague in saying "15 days", that is all.

Here I may note that Mr. Nanak Chand notices a point which incidentally confirms Dina Nath's tale. The latter is explaining to Mr. Tollinton—middle of page 7—how Abad Bihari repaid him for the books Dina Nath had paid the price of to Rama Krishna and says Abad Bihari sent him money by money order *or* by registered letter. The Police thereupon made inquiries of the Post Office and a registered letter receipt (P-94) *was duly found, corroborating Dina Nath. Mr. Nanak Chand vainly tries to show, by reference to P. W. No. 76, Sita Ram, that what went in the registered cover was not money but an examination supervisor's certificate. But Sriram Das, P. W. No. 154, to whom the certificate form should have gone, if that is the true version, was never asked by the defence if he received it. To me it appears extraordinary confirmation of Dina Nath's good faith that on 24th February 1914 he should have said "by money order or registered letter." He could not quite remember which. He must have known that, if the story was false, it would be proved so by inquiry at the Post Office. It is very improbable he would remember the arrival of a registered letter with certificate so accurately as to utilise the incident to cover a pretended remittance, and, if he did remember, would he have said *money order or* registered letter?

*Not printed.

Tenthly, an absurd use is sought to be made of (page 49, first 11 lines) the fact that Dina Nath's father and a friend, Dogar Mal, came to the *kotwali* when Dina Nath was arrested on 18th February. It is suggested that these two gentlemen, the latter being forsooth resident *of the same district* as the Inspector who was investigating, plotted to get Dina Nath off. I merely mention the theory to reject it.

Eleventhly, Chand Baba, P. W. No. 119, page 215, who professes to identify Abad Bihari's handwriting on P-132 A to J, 23-C, 23-F and 93-B, is said really not to know his writing. This seems to me audacious; the two men are first cousins and both of Delhi and they were at school together. This Chand Baba strikes me as a very honest witness; why does he go against his cousin at all, or, if prevailed upon to perjure himself, why does he say so little? The answer is, he is really saying only what he knows.

Twelfthly, it is argued that Abad Bihari had no connection with the 3rd and 4th leaflets. Whether there is or is not proof that he wrote or distributed or handled them, at least 37 copies were found in his box on Amir Chand's balcony.

Thirteenthly, Exhibit P-7 is a note-book, admittedly of Abad Bihari's, containing a list of books, whereof the last nine (with prices) are noted as bought from the aforesaid Rama Krishna, and the last four are said to be those bought through, and paid for by, Dina Nath, in October 1913, when Abad Bihari came to Lahore. Prosecution use this to confirm Dina Nath who says four books costing Rs. 11 were bought, the figure agreeing with the note-book. Mr. Nanak Chand, on the other hand, argues that the ink and writing in Exhibit P-7 show that all nine books were written down at the same time and that in reality all were bought at the same time, in December 1913. Rama Krishna, P. W. No. 116, does not help either side, and even if all nine books were entered up on same occasion, this does not show they were bought on same day. The account given in the witness's supplementary statement

does not help. Abad Bihari does not appear in it, and no doubt Dina Nath did buy certain books in December *on credit*, the purchase for Abad Bihari in October was for cash.

I can find nothing further in Mr. Nanak Chand's criticism of the evidence. In my opinion rejection of his client's appeal is the only course open to us. He is a man deserving of no mercy or consideration.

The next appellant to be looked at is

AMIR CHAND.

Again, I can unhesitatingly concur in the summing up of the learned Sessions Judge, page 61 of judgment:

"Not only do I find Amir Chand guilty of having been an active member of this conspiracy, but, considering his age and considering the facts that he used his undoubted talents in corrupting the young and adding recruits to the cause of anarchy, he appears to me to be a criminal, for whom nothing whatsoever can be said, as being not only a* murderer on a great scale, but one who spent his life in furthering murderous schemes which he was too timid to carry out himself." And again, at page 74:

*Perhaps the word "would-be" inserted here might be an improvement.

"The case of Amir Chand is, if possible, worse than that of Abad Bihari. A man of 40 years of age, filling a position of importance in the educational world at Delhi, respected and consulted by his compatriots, such as Rai Bahadur Sultan Singh*, no less than by the members of the Delhi Mission, a man who used his undoubted gifts and his influence over the young to train others and even his own adopted son* by means of the literature of anarchy and crime, and not only this but a man who assisted in the dissemination of the poisonous literature of this organization, and who himself composed an article* advocating a wholesale massacre of Europeans; a man, moreover, who allowed his house to be used as the general meeting place of disaffected criminals, and in whose possession a portion of a bomb was discovered. There is only one possible sentence for him also. . . ."

*P. W. No. 163.

*Sultan Chand.

*Exhibit P-23-M.

As already stated the learned Sessions Judge has treated the cases of Abad Bihari and Amir Chand together, though he has summed up against each separately. Of the 11 "facts" noted above against Abad Bihari, Nos. (1), (2), (3), (4), (6), (7) and (8) apply with at least as much force to Amir Chand, and I need say little more about most of them. No. (3), the infamous training of Sultan Chand and Ram Lal, tells most against Amir Chand, in whose house these victims of criminal influence long lived: of these Sultan Chand turned approver and Ram Lal was made an accused but was acquitted, mainly on the ground of his youth and of the doubt whether he had been fully initiated. Sultan Chand's evidence—he is P. W. No. 201, and it is not pretended that he has any reason for speaking falsely against his adoptive father and his friend—and the proof of the training of Ram Lal to be found in his history and in the atrocious things he was made to write out, especially P-4 already mentioned, prove "fact" (3) to the hilt. That and other documents give a very clear idea of the devilish ingenuity of the methods adopted to warp and corrupt the youthful mind. Briefly stated the plan was first to appeal to the religious emotions, so near the surface in most Hindus, and to persuade the victim by a perverted interpretation of Hindu ideas, that, if he committed a crime in furtherance of the designs of his teachers, that need not trouble his conscience, because all human minds were as it were a part of the Divine Mind and so the act was really the act of God. The next step was, by travestying the history of British India and the present condition of it, to make the victim think that the present Government, was an iniquitous Government the cause of all the real and imaginary evils from which the country suffered - plague, famine, poverty, oppression—and that the only remedy was rebellion, boycotting and intimidation by murder, and that any one dying in such a cause was a martyr and a saint. Passing over (4), as the Sessions Judge has done, there is no difficulty in holding that (6) is fully established. It is only necessary to refer to P-23-M. to prove the point. It was found in Abad Bihari's box in Amir Chand's house, and the handwriting is

admittedly the latter's. It was never published and it was written in 1914, it is true; but I entirely reject as farcical the desperate attempt to explain it away by saying, as Amir Chand says, that it was written in a moment of irritation and was not intended as an expression of the writer's real feelings. He says he intended to destroy it, but was unable to find it. This explanation is falsified by examination of the document, which was written in black ink and then successively corrected and "improved" in red ink and in pencil, showing that there was a serious purpose in it and that it was produced in its final form after at least three sittings. Though not published, it was evidently given to the pupil, Abad Bihari, who must have read it. The violence of the language almost exceeds that of the *Ghadr*, for it abounds with phrases like these—

"The cursed foreign yoke of the English devils."

"The common foes of all Indians . . . . sucking our life blood." "We are so many that we can seize and snatch from them their cannon."

"*Reforms* will not do. Revolution and a general massacre of all the foreigners, specially the English, will and can alone serve the purpose."

As the learned Sessions Judge observes, such a document speaks for itself.

As regards "fact" (7), not much need be said. The bomb cap was certainly found in a locked room at the top of Amir Chand's house, and I take it as proved, the search having been made by Mr. Petrie and with all care, that it was really found at the opposite side of the room from the hole in the wall and so must have been placed there by some one who entered by the door. The idea that this was done by a spy or Police agent or an enemy is absurd, and Amir Chand must be fixed with the responsibility. No doubt the top storey as a whole had been made over to Sultan Chand and his mother, but this room was locked and none of their property was in it, though a box of Abad Bihari's containing nothing in particular was there.

Expert evidence, especially P. W. No. 161 and P. W. No. 1, not criticised in argument before us, proves point (8); and there remains, if any more proof is required, the evidence of Dina Nath, and of the numerous witnesses named in detail by the Sessions Judge at pages 52 and 53 of his judgment. His view, in which I fully concur, is that this evidence fully proves Amir Chand's leading part in the conspiracy. It is impossible, and in an appellate judgment unnecessary, for me to re-state all that these witnesses are supposed to prove and do prove: I need only say that my remarks below upon the arguments of Amir Chand's Counsel, Mr. Raghunath Sahai, show how futile are his attacks upon the strong fortress in which the prosecution are entrenched. We heard him for two whole days and gave the most earnest attention to his contentions.

First, he suggested that the document P-23-M should be left out of our minds, but this is out of the question, for reasons I have already given.

Next, it is pointed out that, whereas Dina Nath at page 13, lines 20 to 40, says Chatterjee told him in 1908 he was going to stay with Amir Chand and was actually at Amir Chand's house when witness went there; Chatterjee, page 290, lines 30 *et seq*, and page 292, lines 24, 25, says he did not know Amir Chand before he went to his house and does not think he had ever heard his name. This is certainly a discrepancy, but only as to Dina Nath's saying that Chatterjee *told him* he was going to stay with Amir Chand. A discrepancy of so minute a kind in evidence given six years after the event does not strike me as important.

Thirdly, it is asked why was not Dina Nath's servant, mentioned at page 15, line 25, as the man who pointed him out to Balmokand, called to corroborate. A much more telling question is, why did not the defence ask Dina Nath the name and address of the servant and call him to contradict?

Fourthly, Counsel tries to discredit Dina Nath by pointing to pages 17 bottom and 18 (Dina Nath) and page 177, 2nd paragraph, and page 179 (Fazl Karim), the latter denying receipt with the leaflets of an anonymous letter, which the former says

he sent. The reply is that the letter was probably just a slip and may have been overlooked, and any how the matter is insignificant. *What is significant is, how did Dina Nath, if he did not send the leaflets, know that Fazl Karim had received them?*

Certain other arguments like this really affect specially the cases of other appellants and will be noticed in dealing with them. The next criticism, *fifthly*, is connected with the 3rd of November 1913 edition of leaflets. Dina Nath, page 22, line 41, says these had no poetry in them, but P.-13-B begins with a stanza. Again, an infinitesimal point: these leaflets were not distributed then, but in January 1914 along with the December leaflets, so that a slight confusion is natural enough.

Sixthly, advantage is taken of two remarks of Mr. Norton, P. W. No. 1, printing expert, at page 11, lines 10 and 33. It is said that the *Om* leaflet (called 4th edition by prosecution) could not have been printed so early as 21st November 1913, for, he says, it was printed only "a few days" before his visit to the Press, his first visit being on 8th December 1913. I think "a few days" can easily be taken to cover 17 days, and further it is after all only an opinion of rather a hazardous kind.

Seventhly, see page 51, line 33: "The parcel was closed when I gave it to Balrāj." Counsel asks how Dina Nath could know what was in the parcel if he handed it over unopened and Balraj did not open it before him. But Dina Nath says he had the parcel some days and does not say he never opened it during those days or saw the contents.

Eightly, see page 21, top—it is argued that Amir Chand was evidently not initiated at that time (end of 1913), for otherwise the project against Sir James Meston, discussed between Abad Behari and Dina Nath, would have been discussed also with Amir Chand. But that project had been perforce abandoned and why should it be discussed again?

Ninthly, it may be conceded that Amir Chand had no direct part in the meeting of October 1912, or the Lahore bomb outrage, or the May leaflets; but he was already an intimate friend and co-conspirator with the persons who engineered those things: and I also consider it of no importance that Amir Chand is not shown to have had any personal acquaintance with Basant Kumar.

Tenthly, it is argued that evidence of conspiracy before October 1912 is irrelevant, because the case for the Crown is that then the conspiracy was formed. This is not so; the conspiracy was *organised* then, and see the words in section 10, Indian Evidence Act, "after that intention was first entertained by any of them."

Eleventhly, it is said that there is no proof that Amir Chand took over Hardayal's disciples. In my opinion, this is proved for all practical purposes by Dina Nath and Chatterjee (page 290, lines 50-60) and by the circumstance of Abad Bihari's living in Amir Chand's house later.

Twelfthly, it is argued that Ram Lal's acquittal should lead to Amir Chand's absolution. One has only to read the evidence to see how absurd this is.

Thirteenthly, I have carefully examined the evidence beginning with Exhibit P-100 and the Exhibits of the 185 series produced by North-Western Railway regarding refund of price of railway ticket, Delhi to Lahore, and I can only reject Amir Chand's explanation that the ticket was for himself and not for Rash Bihari and that he missed his train. The story of the prosecution is that Dina Nath wired to Delhi from Lahore advising that Rash Bihari should not come at that time, that Amir Chand had bought the ticket at the City Booking Office for Rash Bihari, who would naturally not want to be seen there, and the wire led to the abandonment of the journey. It seems to me extraordinary that Dina Nath should in his long story have hit off just the days on which Amir Chand bought a ticket in an unusual way at the City Booking Office, and got a refund. I have no difficulty in accepting the prosecution theory of the incident. Counsel admits that Dina Nath, when making his statement, could not have known of the refund of the ticket money.

Fourteenthly, at this point Counsel was obliged to make several admissions—*e. g.*, that the whole of Sultan Chand's story, as told at foot of page 53 of judgment, is true; that the handwriting of Exhibit P-12 etc., detailed at middle of same page

is Amir Chand's; that Amir Chand and Abad Bihari were intimate friends: and then he goes on to argue that Sultan Chand, P. W. No. 201, page 296, line 2, says he got leaflets from Abad Bihari and kept it dark from Amir Chand showing Amir Chand's innocence. But in dealing with Sultan Chand one has always to remember that he is the nephew and adopted son of Amir Chand, living in his house and apparently entirely dependent on him. Thus attempts by him to screen Amir Chand, however useless, are natural.

Fifteenthly, the whole of the evidence of Amir Chand's connection with Ram Lal is then discussed with a view to showing that it was merely an innocent and philanthropic connection. It seems to me immaterial why Ram Lal left his home and came to Delhi: what we are concerned with is, how he was dealt with at Delhi, and what was being instilled into his youthful mind. As to this the proof is overwhelming, see *inter alia* Exhibits P-4, P-5 and P-6 in Ram Lal's hand. No doubt these were found at Abad Bihari's house, but admittedly Ram Lal had lived in Amir Chand's house until just before his arrest.

(1) Ram Lal's written statement, page 337.
(2) P. W. No. 99, Hukm Chand, page 197.
(3) P. W. No. 100, Nannoo Lal, page 199.
(4) P. W. No. 170, Manak Chand, page 261, line 28.
(5) P. W. No. 196, Shib Narain, pages 286, 287, line 20.
(6) Amir Chand's written statement, para. 7, page 310.
(7) Exhibits P-149-B and 150-B.

Sixteenthly, a parcel, which Dina Nath says contained the third lot of leaflets, certainly came to him from Amir Chand. A parcel is admitted; but it is said that it contained volumes of Swami Ram Tirath's works. Amir Chand's business books contain no entry of such despatch, but he says it was not customary to make entries regarding "presentation" copies. Here appellant falls into a self-constructed trap. The parcel was sent "bearing," which contradicts the idea of a present and incidentally appellant here admits friendship with Dina Nath, a thing which he elsewhere denies. The volumes of the Swami's works are a myth—see the cross-examination of the witness D. W. No. 4, page 366, especially lines 30 and 45. Amir Chand admits sending a parcel and it did *not* contain books. What did it contain? The only answer to this is, it contained what Dina Nath says.

Seventeenthly, Exhibit P-23-L is denounced as irrelevant, the prosecution can do without it.

Eighteenthly, I concede that the learned Sessions Judge has fallen into a few small errors, *e. g.* where he says P-7 was found in Abad Bihari's *coat*, and where he says the cases against him and Amir Chand are "very similar"—page 59 of judgment—and where he says the witnesses were absolutely "positive" that there was no other box in room Z in Amir Chand's house when the bomb cap was found—page 60 bottom, and P. W. No. 9, page 87, line 7, and Brij Lal, P. W. No. 8, page 81.

Nineteenthly, at this point Counsel made a most unfortunate point against his client. By way of showing what a fine fellow Amir Chand really is, he pointed proudly to P. W. No. 107 and P. W. No. 110 and Exhibit P-212. Now, no doubt a good character vouched for by the two witnesses Canon Allnutt and Mr. S. K. Rudra is a valuable asset, but it must be borne in mind that "patriots" of Amir Chand's type are often, except in regard to the monomania possessing them, estimable men and of blameless private life; and the reference to Exhibit P-212 is most unfortunate The writer, R. S. Narayana Swami, in extraordinary diffuse and ornate phraseology, is really only writing a business letter as to how much commission Amir Chand is to pocket. In doing so, he no doubt expresses profound admiration for the latter, but what kind of a man is the writer? At the bottom of the first page of the document will be found a reference to a lecture by the writer and that is to be found as Exhibit P-14 and P-14-A. After reading that one is forced to the conclusion that to be praised as a patriot, etc., by the author thereof amounts in itself to a damning indictment. Incidentally this document P-212 tells also against Abad Bihari, for the writer calls him "dear Abadji."

Twentiethly, it is urged that at the most Amir Chand only became member of conspiracy in November 1913 and then only of a conspiracy to disseminate seditious

literature. In my opinion, however, the intimacy with Rash Bihari and Dina Nath and Hardayal, the harbouring of Abad Bihari, the training of Sultan Chand and Ram Lal, and the coming and going of conspirators in his house take Amir Chand's connection with the conspiracy back to a time much earlier and show that he was a member even before October 1912. As he was then a member, under section 10, Indian Evidence Act, all the acts of the other conspirators are evidence against him.

Lastly, I notice one legal argument, specially appertaining to this part of the case. *Romesh Chandra Banerjee* v. *Emperor* (6) is invoked as showing that the finding of papers in Abad Bihari's box in closed covers is nothing against Amir Chand, but this argument ignores section 10, Indian Evidence Act.

This long and tedious review of Mr. Raghunath Sahai's arguments has been undertaken in order that no point in favour of Amir Chand, or supposed to be so, should be overlooked. The result is damning. The man has fully earned the reward he has received.

The next appeal to be dealt with is that of

BALRAJ.

This young man, now about 24, partially passed the B. A. Examination in 1910 and apparently secured the degree the following year. I may state at once that, in my opinion, it is proved that he was a member of a conspiracy to commit murder, that in pursuance of that conspiracy the murder of May 1913 was effected, but that it is not proved that he was really a member until a later date. To my mind the law is not clear, but I am content to hold that under section 120-B, Indian Penal Code, he can, in the circumstances, be punished only under section 115 of that Code with seven years' rigorous imprisonment as a maximum. There is no reason for showing him any indulgence, and, if my learned colleague agrees, I would sentence him accordingly.

(6) 23 Ind. Cas. 985; 41 C. 350; 18 C. W. N. 498; 15 Cr. L. J. 385.

I will here also notice the arguments of his Counsel (Mr. Beechey) on his behalf. He sketches thus the history of Balraj from 9th October 1912, before which date the only mention of him by Dina Nath is that he was present—that is all—when Rash Bihari came to Nabha House, Lahore, in the summer of 1911 :—Went on 9th October 1912 to Jodhpur as tutor to the Princes ; reached 12th October, thus missing the Agarwal Ashram meeting. In 1913 went with the Princes and Mrs. Windham to Kashmir and stayed there till September 1913, thus missing the episodes of the May leaflet, the Lahore murder, and the July leaflet ; on 15th September 1913, asked for a year's leave, joined the Government College ; went on 1st October 1913 to Jodhpur, taking his sister, and returned on 10th October ; went to Mussoorie on 21st November 1913 at invitation of General Partab Singh's son, Prince Narpat Singh—meeting him at Dehra Dun on 22nd and taking him up the hill, where he remained until 26th November ; returned to Lahore 27th November, arriving with Thakur Indar Singh by Bombay Mail on evening of 28th ; stayed at the house of his cousin Sheo Raj in Lahore until 13th January 1914, when he and the Princes and accused Balmokand, who had been tutor in his place, went to Jodhpur, whence he returned on 21st January 1914 and continued his studies till his arrest on 20th February. These dates are to a large extent proved.

First, Mr. Beechey points out that Dina Nath's saying he saw Balraj at Nabha House in 1911 is wholly uncorroborated, for Jagdish Ram and Manni Ram (P. W Nos. 79 and 80) do not mention Balraj as being there ; and that in October 1912 the only trace in the evidence as to Balraj is that Dina Nath says Rash Behari at the Ashram remarked that Balraj had gone to Jodhpur. In my opinion Mr. Beechey is justified in contending that this is hardly proof that Balraj was then one of the gang, for we are left in the dark as to the occasion for Rash Behari's remark. The learned Sessions Judge's way of putting the matter in last paragraph of page 24 of his judgment is, therefore, hardly correct.

BALMOKAND v. EMPEROR.

Secondly, Mr. Beechey has essayed to help his colleagues in the defence by a long series of arguments as to weak points in connection with the facts of the Lahore bomb outrage. I will not discuss these here, as I hold that there is no proof that Balraj had become a member of the conspiracy at that time or knew what was going to be done. In connection with the October 1912 meeting he was only mentioned as having gone away, and here he is brought in only in a very indirect and circuitous way, that is, Girdhari Lal, P. W. No. 40 said to Committing Magistrate the statement being brought on to the Sessions record, (but denied to Sessions Judge) that Balmokand accused, in asking him to get employment for Basant Kumar Biswas, said Balraj had recommended him. In my opinion this statement of Girdhari Lal's is technically *relevant* against Balraj under section 10, Indian Evidence Act, inasmuch as I am going to find Balraj was a conspirator, albeit he became one later on; but I decline to hold on such a tainted piece of hearsay* that Balraj is *proved* a conspirator in October 1912. Amar Nath, P. W. No. 38, page 126, is taken by the Sessions Judge to be an honest witness, and he says, line 29, that Girdhari told him that Basant Kumar told *him* that Balraj had instructed him (Basant Kumar) to go to Lahore and get service. I do not think that even with this reinforcement the evidence can be said to prove Balraj at that time a member of a conspiracy to commit murder.

*See especially page 13, line 10 *et seq.*

Thirdly, it is pointed out that Dina Nath, a head conspirator, never saw Balraj between summer of 1911 and September 1913, though the latter was in Lahore till October 9th, 1912, and it is argued that this is not what one would expect had Balraj been a conspirator.

Fourthly, the next mention of Balraj, it is shown, is also hearsay— page 22, line 25, Balmokand telling Dina Nath that Balraj was now working in Lahore and saying that the trio should agree on some work and that Balraj had assented to the plan for throwing a bomb at the Viceroy at Kapurthala. As this is both hearsay and uncorroborated, it is urged that it should be entirely rejected; but in my opinion it stands on rather a different footing from the earlier hearsay utterances of Dina Nath and Girdhari Lal, for here the statement of the fellow-conspirator was certainly in furtherance of the "common intention," whereas the other statements were at most only inferentially so. I take this as inconclusive standing alone, but at the same time as the *first* of a series of links connecting Balraj unmistakably with this criminal conspiracy.

Fifthly, I do not think much of the next point raised, which may be stated thus. Dina Nath says to Mr. Tollinton, page 11, the conversation with Balmokand about the Viceroy and Kapurthala was some 15 or 20 days before the Viceroy went there and that he understood Balmokand had the bombs then; whereas by the story told elsewhere the bombs were handed by Basant Kumar to Dina Nath and by him to Balmokand some time between 9th and 24th October 1913, *i.e.* later, for the Viceroy went to Kapurthala on October 16th. The trouble has arisen over Mr. Tollinton's way of recording the statement at page 11. He mixes up the conversation as to the Viceroy (September, October 1913) and that regarding the Christmas dance (December 1913) and in a general way says the bombs were with Balmokand then. In the Sessions Court the matter is made quite clear, see page 50 top and line 39, and page 22 bottom.

Sixthly, it is pointed out, correctly enough, that there is no corroboration of Dina Nath's statement, page 22 bottom, that Balmokand said he had consulted Balraj and secured his agreement to the Lahore dance project.

Seventhly, Mr. Beechey complains that his client is brought into the matter of the 3rd and 4th leaflets merely by Dina Nath's unsupported assertion that he gave them to Balraj for no rhyme or reason and that the latter kept them for some time. In reality Dina Nath's story of Balraj's connection with these leaflets is in great detail, see pages 22, 23 and 24, and can hardly be all invention. It is true that to Committing Magistrate, page 48, middle of his printed Record, Dina Nath, though not in so many words, gives the impression that he handed

over the November leaflets to Balraj on day of receipt, 24th November, but he speaks more explicitly to Sessions Judge, and I do not think it fair to take it that Dina Nath really meant transfer on 24th November to Balraj. The point is, of course, that Balraj was away from Lahore at Mussoorie until 28th November, and the suggestion is that Dina Nath, learning that Balraj was not in Lahore on 24th November 1913, has deliberately altered his story; but I cannot find any sufficient ground for this idea, and against it is the important consideration that the later story came out not in examination-in-chief but in cross-examination, page 51, lines 14-30, Sessions Record. Had the (supposed) alteration been the deliberate result of a desire to slip out of a difficulty, I think it would have been made in examination-in-chief and not have been left to the chances of cross-examination; and see Dina Nath page 51, bottom, where he says he did not even then know Balraj was out of town.

Seventhly, attention is drawn to Exhibit P-99 (not printed). This is a slip of paper on which Dina Nath says he tried the typewriter, page 28, line 40, and we find at the top of it

"LAHORE 211"

with the last 1 struck out. It is urged that this was the beginning of the date on which it was being tried; *i.e.*, 21st November, whereas witness says he borrowed the machine on the 27th, and that the slip, therefore, gives the lie to him. It is also contended that the document is probably a fabrication for the purposes of the case, but, of course, these two criticisms are mutually destructive. I reject both. It is noteworthy that Dina Nath was not cross-examined as to the details of Exhibit 99, nor asked what "211" meant.

Eighthly, a futile attack is made upon Dina Nath as to the bringing of the machine from Balraj's, based on the various English records. To Mr. Stead, P. W. No. 36, page 120, line 40, Dina Nath said Ram Sarn Das went with him to Balraj's, but, line 46, Ram Sarn Das denied this. In Sessions Court Dina Nath does not mention Ram Sarn Das. Then to Mr. Tollinton, page 8, he said Balraj brought it, to Committing Magistrate he said he went to Balraj's with a coolie and the coolie came back with him carrying it: in Sessions Court he left out the coolie as such and said a man whose name he did not know carried it. This is a very good instance of the sort of minute analysis to which the approver's story has been subjected, and the whole fabric of the criticism breaks down when the vernacular version in the Sessions Court is seen, for there the coolie is mentioned and naturally the name of the coolie was not known to the witness. The attempt to keep Ram Sarn Das's name out arouses no suspicion in my mind.

Ninthly, it is said that, even if Balraj's connection with these leaflets is proved, as I hold it is, this is no proof of his being a member of a conspiracy *to commit murder*; but as to this I need only point to the contents of the leaflets.

Tenthly, it is contended that Dina Nath never mentioned Balraj until 20th February, *i.e.*, the day after he saw him at Khushi Ram's house, and this makes the mention of him suspicious. To me it seems natural enough that Dina Nath should, in his original statement to Police, not tell absolutely all he knew, for he was then only fishing for a pardon and a complete detailed story was not called for; and I can find no reason to suppose that he after that kept improving his story dishonestly or at the instigation of the Police.

Eleventhly, in my opinion, Exhibit P-119 is an extremely suspicious document, but, as my learned colleague will explain at length, doubt as to its meaning is permissible. This point I concede to Mr. Beechey.

Twelfthly, Exhibit P-120 is objected to as showing nothing against Balraj, and I rather agree with Mr. Beechey here.

Thirteenthly, Exhibit P-131 (letter to Balmokand) was put forward as written by Balraj, but, see P. W. No. 91, P. W. No. 92, P. W. No. 93, and D. W. No. 5, page 360, it is not proved. I agree here and leave this letter out of account.

Fourteenthly, one of the strong points in favour of Dina Nath's good faith being the success with which he avoids attributing to Balraj presence in Lahore when he was

really absent, Mr. Beechey tries to meet the argument by pointing out that Balraj, arrested on 20th February, was at once taken before Mr. Stead, and it is urged that he must then have said he was absent from Lahore from 9th October 1912 to 15th September 1913, and that this was passed on to Dina Nath, so that on 24th February he was able to avoid all pitfalls. This is, of course, *possible*; but I must decline to believe without better reason that the Police were engaged in tactics of this sort. My general impression, after examination of the whole case and after listening to arguments for 18 days, is that the Police have acted throughout with great impartiality and moderation, and I prefer to hold that Dina Nath avoids pitfalls because he is following a straight and true path.

The above is an exhaustive examination of Mr. Beechey's arguments. The result is as stated already: I would hold Balraj guilty of being a member of the conspiracy but of joining it after 17th May 1913 and under section 115, Indian Penal Code, I would sentence him to the maximum there provided.

We now come to the case of

BALMOKAND.

The learned Sessions Judge rightly remarked that this case was inextricably mixed up with that of Balraj. Against him he sums up in a passage which ends thus:

"I have no manner of hesitation in finding that the story told by Dina Nath is substantially true, and that it is corroborated in material details, connecting Balmokand with the offence with which he is charged. I find that he was one of the leading members of the conspiracy, that he took an active part in the distribution of the first "Liberty" leaflets, was throughout in the inner council of the conspiracy, and took over from Dina Nath two bombs which he had received from Basant Kumar Biswas. I, therefore, find him guilty agreeing with the opinion of all the assessors."

The points taken as proved against him are his participation in the Agarwal Ashram meeting of October 1912 (based on Dina Nath's evidence), at which he was appointed a leader; that that meeting was held for the purpose of organising a conspiracy to commit murder and distribute seditious literature (Dina Nath); that it was through his agency* that Basant Kumar was employed at the "Popular Dispensary" in Lahore (Dina Nath, Girdhari Lal, P.W. No.40); that Basant Kumar's employment was not merely an act of charity, for he was to be used and was used in murderous projects; that he co-operated in the May leaflet; that in October 1913 Dina Nath received two bombs from Basant Kumar and handed them on to Balmokand, who, when Abad Bihari came to fetch one away a few days later, said he had deposited them with a friend (Dina Nath's story); that he was consulted about the 3rd and 4th leaflets (Dina Nath); and that on several occasions, *e.g.*, the Mussoorie visit, the conspirators came into contact (Dina Nath, Sultan Chand, etc.). It is clear that much depends on the view we take of Dina Nath's good faith. I have dilated on that already, but I may note here the telling remarks of the learned Sessions Judge at page 26 of his judgment, lines 5 *et seq*, and the remarkable fact that, as in the case of Balraj, Dina Nath never says he saw Balmokand at times when the latter was away. I agree with the learned Sessions Judge that the above points are proved and that they are sufficient warrant for the capital sentence that has been passed. The position taken up has not been successfully assailed by Mr. Gokal Chand Narang, Counsel for Balmokand, as will appear from the following remarks on the arguments, covering a day and a half, put forward by him.

*Sessions Judge, page 25, says Balmokand brought Basant Kumar to dispensary, but this is an error, it was Girdhari Lal at Balmokand's request.

First, it is pointed out, rightly enough, that search of his houses at Jodhpur and Karyala, his home in the Jhelum District, failed to reveal in his possession any seditious literature. *Pro tanto* this is in his favour.

Secondly, admittedly he had no direct connection with the Lahore bomb outrage or the July leaflets.

Thirdly, it is said that Dina Nath admits that before October 1912 he did not know

Balmokand's name, though the latter was to be appointed a leader at once, and though Dina Nath had at that time had six or seven admitted meetings and talks with Rash Bihari from 1910. I do not think this is material, though it is certainly a little strange.

Fourthly, no corrobration of Agarwal Ashram, this is true, but I believe Dina Nath.

Fifthly, Amar Nath and Thakar Das (P. W. No. 38 and P. W. No. 39) do not say Girdhari Lal put forward Basant Kumar for employment as a *protege* of Balmokand, only Girdhari Lal (P. W. No. 40), discredited by resiling from his statement to the Committing Magistrate, mentions Balmokand in this connection. But the learned Counsel has overlooked one circumstance which tells very strongly against his client here, namely, that Girdhari Lal, though he repudiates much of his earlier deposition, still says it was Balmokand who brought Basant Kumar to him. This, looked at in the proper way, is almost conclusive that the assertion is true: if the inclusion of Balmokand was a lie told at the instigation of the Police, why was it also not withdrawn in Sessions Court? There is no suggestion of any enmity between Girdhari Lal and Balmokand.

Sixthly, it is again urged that Balmokand has proved that at the time of the Agarwal Ashram meeting he was away from Lahore; that on 9th October 1912 he was present in a Magistrate's Court at Dina, District Jhelum, in a case he was concerned in, that he went thence to Karyala, his home, and stayed there, and that on the 24th October he was again present in the same Court, at Karyala. The learned Sessions Judge rejects the *alibi*, and after a careful consideration of the evidence I do the same. I am unable to see how appellant has proved more than this that on the 9th October he was at Dina and on 24th at Karyala. I have seen Exhibits D-12, D-13, D-14, D-15 and this is all they show. I have looked at the evidence of P. W. No. 65 Mulraj, page 158, line 38, P. W. No. 67 Rambhaj, page 160, line 19, P. W. No. 68 Amir Chand, page 161, lines 10-12. These witnesses, though the statement of the first is ambiguous, do support the *alibi*, which it is also sought to re-inforce by Exhibit D-48, second and third items. The Sessions Judge's criticisms at page 33 of his judgment are denounced as "inaccurate" and "flimsy"; but I agree with him and I think that a bald statement by a witness that so-and-so stayed 15 days in such a place is of little value, made in cross-examination nearly two years after the event and without any indication (*a*) why the witness should remember so trifling a matter, (*b*) that the witness had any special interest in the matter or reasons for noting the daily presence of the person concerned.

Seventhly, the whole question of the May leaflets and Fazl Karim (P. W. No. 87) is attacked and it is said that Balmokand's share in it rests on the unsupported evidence of Dina Nath. This is true in some respects, but the partial corroboration in reference to the type-writer, see deposition of the Jodhpur Princes, P. W. No. 92 and P. W. No. 93, must not be lost sight of. Further, as already shown there is very strong reason for trusting Dina Nath; and it is a useful point in his favour that he admits he did most of the work himself and assigns only a small part to Balmokand.

Eighthly, it is gravely contended that inasmuch as according to Dina Nath, the two heads of the local gang were to be both consulted as to any proposed action and Balmokand was not consulted about the Lahore murder, therefore, it should be taken that he was not a member of the conspiracy to do that murder. This is a mere quibble. Balmokand was away, and he cannot be allowed to escape responsibility merely because an act, fully in keeping with the aims of the conspiracy, was done in his absence.

Ninthly, a pedantic argument of a legal kind, namely, that as in October 1912, the present law (section 120-B) had not been passed, a conspiracy then formed to do murder was no offence, and thus the prosecution must prove an actual agreement to commit murder entered into after 27th March 1913 (date of new law). The fallacy here is in saying that a conspiracy formed in October 1912 was no offence: it was, under the law of abetment. The new section was enacted merely to make the law

clearer and more readily available in all possible circumstances.

Tenthly, the whole of Dina Nath's story about his meeting with Balmokand in August—September 1913 and the visit to Mussoorie seems to me, notwithstanding Mr. Gokal Chand's general criticism of it, to bear the stamp of truth. Raghbir Singh, P. W. No. 164, confirms Abad Bihari's being there, and the fact that he cannot recognise among the accused the friend who was with him when he saw him, seems to me by no means to contradict Dina Nath, though no doubt it does not corroborate him. In this connection Counsel draws attention to the patent contradiction between Sultan Chand, page 293, lines 50 to foot, and page 294, line 46, and Raghbir Singh as to the stranger (Balmokand) staying the night in the same room, and one can only conjecture that Sultan Chand is making a mistake, or that Raghbir Singh does not like to admit intimacy with a criminal such as appellant. The matter is in any case not enormously important.

Eleventhly, the Sessions Judge says, without support on the record, that Balmokand was a friend of Amir Chand. I agree with Mr. Gokal Chand here.

Twelfthly, Mr. Gokal Chand's remarks regarding dates, etc., in connection with Abad Bihari's visit to get a bomb and the transfer of the two bombs from hand to hand have been already sufficiently dealt with in advance under "*Ninthly*" in the discussion of the case of Abad Bihari. We have looked at the statement of Dina Nath in the Police diaries and it does not help the appellant; and I would like to note here that the story that Abad Bihari came for a bomb and *went away without it* could hardly have been a mere invention. I can see no possible point in such an invention.

Thirteenthly, Counsel attempts to overthrow the Sessions Judge's reasoning in connection with Balmokand's second *alibi*, page 34 of judgment. His client says he was away from Lahore from 20th October to 27th November 1913, that is, till 18th November at Karyala, and Lyallpur 20th to 27th November. We have listented patiently to a very lengthy argument on this point, and have carefully read the depositions of Balmokand's witnesses Nos. 6 to 9. These witnesses Counsel describes as independent, but they are far from that, for the first is Balmokand's collateral relative and the others are all related to *him*. I heartily agree with the Sessions Judge that it cannot be said to be proved that Balmokand was in Karyala from 20th October to 18th November.

There is nothing more worth noting to be said for Balmokand and I would simply reject his appeal. No mercy should be shown to him.

The next appeal for consideration is that of

HANWANT SAHAI,

whose case differs from those already discussed in this that he is not mentioned by Dina Nath and was apparently not personally known to him. The learned Sessions Judge deals with him at pages 61—66 of his judgment. He is a near relation of Hardayal, admittedly a friend of Amir Chand and Abad Bihari, being a Delhi man and a Kaisth by caste. He is no student or scholar but a trader by occupation. He first came into the case according to the Sessions Judge as having in April 1913 given to Balmokand the name of Fazl Karim, P. W. No. 87, as a suitable person to whom to send leaflets for posting up and distribution in the Islamia College, Lahore, where he was a student. Very briefly stated, Fazl Karim's story is that, some days before he got the leaflets, he met Hanwant Sahai for the first time in the house of Panna Lal Mathur, P. W. No. 138, a Professor in that College; that he had two talks with him in the course of which the latter spoke of politics, suggested his help in his schemes, read to him passages from "The Prince," told him he, Fazl Karim, was looked upon by the C. I. D. as a dangerous man, and so forth; that then a packet of ten leaflets came* which, however, he destroyed; that he had discussed the matter of Hanwant Sahai's solicitations with an intimate friend, Sheikh Abdul Kadir, P. W. No. 89, fully corroborates on this point. Appellant called, in his defence as to all this, Maulvi Hakim Ali, *quondam* Principal of the College, D. W. No. 41, page 377, who says in his presence

*(Corroborated by Mumtaz Ali, P. W. No. 90).

Fazl Karim admitted that he actually posted up leaflets in the College; and the learned Sessions Judge thinks Fazl Karim is lying here: this does not, however, seem to me important. The Sessions Judge, relying on Fazl Karim's story, as corroborated regarding Hanwant Sahai and the receipt of leaflets, and refuting the arguments placed before him, believes that Hanwant Sahai really did try to seduce Fazl Karim and did arrange, by (probably) giving the latter's name to Balmokand, for the sending of the leaflets by Dina Nath. I may say at once that I accept this view. The way the name of appellant came out when the Police later on questioned Fazl Karim is most natural and is confirmed most remarkably by the evidence of Panna Lal aforesaid, which shows that Hanwant Sahai really was staying in his house at that time and had talks with Fazl Karim, though not unnaturally Panna Lal shrinks from admitting that he heard sedition talked. The Sessions Judge also points to another less important corroborative incident, namely, the finding in Hanwant Sahai's house at Solon, where he was arrested, of a copy of "The Prince"—Exhibit P-48A. The summing up of the Sessions Judge on page 64 seems to me conclusive, except as to one point that will appear later.

The other points against Hanwant Sahai are the proof to be found in the documents found in the house of Radha Mohan, P. W. No. 21, distant relation of his, that Hanwant Sahai has been the channel by which Hardayal, who has discreetly kept out of the way in France, Algiers and America, maintained connection with the criminal organisation of which he started the first beginnings; and the intimate friendship with Amir Chand and Abad Bihari, shown by the discovery, in the box of the last named, of private papers of Hanwant's, and by the clearly proved fact that they co-operated in the proposed arrangements for the distribution of the infamous *Ghadr*, and by such documents as P-78 (3) showing pecuniary dealings with Amir Chand. Stated so the case does not look very complete, but the detailed examination before us and by us of the oral evidence and of the documents aforesaid leaves no doubt in my mind that it is fully proved that Hanwant Sahai was, as early as April 1913, if not earlier, probably a member of this conspiracy to commit murder and to disseminate seditious literature. That the connection between Hanwant Sahai, Abad Bihari and Hardayal was not innocent is fairly clear from the anonymous nature of some letters and the pseudonymous nature of others (*e. g.* Fateh Chand for Hardayal) and the choice of hidden channels of communication (*e. g.* Mannu Lal).

It is impossible, and is also unnecessary, for me to discuss minutely and categorically each and every item of the evidence, the important points in which will sufficiently emerge in the following remarks on Mr. Beechey's arguments.

The *first* point taken is that all the assessors have absolved the man. This is true; but the case has to be decided on the record itself.

Next, it is asked why Dina Nath should fail to bring him into the story. I think the answer is not that Dina Nath necessarily knew nothing of him, but that he never came into personal contact with Dina Nath. Hanwant Sahai is essentially one of the Delhi section of the conspiracy and Dina Nath of the Lahore section, and the two seem not to have met. Dina Nath thus has nothing to say against him of his own knowledge.

Thirdly, Mr. Beechey says Hanwant Sahai is not shown to have known that the aims of the conspiracy included murder; but it is a reasonable inference that his client, giving instructions to send the May leaflets to Fazl Karim, must have read the leaflet (P-85-A), in which we find such things as:

"The special manifestation of the Divine Force at Delhi in December last," etc., alluding to the bomb outrage of 23rd December 1912;

"God Himself worked in Khudi Ram Bose, Profulla Chaki, Kanai Lal Dutt, Madan Lal Dhingra";

"The thrower of bomb on the representative of the tyrannical Government at Delhi was none else but the spirit of the Dispenser of all things Himself."

Further comment as to Hanwant Sahai's knowledge and aims seems uncalled for; but it must be admitted that it is only a matter of *inference* that Hanwant Sahai actually named Fazl Karim to Balmokand.

Fourthly, Mr. Beechey says the documents found and relied upon are all harmless. It cannot be denied that they show close touch between Hardayal and Hanwant Sahai, and it is futile for Kishen Dayal, P. W. No. 167, brother of Hardayal, to try to minimise that connection. It is natural he should do his best to screen both appellant and Hardayal. It is also clear that Hanwant Sahai contemplated at one time joining Hardayal in San Francisco and perhaps earlier in Algiers, and I do not believe for a moment that he was going simply on business. The tone of the correspondence written, of course, in veiled language though it is, makes this clear enough to me. The documents are the P-23 series, found in Abad Bihari's box on the balcony of Amir Chand's house; the P-32 series found with Radha Mohan; and the P-80 and P-82 series found in Hanwant Sahai's house. The genuineness of all these "finds" is undoubted. Taking the last-named lot first I note that while most of them are innocent, one "The Uprising of the Many", 80-A, is distincly of a seditious tendency. As regards the P-23 series Mr. Beechey suggests some confusion in making the two search lists, in which they and the P-32 lot, respectively, occur; but Mr. Petrie is quite clear about the identity of the P-23 lot, page 70, line 7, and see also Inspector Brij Lal, P. W. No. 8, especially at page 77, and Birmanand, P. W. No. 9, at pages 85 and 86, and Gulab Rai, P. W. No. 10 at page 89. It is also clear that the P-32 packet was kept separate, see Hadow, page 7, page 71; and P. W. Nos. 18 to 21, that last being Radha Mohan himself. As to the P-23 lot the significance of them is that they were all found in one envelope, and several of them, *eg.* 23-c, 23-e, are letters addressed to him. In the absence of explanation it is a fair inference that the whole contents of the envelope were his. Then if they are read, the reader can hardly fail to see that Hanwant Sahai was hand-in-glove with members of a secret society, see P-23-L, and was in sympathy with would-be assassins and rebles, see 23-M. The next series, P-32, show connection with Hardayal, and the character and aims of the latter are clear from the *Ghadr* paper, P-24, O-3 and P-24, O-4 and P-177, which is evidently the paper referred to in P-23-A-1 addressed by Hardayal to Hanwant Sahai. Mr. Beechey argues that there is no proof that any *Ghadr* ever reached his client; but this is nothing: the Police have only been able to get copies intercepted in transit.

Fifthly, Mr. Beechey then criticises the manner in which Fazl Karim first could not remember any one having prepared him for the advent of the leaflets and then, after pressure, said a man called "Sahai" had done so. The suggestion is two-fold, either that the Police put the name into the mouth of Fazl Karim, or that Fazl Karim had already heard that Hanwant Sahai was a suspect. But such suggestions are futile in view of the fact that Hanwant Sahai really had been at Panna Lal's and had had talks with Fazl Karim, which Mr. Beechey admits. I do not think either Fazl Karim or the Police would have dared at that early stage to bring in Hanwant Sahai falsely. Hanwant Sahai was not arrested till 4th March 1914, while Fazl Karim named him on 3rd March. No doubt Exhibits P-23-C., P-23L, P-23-P, P-31B-1, etc., and the P-32 series mention Hanwant Sahai and had been found; but they were among a mass of papers that must have taken weeks to examine.

Sixthly, Mr. Beechey says the search which ended in the finding of "The Prince" was perfunctory. I have considered the evidence (P. W. Nos. 25 to 27), and I find the search was quite satisfactory and regular.

Seventhly, Mr. Beechey is mistaken when he says that Sultan Chand's deposition is the only evidence of the intimacy between his client and Amir Chand and Abad Bihari, page 293, and that this is insufficient. The finding of his papers in Abad Bihari's box is a strong point against Hanwant Sahai; and see also P-31B-1. The Sessions Judge also says the intimacy is admitted.

I would, therefore, find Hanwant Sahai to be guilty as charged and dismiss his appeal, but if my learned colleague has doubts as to the proof of his complicity before 17th May 1913, I am content to give him the benefit of the doubt and to sentence him

under section 115, Indian Penal Code, to the maximum sentence there provided, as in the case of Balraj.

BASANT KUMAR BISWAS.

The next is one of the most important of all the appeals, inasmuch as connected with it we have to consider the application for enhancement of sentence. I may say at once that in my opinion this young man is undoubtedly guilty as charged and that no sufficient ground exists for refraining from passing on him a death sentence.

A Bengali boy from the Nadia District, he was taken on by Rash Bihari at Dehra Dun as his domestic servant, given an *alias* (Hari Das), trained to be a useful tool of the conspiracy, taken by his master to Lahore in October 1912, put into employment as a compounder in the "Popular Dispensary" there by Girdhari Lal at the instance of (directly) Balmokand and (indirectly) Rash Bihari, was mysteriously absent from Lahore at the time of the Delhi outrage (December 1912), had a share in distributing the May leaflets, co-operatad with Abad Bihari in the Lahore murder, being the actual depositor of the bomb in the Lawrence Gardens, and later, in October 1913, had two more bombs which he handed to Dina Nath. This is his record as told by the prosecution, and this has been found proved by all the assessors and the Sessions Judge. A good deal of the story is admitted, see written statement of the appellant, page 202, Sessions Record ; that is to say, he admits being employed at Dehra Dun by Rash Bihari as a domestic and the concealment of his identity, but he denies any evil motive in the employment, and further explains concealment of name by saying he did not want to disclose his identity as he was ashamed of his menial occupation, and Rash Bihari was ashamed of openly having his meals cooked by a man of lower caste like appellant. He also admits going thence to Lahore, but says he left Rash Bihari because the latter turned him out on his refusing to brush his boots. In Lahore he admits employment in the dispensary, but says it was got for him, not by any of the conspiracy but as a mere act of charity by Girdhari Lal, P. W. No. 40, then Superintendent of the Hindu Orphanage. He admits he knew Dina Nath, but denies all knowledge of the conspiracy and all connection with the leaflets and the murder in the gardens and the two later bombs.

The learned Sessions Judge deals with the case at pages 43—50 of his judgment. He begins by pointing out that the case is much mixed up with the cases against Balraj and Balmokand, and lest it should be supposed that the absolution of Balraj from connection with the Lahore bomb and with the employment of Basant Kumar in some way helps this appellant, I state here that the present case is in no way weakened by this circumstance.

A good deal of the case of Basant Kumar has been already discussed, *e. g.* see "fourthly," "fifthly" and "sixthly" in the discussion of the credibility of Dina Nath, and the discussion of the two bombs incident under the head of Abad Bihari. These matters I will not touch again ; but a few words are necessary as to the Dehra Dun incidents, and the coming to Lahore, and the Lahore bomb outrage, the latter being of capital importance. In the Dehra Dun episode * the only really important matter is the change of name to Hari Das. Though Mr. Sen, appellant's Counsel, tries to argue that his client is not to blame if Rash Bihari, unknown to him, chose to tell his caste-fellows that appellant's name was Hari Das (a high caste name), the argument fails hopelessly, because, as we have seen, appellant himself freely admits joining in the deception. Again, Mr. Sen's argument that there could be nothing sinister in the *alias*, because in Lahore his client reverted to his own name, does not appeal to me. It seems to me to point to this that Rash Bihari, intending to make evil use of Basant Kumar in Lahore, wanted to conceal all connection between him and the servant of Dehra Dun days. That arch-conspirator may well have reflected that in some rash enterprise in Lahore Basant Kumar might be caught and fall into the hands of the Police, in which case it would be dangerous if he still bore the name he was known by at Dehra. In my opinion on the whole the probabilities are in favour of a sinister explanation o

*(The oral evidence is P. W. Nos. 172, 174, 182, 185, 186, 187, 188.)

the *alias*; and this conclusion is much confirmed by the fact—see Stead, page 120, lines 30-34—that to him Basant Kumar denied ever having been to Dehra Dun or knowing Rash Bihari there.

Dina Nath, page 15 bottom, is quite explicit that Rash Bihari brought Basant Kumar to Lahore in October 1912. The latter reached Lahore in the first half of that month and was employed on the 15th, at which time Rash Bihari was certainly in Lahore. This alone seems to me considerable confirmation of Dina Nath's version, which, as already shown, deserves much credit, even when not corroborated; and there are also the shifty but sufficient deposition of Shib Das, P. W. No. 98, and his deposition to the Committing Magistrate at page 139 of that record, besides the additional circumstance that later, when Rash Bihari again comes on the scene, Basant Kumar goes to see him: why should he do this, if he really parted from him in mutual displeasure? A great deal of what I cannot help thinking is useless argument, has been expended on the question of the date of Basant Kumar's entertainment by the dispensary. I cannot see any significance in differences of statement, on this day or that, that Basant Kumar *would* get employment or *had* got employment. He was no doubt taken on 15th October 1912, but it has been lost sight of by Counsel that he had no salary then but was taken on on mere subsistence, *i. e.* on probation. In these circumstances it was by no means improper to talk of him being *likely to get employed*. It is important to notice that the Police did not know *date* of employment until 26th February 1914 *after* Dina Nath had spoken to Mr. Tollinton. It was on that day they secured Exhibit P-111. Exhibit P-112 does not show *date* but only *month*.

The whole story of the bicycle, the arrangement for the throwing of the Lahore bomb, the meeting of Abad Bihari and Basant Kumar at the gardens and the deposit of the deadly thing, seems to me to bear the unmistakable stamp of truth. Of course, the last two of these incidents depend on Dina Nath's version of his subsequent conversations with Abad Bihari and Basant Kumar himself; but I believe that version, and under section 10, Indian Evidence Act, this part of Dina Nath's evidence is clearly relevant. I will take up now in detail all Mr. Sen's criticisms and will show how inadequate they are. To shorten the matter I will allow that his client's connection with the first leaflet is so slight that it does not tell much against him.

First, Mr. Sen says neither Amar Nath (P. W. No. 38) nor Thakar Das (P. W. No. 39) saw any card-board box (containing part of bomb) in the hand of Basant Kumar when he left on evening of 16th May 1913; also that these witnesses did not remember the bicycle incident until pressed and virtually threatened. In my opinion the Sessions Judge is right when he elects to believe these witnesses. It is natural enough they should not remember whether, on that particular evening out of the hundreds of evenings on which Basant Kumar left the dispensary for an airing, he had a small parcel in his hand; and as to the bicycle it seems to me also natural that its presence should have been genuinely brought back to memory by Dina Nath's reminding them of it. If the Police had so frightened these two men that they were ready to say anything, would not the Police have told them also to mention the box? And would they, having fallen in with the views of the Police, have been allowed to raise up arguments against the prosecution by telling the story of how they came to remember the bicycle? Nor do I think anything of the fact that Dina Nath says he took away the machine on Monday, two days after the outrage, while these witnesses say "next day." They *heard* of the outrage on Sunday and say loosely "next day." Even if they really think the bicycle was taken back on Sunday, I can see no importance in this slight lapse of memory. Everything, in short, points to the entire reliability of these two witnesses.

Next, Mr. Sen tells us that his client was absent from Lahore four times (*i*) 21st December 1912 to 15th January 1913; (*ii*) 24th August 1913 to 8th October 1913; (*iii*) 24th December 1913 to 15th January 1914; (*iv*) 5th February 1914 until his arrest at Nadia. How this helps his client, I cannot say; it certainly helps Dina Nath, who has never fallen into the mistake of attributing to him any act in Lahore during those

periods, except the matter judiciously dealt with by Sessions Judge at page 47, 2nd paragraph, of his judgment.

Thirdly, the whole question of the Lahore murder was evidently very hotly contested in the lower Court, see pages 47 and 48 of the judgment, and we have read and carefully considered all the eight points raised there. Before us Mr. Sen specifically notices the 3rd point, which does not seem to me important. I think it is quite natural that in his general first statement to Mr. Tollinton Dina Nath should have omitted matters which he knew all the time. Then he discusses the 5th point, the difficulty about the times of the putting down of the bomb and of the explosion and of the return of Abad Bihari to his College. The last-named difficulty I think nothing of; there is no evidence that any responsible person keeps the record of arrivals of inmates, and one knows how casually these things are usually done. No doubt Amar Nath, page 127, line 11, says Basant Kumar came back that evening at 8-30, but he adds "or after." There is thus here no *alibi* for *him* worth mentioning. Thakur Das, page 131, line 31, says "about 8-30," which is equally useless; neither had any special reason for noting the time. The explosion actually took place at 8-55 P. M., see Mr. Bevan Petman, P. W. No. 131, pages 221—222, but we do not know for certain how long before the explosion the bomb was laid down, for the evidence of such witnesses as D. W. No. 1 for Basant Kumar, page 359, really proves nothing. No other points are argued, and I think the Sessions Judge is generally correct in the whole of his discussion of the subject.

Fourthly, it is asked why Basant Kumar, not shown to be previously known to any conspirator but Dina Nath, should have suddenly developed into a murderer, and why the astute Dina Nath and Abad Bihari should have entrusted so dangerous and delicate a task to him. All this ignores human nature and especially criminal human nature. Experience shows that it is the invariable rule in criminal conspiracies for the master minds to keep in the background and to employ pupils and tools in all acts of violence. Basant Kumar had had a long training and was quite ready for anything, though he was kept purposely outside of the inner circle, so that, if caught, he would not be able to give much information to his captors.

Fifthly, it is suggested that Dina Nath did the whole thing himself, or with the help of his cousin, Ram Saran Das. As to this, no doubt this is physically possible, but it is so improbable that I must reject the suggestion.

Sixthly, Rash Bihari was a Police spy. I have already said I am leaving my learned colleague to discuss this. I only draw attention to the pregnant remark at page 19 of the lower Court's judgment, 19 lines from the bottom.

I find, then, as already stated, that Basant Kumar is guilty as charged, and there can be no reasonable ground for doubting that as a member of this murderous conspiracy he actually caused the death of Ram Padarath. I can find no extenuating circumstance. He is not a boy, for at 23 an Indian has long reached maturity. We have seen him in Court, he was specially sent for and I am unable to recognise in him any indications of deficient development, either mental or physical. He looked to me a man of some force of character, with none of the familiar marks of weakness in his face. No doubt he comes of a humble class, as Sessions Judge says, but this is no reason for showing mercy. He is an educated man, able to do compounder's work and intelligent enough to get employment and to secure* increase of pay after some months. The mere fact that he was never in the inner circle of the society is nothing in his favour; and it is a very damning fact that a few months later he should have been in possession of two more bombs.

*See his written statement, page 302, line 50.

Finally, I would note that he was not in May 1913 acting under the influence of the supposedly overpowering Rash Bihari, for he had not at that time seen him for ever so long. In short, he is guilty and he should be hanged.

I will now take up the case of

CHARAN DAS

who has been acquitted and against whose acquittal the Crown has appealed. The

learned Sessions Judge says the evidence against him is all admitted, but finds even so he is not proved guilty. Perusal of this part of the judgment shows that the most important feature of the case is the man's confession: if it is genuine and voluntary, he is undoubtedly guilty; if it is not, the case is not so strong. The prosecution, however, insist that even apart from the confession the evidence is sufficient for conviction. I state at once that I see no reason to reject the confession, the circumstances under which it was made satisfying me that it was voluntarily made, though afterwards retracted, there being also sufficient corroboration, and Mr. Sen's arguments *per contra* by no means impressing me as valid.

Perhaps the best way to deal with this case is to follow the learned Sessions Judge. On page 69 of his judgment he states what is proved if the confession is accepted and the points may be stated thus:

(*a*) Shown and admitted that he had known Rash Bihari for two years.

(*b*) Clear from the confession and documents that Rash Bihari had trained him in the peculiarly diabolical way described in an earlier part of this judgment.

(*c*) Accused stopped with Rash Bihari and used his address for receipt of letters, see Exhibit P-31-A.

(*d*) He forwarded letters for Rash Bihari to Lahore and allowed his name to be used in inquiring as to hotel rates from Khanna, P. W. No. 134.

(*e*) A Code was found on Charan Das's person, see third entry in Exhibit P-153, and this was to be used in correspondence with Rash Bihari, who handed it to him at his (Charan Das's) home in Gurdaspur.

(*f*) A futile attempt having been made to ascertain Mr. Gordon's address in the District Office, Gurdaspur, where accused was Revenue Clerk; Rash Bihari told accused that he wanted to kill that gentleman, who (in Bengal) had put obstacles in their way.

(*g*) At same time Rash Bihari told him he could get bombs and where they were made.

(*h*) Told him also that he contemplated getting him (accused) employment in Lahore, where he would be more useful; *cf.* last line of Exhibit P-154-A written by accused to him.

Then the lower Court goes on to express the opinion that, with the help of the confession, it can safely be taken as proved that the respondent knew the work Rash Bihari was engaged in, knew that Rash Bihari only wanted Mr. Gordon's address in order to make plans for killing him, knew that Rash Bihari was going to Lahore on the business of this murderous conspiracy and helped him and forwarded letters to him; but that, without the help of the confession, no more is proved than that Charan Das was in process of being trained to join a conspiracy, of which he is not proved actually to have become a member. I am inclined to agree with Mr. Ross Alston that, confession relevant or irrelevant, the charge is established. On all the points (*a*) to (*h*) detailed above there is independent evidence, except (*g*), which depends entirely on the confession, thus—

(*a*) See written statement, page 330, line 45, and P-108-H.

(*b*) See same page, lines 45 to 50; also entries Nos. 6, 7, 11, 17, 18, 22 and others in* Exhibit 154 (list of things found in Charan Das's house), especially 7, 17, 18 and 22; also letters of the 108 series, especially P-108 H.

*The printers have made a mistake in connection with P-154. The first page of it and of Exhibit P-143-A is all right, but the *second* pages of each have been transposed, *i.e.* interchanged.

(*c*) Exhibit P-31-A and written statement, page 330, lines 48 to end of page.

(*d*) See written statement, page 331, lines 6 to 14, and connected documents, *e. g.* Exhibits P-101, 101-A, 101-B, 108 Z-A and other letters of the P-108 series.

(*e*) See the Code. It is impossible to suppose that Charan Das's present story is true that Rash Bihari, before leaving for Lahore, thrust this into Charan Das's hand telling him merely to keep it for him. It is justifiable to infer from the gift of this Code to Charan Das that it was to be used in furtherance of criminal designs.

(*f*) In his written statement, page 330 bottom and page 331 top, Charan Das admits that at the instance of Rash Bihari he enquired about Mr. Gordon's address, but does not admit that the inquiry was made with

reference to any murderous design. However, the evidence of Nathu Ram and Muhammad Yusaf (P. W. No. 95 and P. W No. 94) afford a certain corroboration that the inquiry was not innocently made.

(*h*) As already noted, see last line of P-154-L.

Even on this evidence, leaving out the confession, my opinion is that Charan Das is sufficiently shown to have joined the conspiracy before 17th May 1913. Exhibit P-108-G and its reply, P-154-L, both of October 1912, with the pregnant sentence in the letter:—"I think you mig t have finished the work which was the cause of your journey to Lahore," together with the animated correspondence the two men maintained, satisfy me that they were in each other's secrets. But we are not justified in setting aside the confession. The Sessions Judge's reasons for doing so are singularly unconvincing. They may be stated briefly thus:

(*i*) It was made on 3rd March 1914, *i. e.*, 11 days after the arrest. I am unable to see any force in this. One would hardly expect a man in the position in which Charan Das found himself to blurt out a confession at once.

(*ii*) It was recorded in the Railway Police Office, "not a very happy selection." But it was recorded by a Magistrate of the 1st class and the Police were not present, except momentarily, when Mr. Stead came in to get his despatch box—see Mr. O'Neil Shaw, page 241, line 43. This objection seems to me to have no value whatever.

(*iii*) The precautions laid down by the Code of Criminal Procedure antecedent to the recording of a confession were neglected. The law is contained in section 164 (3) of the Code and section 364 (1). The former provision runs thus:

"No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession, he shall make a memorandum at the foot of such record to the following effect, etc."

The confession has been printed as Exhibit P-204. It contains the prescribed memorandum and is signed by the Magistrate. There is no note before the confession that the Magistrate satisfied himself that it was going to be voluntarily made and this wa an irregularity; but this, in my opinion, has been fully cured by the examination of the Magistrate in the Sessions Court—P. W. No. 158, page 241—under section 533 of the Code. The Magistrate says:

"Before recording the statement I satisfied myself that Charan Das was making a voluntary statement . . . . Only the accused and myself were in the room when I recorded his statement . . . . This is a full and true record of what he said. The certificate at the end is in my handwriting. The statement was read out to him, and he signed it . . . I asked Charan Das whether he was willing to make the statement. He said, yes. That is all the conversation I had with him before beginning to record the statement . . . . Charan Das did not indicate by anything he said or by his manner that he was not acting of his own free will. Nothing happened which suggested to my mind that he was not acting of his own free will."

I confess that I am unable to see what more was required to put matters on a proper footing, and it is somewhat remarkable that the Sessions Judge *at the time* seems to have been quite satisfied—see the note at top of page 242. The policy of the Legislature in this matter is clear. Certain rules are laid down the observance of which enables the Court dealing with a confession to be *prima facie* assured that it was voluntarily made; but well knowing that in the hurry of work the formal recording of what has been said and done is not always perfect, the Legislature, to prevent miscarriages of justice and to ensure that evidence of value shall not be lost, has enacted section 533 aforesaid. The important thing is not the formal writing down of this or that, but that it should be made clear to a Court using a confession as evidence that the recording Magistrate applied his mind to the question whether it was being voluntarily made and decided that question in the affirmative.

As regards sections 364, Criminal Procedure Code, I need only remark upon the rule that questions and answers should be recorded in full; but the matter is of no great importance in any case and is of none at all here, for the Magistrate seems to say that the only questions put were when the

Magistrate could not altogether follow the speaker and wanted him to be more explicit.

In my opinion the confession is not vitiated by its informality, and indeed is not in the least weakened.

(*iv*) Then the Sessions Judge says the confession was dictated from a written statement previously prepared by Charan Das while in Police custody. The Magistrate rather supports this idea, line 28, page 241, but both he and the Sessions Judge make too much of it. Comparison of the written statement in question (D-29) and the confession show it is a misuse of language to talk of "more or less *verbatim*" and "practically dictating." There is, as we have seen for ourselves, much difference between these two documents. I would like to draw special attention to P-204, page 2, first half of page, and page 3 as to Mr. Gordon, and the cartridges (not in D-29), and the writer of the leaflets, P-204, has much not in D-29. Things present in one are not in the other, phraseology, in some passages alike, is in important parts different, and such differences occur as the divergent accounts of the apparition, etc., of the boy "Sant" (meaning Basant Kumar), and, in my opinion, what really must have happened is this. Charan Das told the Police he was willing to confess. Knowing that the story to be told would cover years and that in the stress of examination important particulars might be omitted, Charan Das, either on his own initiative or upon suggestion by the Police, made out a rough sketch of his tale. Brought before the Magistrate. he held this in his hand and refreshed his memory from it.

There are many reasons for looking at the thing in this way, but I need only discuss one or two. The first is, of course, the results of our comparison of the two records, D-29 and P-204. The next is that the circumstances, taking the worst possible view of Police morality, did not call for such a device. As we have seen a very large part, in fact nine-tenths, of D-29 (leaving out the treatise on philosophy) is *admittedly* true, and it is only here and there in the confession that statements are made the truth of which is now denied. If the accused had been put up by the Police to tell a long and intricate story, wholly or mostly false, he would certainly need a memorandum like D-29 to keep him straight; but why should the Police be anxious that he should have a memorandum in the actual circumstances? The Police are presumably not fools, and they must have foreseen the sort of argument that would be raised on the foundation of the use of D-29.

The Sessions Judge does not believe Charan Das's statements that he was compelled to confess by threats and promises, and I agree with him heartily here. His Counsel did not venture to cross-examine S. Sukha Singh or Mr. Stead as to threats or promises or ill-treatment, nor did accused say a word on the subject to the Committing Magistrate—see page 331, lines 30-40, Sessions Record. I also do not believe—again agreeing with the Sessions Judge—that he was brought up before the the Deputy Commissioner of Gurdaspur and Lahore in succession and refused to confess, but even if he did, does this disprove in the smallest degree that by 3rd March 1914 he had become willing to confess? And the remark of Mr. Shaw at page 241, lines 37-38, that he said Charan Das should speak the truth and it would be better for him, must not be taken as an inducement by a person in authority, for the remark was made after the confession had been recorded.

I think, further, that there is in the confession and in the document D-29 indication that they were not written or made at dictation of Police who wanted Charan Das to put the noose round his own neck. Would the Police have made him write that part of D-29 which is a philosophical or religious tract? Or would they have told him to pretend he was not in favour of violence? As a matter of fact it is futile for him to pretend that he did not approve of Rash Bihari, for see P-154-M, which (proved by P. W. No. 172, page 262, bottom) shows Charan Das wanted to maintain the connection.

Then, apart from the relevancy of the confession, which I consider clear, there is the question of its value. I believe it to be all true, that is, I see no reason

to doubt that everything Charan Das in it says against himself is true, though it may not contain the whole truth

In short, I hold it proved that from some time in 1912 Charan Das was hand-in-glove with Rash Bihari and was prepared to help him and co-operate with him in this conspiracy, well knowing that murder was contemplated.

I have given careful and earnest attention to Mr. Sen's arguments against this appeal, but the facts are too strong for him. He again parades the Rash Bihari Police spy theory, which I have already discussed, and strives hard to show that the P-128 series of documents and 154-L are harmless. No doubt we cannot find in them plain statements of intention to do murder, but the whole tone—see especially 154-L, last few lines of first paragraph—shows that in the minds of writer and addressee was working something not to be disclosed, something in the achievement of which all posssible spiritual and moral re-inforcement was requisite. Finally, he cites a large number (16) of rulings as to retracted confessions. He did not rely on any special *dicta* in them and Mr. Ross Alston has not discussed them. Most of them are well-known and contain familiar maxims with which we have no quarrel, and I do not think any good purpose would be gained by wading through them here. I am well aware of the warnings against retracted confessions ; but each case must be treated on its own merits and I have no hesitation in accepting this confession, or in holding that, on the strength of it and of the abundant corroborative evidence put forward, Charan Das is guilty as charged and should be sentenced to transporation for life. I do not think he is so bad as the four condemned to death and, therefore, the lesser sentence will suffice.

Finally, at the end of the proceedings, Mr. Broadway put before us a copy of a paper called "India," published in London and dated Friday, October 23rd, 1914, in which (page 165) is to be found an article headed "Delhi Sedition Trial." It purports to be a reproduction of an article from "The New Statesman," a paper unknown to me, of October 17th, upon the very case which has been occupying our attention during the past month, and it consists of a denunciation of the Police and the Indian Courts, a discussion of the merits of the case with a strong bias in favour of the accused, and an attempt to "white-wash" some of them. Government, through Mr. Broadway, asks us for an expression of opinion on this phenomenon, and for my part I hasten to say that the publication of this article is a very bad case of contempt of Court. It is contrary to all the canons of decent journalism and one only regrets that the state of the law and the fact that the "India" is not published in this country make it impossible for us to take any action.

RATTIGAN, J.—The case as a whole, and in particular as regards each individual concerned, has been dealt with exhaustively by my learned brother with whom I have considered and discussed the evidence on the record and the arguments addressed to us, and whose judgment I have had the benefit of reading, and I find myself so entirely in agreement with all his conclusions that I might content myself by merely expressing my general concurrence, especially as I feel I cannot add anything of very material weight or value. But in view of the important issues involved and of the very able arguments addressed to us by the learned gentlemen who appeared, respectively, for the various appellants, the respondent Charan Das, and the Crown, I feel it necessary to deal, though as briefly as the circumstances will permit, with some of the arguments and certain more general aspects of the case before us.

The questions of law which we have to decide are stated succinctly in my brother's judgment.

(A). It is, in the first place, urged that the charge as amended (see page 209 of the Sessions Judge's record) was so vague and misleading that it materially prejudiced the accused persons, and it was explained that this vagueness consists in the omission to specify (*a*) the date on which the accused persons are alleged to have agreed *inter se* to commit murder ; (*b*) "the other places" in British India where they are said to have so agreed ; and (*c*) the person of

persons whom they are alleged to have agreed to murder.

As regards this objection I have no hesitation in holding that these omissions in no way prejudiced the accused who were all defended by Counsel and were fully cognisant of the nature and particulars of the case which each of them had to meet. In my opinion, sections 225 and 537 of the Criminal Procedure Code would afford a complete answer to this objection even if it be assumed that the particulars referred to should have been set forth in the charge. But I go further and hold that it was not incumbent upon the prosecution to specify any such particulars in the charge. I shall deal later with the objection that the date on which the alleged agreement was entered into should have been set forth, and it is only necessary here to state that, generally speaking, it would make it impossible for the prosecution to succeed on a charge of conspiracy if such a charge could not be substantiated without proving the exact date on which each alleged conspirator entered into the conspiracy.

As to the places where the accused persons are said to have agreed, the charge expressly mentions Lahore and Delhi, and the words "or in other places in British India" were added obviously *ex majore cautela*, and could not have misled any of the accused persons. At all events, no one of the learned gentlemen who appeared for them was able to state that his particular client had thereby been prejudiced.

Then, as to the omission to specify the intended victim or victims of the conspiracy, I need say no more than that it must have been obvious to the accused as the trial proceeded that they were alleged to have conspired to murder Europeans, generally without regard to age or sex, or to the possibility that the lives of others than Europeans might thereby be sacrificed. The charge is that they agreed "to commit murder," and in such cases *Reg* v. *Most* (7) is ample authority for the proposition that it is not necessary for the prosecution to particularize the person or class of persons intended to be murdered. As a matter of fact, the prosecution in the present case could not possibly have given such particulars, as their allegation is that the accused were ready and agreed to kill indiscriminately in the hope that in so doing they might murder Europeans. Persons, for example, who agree to throw a deadly bomb at the Viceroy upon the occasion of a State Ceremonial, or into the Montgomery Hall when a crowded ball is in progress, must know that the chances are very considerable of their killing not only Europeans but Indians as well.

The case upon which reliance is placed by Mr. Rahgunath Sahai, *Poresh Nath Sircar* v. *Emperor* (8), relates to an entirely different state of facts, the accused persons there having been charged with committing riot with the common object of taking possession of "some property" by means of criminal force or of enforcing a right or supposed right in it. Mookerjee and Woodroffe, JJ., (Rampini, J., dissenting) held that if the property had been specified, the whole complexion of the case would have been altered. This was clearly a decision upon the peculiar facts of that case and can have no relevancy to the case before us.

(B). It is next urged that the pardon granted to the approver, Dina Nath, by the Committing Magistrate (Mr. Connolly) was illegally granted and that in consequence the evidence thereafter given by Dina Nath at the inquiry and trial was legally inadmissible. The ground upon which this objection is based is that the Committing Magistrate was at the time inquiring into charges of various offences of which one at least (that under section 124-A., Indian Penal Code) was not exclusively triable by the Court of Sessions.

The short answer to this objection is that under the provisions of section 337, Criminal Procedure Code, it is permissible to the Magistrate inquiring into *any* offence triable exclusively by the Court of Session to tender a pardon to any person supposed to have been directly or indirectly concerned in, or privy to, such offence. Here the offence in respect of which the accused were tried (sections 120-B and 302, Indian

(7) 7 Q. B. D. 244; 50 L. J. M. C. 113; 44 L T. 823; 29 W. R. 758; 14 Cox. C. C. 583; 45 J. P 696.

(8) 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153.

Penal Code) was admittedly one triable exclusively by the Court of Session, and I cannot agree that because at the same time the Magistrate was inquiring into another offence not so triable, he was thereby precluded from tendering the pardon. So far as the present trial is concerned, the tender of pardon made by the Committing Magistrate was, in my opinion, validly and legally granted.

(C). In the third place, it is objected that the real offence charged against the accused was that of sedition, an offence punishable under section 124-A., Indian Penal Code, and that as the sanction prescribed by section 196, Criminal Procedure Code, was not obtained, the whole trial is null and void. This is a somewhat curious argument and not very easy to follow. The accused were not tried upon any such charge nor did the prosecution at any time allege upon this trial that any of the accused had been guilty of offences punishable under section 124-A of the Indian Penal Code. So far as the present trial is concerned, the accused were charged with having entered into a conspiracy to murder and the evidence adduced by the prosecution was intended to prove, not that the accused or any of them had been guilty of sedition, but that they had agreed to commit murder or to abet the commission of murder. The charge was, therefore, clearly and specifically framed under sections 120-B and 302/109, Indian Penal Code, and section 196 of the Criminal Procedure Code has no possible relevancy.

(D). It is next urged that as murder was actually committed at Lahore on the 17th May 1913, such of the accused as were alleged to have been concerned in that murder, should have been tried for that offence and not for having conspired to commit murder.

In support of this contention reliance is placed upon certain remarks of Jenkins, C. J., in *Emperor* v. *Noni Gopal Gupta* (5), but those remarks had reference to the peculiar facts of that case, and in any event, as observed by the learned Chief Justice and also by Rolfe, B., [in *Rex* v. *Selsby* (9)], and Cockburn, C.J. [in *Rex* v. *Boulton* (10)], the course adopted by the prosecution, though not altogether satisfactory or expedient, is undoubtedly legal. In the circumstances, as there was nothing illegal in the procedure, we obviously cannot, especially at this stage, interfere with the discretion of the prosecution who had elected to proceed against all the accused upon the charge of conspiring to commit murder, instead of charging some of them with the actual murder of Ram Padarath and the others with the offence of entering into a conspiracy to commit murder.

(E). Mr. Beechey, on behalf of the appellants Balraj and Hanwant Sahai, contended that acts or statements said to have been done or made by alleged co-conspirators are not admissible in evidence against a person accused of an offence under section 120-A of the Indian Penal Code unless (1) it is first proved that a conspiracy existed and that the accused person was a member of that conspiracy ; and (2) such act or statement was done or made in the execution or furtherance of the common object. In support of this contention the learned Counsel relied upon numerous English authorities, but even in England it has been held in many important cases that evidence may be given of a general conspiracy before any proof is adduced of the particular part which the accused party has taken (Roscoe's Criminal Evidence, 11th Edition, page 405, and cases there cited). The law as enacted in section 10 of the Indian Evidence Act, 1872, is much wider and more general than the English Law, and under its provisions once the Court has "*reasonable ground to believe* that two or more persons have conspired together to commit an offence, anything said, done or written by any one of such persons *in reference to their ommon intentio n*, after the time when such intention was *first entertained by any one of them*, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it." In *Pulin Behary Das* v. *Emperor* (2), Mookerjee, J., observed :

"I must advert for a moment to the con-

(9) Unreported, printed as a note to the case of *Reg.* v. *Rowlands*, 5 Cox. C. C. 495.

(10) 12 Cox. C. C. 87 at p. 93.

tention of the learned Counsel for the appellants that before a document in the possession of any of the accused persons can be used in evidence against the others, it must be completely established by independent evidence that they were conspirators. This argument is too broadly formulated and is negatived by section 10 of the Indian Evidence Act.....It is clear, therefore, that for the admission of such evidence, what has to be established is that there is reasonable ground to believe in the existence of a conspiracy among such persons.....The reason for this doctrine is plain. The criminality of the conspiracy lies in the concerted intention, and once reasonable grounds are made out for belief in the existence of the conspiracy amongst the accused, the acts of each conspirator in furtherance of its object are evidence against each of the others, and this, whether such acts were done before or after his entry into the combination, in his presence or in his absence."

But it is not only when such acts are done or statements made *in furtherance of the* objects of the conspiracy that they are relevant under section 10 of the Indian Evidence Act against the other accused persons; they are equally admissible under that section if done or made *in reference to* the common intention, though not in support or in furtherance of it: "The act or declaration of a co-conspirator may have been done or made to a stranger to, and in the absence of, the party against whom it is offered; or without his knowledge or before he joined the combination or even after he left it" (Ameer Ali and Woodroffe's Indian Evidence Act, 3rd Edition, page 120; Cunningham and Shephard's Indian Evidence Act, 11th Edition, pages 29-30). In order, therefore, to decide in the present case whether any act done or statement made or thing written by an alleged co-conspirator is admissible in evidence against any of the accused persons, the test we shall have to adopt is to see, in the first place, whether there is *reasonable ground to believe* that a conspiracy existed between him and any such person, and in the second place, whether such act, statement or writing had *reference to* their common intention.

Mr. Beechey's further contention that the *Illustration* appended to section 10 of the Indian Evidence Act is erroneous in law and not justified by the terms of the section may, or may not, be correct. So far as I can remember, the illustration has not been called in aid by the prosecution to support the admissibility of any evidence tendered by them in the course of the present trial, and it has frequently been held that "Illustrations" appended to sections of an Act of the Legislature are not to be taken as express provisions of law or as binding on the Court (see authorities cited at page 41 of Ameer Ali and Woodroffe's Indian Evidence Act).

(F). A contention vigorously put forward by every one of the learned gentlemen who represented the accused persons relates to the evidence given by Dina Nath, the approver. It was pointed out time after time that he is on his own showing an accomplice in a vile crime, a traitor of the worst and most despicable type, and a man who would have no scruple in committing perjury in order to save himself and his relations, Jagannath and Ram Saran Das. A large number of authorities were referred to in support of the proposition that the evidence of an accomplice should not be accepted as sufficient basis for a conviction unless independent evidence corroborated it in material particulars directly connecting the accused with the commission of the crime; in other words, that there must be corroboration *aliunde* not only as to the crime but also as to the identity of each of the accused. As a general proposition, enunciating a rule of practice which is now well recognised and acted upon by the Courts of this country, this statement of the law is correct, but it is an equally well established principle that there is no hard and fast rule which absolutely and under every possible circumstance precludes a Court from accepting and acting upon the uncorroborated evidence of an accomplice. On the contrary, section 133 of the Indian Evidence Act expressly provides that "an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." If, therefore, the Court, while keeping in view the presumption that an accomplice is unworthy of credit unless he is corroborated

in material particulars (section 114, Illustration (*b*), of the Indian Evidence Act) and after making due allowance for the considerations which render the evidence of an accomplice untrustworthy, nevertheless comes to the conclusion that it is true although uncorroborated and that it establishes the guilt of the accused, it is its duty to convict. [*Queen-Empress* v. *Juala Prasad*(11), *Queen-Empress* v. *Gobardhan* (12).] Nor in any event is it necessary that the evidence of the accomplice should be corroborated in every detail, if, taken in its entirety, it is found to be confirmed by the testimony of independent witnesses or by circumstantial evidence which strongly supports it.

In the case before us the approver, Dina Nath, was arrested about mid-day on the 18th February 1914, and on the 24th February before Mr. Tollinton, District Magistrate, he made a lengthy statement which exhibits an intimate and extensive knowledge of the movements at various times and places of Amir Chand, Abad Bihari, Balmokand, Balraj and Basant Kumar Biswas. It is absurd to argue that within the short time that elapsed between his arrest and his appearance before Mr. Tollinton, the Police had obtained knowledge of these facts, but even if we assume that they had, I cannot believe that it would have been possible for them to "tutor" Dina Nath with such success that he made no slip in any material point when making that long and detailed statement. Nor, again, can I believe that it would have been possible for Dina Nath after the lapse of a period, extending sometimes to over a year, to recollect, with such amazing accuracy, the facts of the presence or absence of those persons at or from various places at different times, details which would be very unimportant *per se* unless he had some very special reason for keeping the facts in mind, or was truthfully relating events as they actually occurred. To take an example to illustrate my meaning. Dina Nath obviously knew that Balmokand was in Lahore in April 1913, but, unless Balmokand's presence in Lahore at that time was associated in his mind with some event of importance (such as the consultation about the preparation of the first "Liberty" leaflets), would it have so impressed itself upon his memory that he could, some ten months afterwards, boldly and confidently assert that he and Abad Bihari met Balmokand at the latter's house in Lahore on that occasion? If it be urged that this was a mere lucky guess on his part, the obvious answer is that it would have been a singularly risky speculation, especially as we now know that Balmokand actually left Lahore shortly afterwards on the 13th May 1913. Here, again, upon the assumption that Dina Nath's story is untrue, we must take it that Dina Nath knew that Balmokand had left Lahore on the 13th May and was away till the 27th May when he admittedly returned to Lahore, and that for some unknown and unexplained reason Dina Nath kept this fact in mind and was thus able to avoid the pitfall of accusing Balmokand of participation in the Lahore bomb outrage which took place on the 17th May 1913. If the story which he tells is untrue and if his object is to get Balmokand, a perfectly innocent person, into trouble, why did he not accuse him of having taken part in that crime? According to his own statement, Balmokand was selected by Rash Bihari to be one of the "Heads" of the conspiracy, so far as the Punjab was concerned, and in the natural order of things, Balmokand obviously ought at least to have been consulted before that crime was committed. But Dina Nath does not suggest that Balmokand was present at Lahore at the time or in any way concerned in or consulted about that transaction. The only explanations possible to accept for this omission are (1) that Dina Nath is truthfully relating facts as they actually occurred and does not mention Balmokand's name because in point of fact Balmokand had nothing to do with the outrage, or (2) that Dina Nath, though lying, has retained in his memory the fact that Balmokand was absent from Lahore for about 11 days in May 1913. Then, again, Dina Nath does not connect Balraj directly with any of the proceedings of the conspirators that took place between October 1912 and September 1913, and it is admitted on both sides that Balraj was not in Lahore

(11) 7 A. 174; A. W N. (1884) 321.
(12) 9 A. 528; A. W. N. (1887) 156.

during that period. But Balraj returned to Lahore about September 1913, and in that month he was, according to the approver, consulted by Balmokand as to the advisability of throwing a bomb on the occasion of His Excellency the Viceroy's visit to Kapurthala on the 16th October 1913. Now, unless Dina Nath had actual knowledge of, and special reason for recollecting Balraj's return to Lahore in September 1913, after a long absence, is it likely that he would have run the risk of bringing in Balraj's name on the occasion? He knew Balraj had long been absent from Lahore and, apart from the reason given by him, he would have had no special cause to remember many months later whether Balraj returned in September, October or November. It was not till the 20th February 1914 that Balraj was arrested, and it is difficult to believe that within three days the Police were able to trace all his movements between October 1912 and September 1913. Mr. Beechey did, indeed, suggest that Balraj himself had given all this information to Mr. Stead on the 20th February, but I cannot find anything in Mr. Stead's evidence to support the suggestion, as all that that witness says is that Balraj told him that he (Balraj) could not have had a hand in the bomb outrage, as he was at Jodhpur at the time. From this the learned Counsel infers that Balraj gave Mr. Stead a full and detailed account of all his doings between October 1912 up to the 20th February 1914. But even if Mr. Stead did receive this information and forthwith conveyed it to the approver (a suggestion which I cannot entertain), I find it impossible to believe that Dina Nath could have so accurately retained all the details in his memory as to avoid making any mistakes when his long statement was recorded by Mr. Tollinton two days later. In saying this I am not overlooking the argument that Dina Nath is alleged by the defence to have made a fatal mistake with regard to the date in November 1913 on which he handed over the parcel of the third "Liberty" leaflets to Balraj. This argument is fully discussed by the Additional Sessions Judge in his judgment at pages 39-40 and I agree with him that there is no force in it. Balraj's absence from Lahore from the 21st to the 27th (or possibly 28th) November was definitely established about one month after Dina Nath had made his statement in the Session Court, and till then the defence had not suggested an *alibi* as regards this incident. It is true that the Police were aware on the 2nd March 1914 that Balraj was not at Lahore between the 21st and 27th November, but had they acquainted Dina Nath with this information, it is hardly likely that he would not have stated in his examination-in-chief the important fact which Balraj's Counsel succeeded in eliciting in cross-examination. In his examination-in-chief, Dina Nath deposed that he took delivery of the parcel on the 24th November and asked Balmokand what he should do with it. He then adds: "he told me to give them over to Balraj"... "I gave this list with the leaflets to Balraj". In reply to questions put to him in *cross-examination*, he added that he had taken the parcel to Balraj's house on the 24th November, but finding it shut and its owner absent, he brought the parcel back and kept it in his own trunk for three or four days when he handed it over to Balraj. The fact that this further information, which shows that Dina Nath was well aware of the temporary absence of Balraj from Lahore in November, was brought out in cross-examination is significant, as virtually negativing the possibility of its having been conveyed to Dina Nath by the Police in order that he might explain away his statement to the Committing Magistrate which, read literally, might suggest the idea that he made over the parcel to Balraj on the very day that it arrived. Not, indeed, that there would be any weight in the suggestion that the Police gave Dina Nath this information; they were aware on the 2nd March of Balraj's absence from Lahore on the 24th November, and it was not till the 30th March that Dina Nath made his statement before the Committing Magistrate; but he made no use of the information then in the possession of the Police. Balraj, who would have us believe that he is not even an acquaintance of Dina Nath, obviously would not have supplied this information to the latter, and for the reasons given I am satisfied that Dina

Nath did not get it from the Police. Unless, therefore, his story is true, how did he acquire this information?

The learned Counsel for the accused persons have suggested that Dina Nath has from time to time, and as he was supplied by the Police with additional items of information which came to light as the investigation proceeded, elaborated and added materially to the statements made by him to Mr. Tollinton on the 24th February 1914 and to Mr. Connolly during the inquiry. I confess I have not been able to discover any such material elaboration. All the essential facts were stated to Mr. Tollinton, and as regards details which came out at subsequent stages, it must be borne in mind that on the 24th February 1914 Dina Nath was himself narrating from memory the general history of the conspiracy with special reference to the Lahore bomb outrage. Before Mr. Connolly he was examined by Counsel for the Crown who would, in the natural course of things, get a more detailed account from him by questioning him on various points, and in the Sessions Court all the more important additional details were brought out, not invariably to the benefit of the accused persons, by their own Counsel in cross-examination. But I cannot find in any of the additional particulars anything to support the contention that Dina Nath's statement to Mr. Tollinton did not give, in all material respects, a full account of the connection of Abad Bihari, Amir Chand, Balmokand, Balraj, and Basant Kumar Biswas with the alleged conspiracy. On the contrary, Dina Nath, despite the very lengthy and searching cross-examination to which he was subjected in the Sessions Court, has adhered with remarkable consistency to his original statements and except in a very few unimportant matters, his testimony has remained unshaken. That he has an exceptionally good memory is obvious, but even with that gift, an untruthful witness who had to undergo for several days the severe ordeal of a most minute and thorough cross-examination at the hands of several able Counsel must inevitably have come to hopeless grief in at least one or two material particulars.

In these circumstances, while I fully appreciate the argument that an accomplice's evidence should not as a general rule be accepted unless confirmed by independent evidence, and while I do not everlook the facts that Dina Nath is on his own showing an unprincipled scoundrel and that he has in the present case probably minimised the parts taken by his relations, Jagannath and Ram Saran Das, in certain matters connected with the conspiracy, I am satisfied that he has given a substantially true and accurate account of all that he knows concerning the conspiracy and the proceedings of its members. It must be remembered, moreover, that his statements are in many very important particulars amply corroborated by evidence *aliunde*, and that none of the appellants has been able to assign any good and sufficient reason to explain his conduct in charging that particular individual with complicity in this conspiracy. Balraj and Balmokand practically disown all knowledge of Dina Nath. Balmokand does not attempt to assign any motive which could have induced Dina Nath to implicate him, and all that Balraj alleges in this respect is that Dina Nath belongs to a rival section of the Arya Samaj to that to which he and his father, L. Hans Raj, belong ; that Dina Nath was anxious to save his own relations and as he had to name somebody, introduced his (Balraj's) name; and that the Muhammadan Police, who "predominate at Lahore," were at the bottom of the case.

Abad Bihari frankly stated, when questioned by the Additional Sessions Judge, that he could suggest no reason why Dina Nath should have invented this long story against him; Amir Chand has given no explanation, and all that Basant Kumar Biswas can state is that he has been charged because Dina Nath wished "to save himself." In this connection it is also to be borne in mind that none of the appellants made any statements to the Committing Magistrate and that in the Sessions Court they all presented written statements which were clearly prepared with the aid of the legal gentlemen who respectively represented them. It is thus a very significant fact that none of the accused persons, except, Balraj attempted

in those statements to explain why it was that Dina Nath had falsely charged him and that the explanation given by Balraj is ludicrously insufficient.

(G). The next point urged by the defence relates to the genesis and nature of the alleged conspiracy. According to the charge as amended on the 11th July 1914, the allegation against the accused persons was that between the 27th day of March 1913 and the 31st day of March 1914, both at Lahore and other places in British India they did agree with one another and with certain other persons to commit the offence of murder under section 302, Indian Penal Code, and were thereby parties to a criminal conspiracy to commit the offence of murder ; in pursuance of which conspiracy a murder, to wit the murder of Ram Padarath, was committed at Lahore on the 17th May 1913, and that they thereby committed offences punishable under sections 302/120-B., Indian Penal Code, and 302/109, Indian Penal Code.

The defence contend that while the charge states that the conspiracy commenced on the 27th March 1913 and was alleged to be for the one specific offence of committing murder, the prosecution have adduced evidence relating to events which are said to have taken place in 1908, 1909, 1910, 1911 and 1912, and to matters connected rather with the offence of disseminating seditious literature than with that of committing murder. They further urge that according to the evidence of the approver, the alleged conspiracy was entered into in October 1912 and that the only persons who, according to that evidence, joined in that conspiracy were Rash Bihari Bose, the approver himself, Abad Bihari and Balmokand, and that no evidence has been given to support the allegation that any of the other accused persons joined that conspiracy after it had been so formed. In my opinion, these contentions are based upon a fallacy. The Additional Sessions Judge in the first paragraph of his judgment explains that, as originally framed, "the charge against the accused persons cited the first of October 1910 as the date on which the agreement began which eventually constituted the conspiracy." But in view of objections urged by the Counsel for the defence, the date was subsequently altered to the 27th March 1913, that being the date on which Act VIII of 1913, which added section 120-A and 120-B to the Indian Penal Code, came into force. But the case for the prosecution is not that this alleged conspiracy came into being *ex uno ictu* or on any precise date. They allege that its growth was gradual, and that it developed in course of time as the ultimate result of the pernicious campaign of sedition inaugurated in 1906 and 908 by one Hardyal who visited the Punjab in those years with the express object of fostering discontent, especially among the student class. This Hardyal, who is described by Amir Chand as a former "brilliant" student of the St. Stephen's School and College, Delhi, proceeded in 1904 to England to complete his studies at St. John's College, Oxford. He held a Government Scholarship of £200 a year tenable for three years, but after enjoying the emoluments for about 2½ years, decided that it was contrary to his principles and conscience to receive monetary aid from a Government of which he did not approve, and surrendered the scholarship there by sacrificing the emoluments for the last six months. During his visits to this country in 1906 and 1908, he delivered lectures which appear to have been attended by a considerable number of young men, among whom were the witness Mr. J. M. Chatterjee (P. W. No. 199) and the approver Dina Nath. His doctrines, as explained by these two witnesses, were at that time those of a passive resister. He advocated the liberation of India from the foreign yoke, but so long as he was in this country, he confined his suggestions within the limits of a boycott of Government and of Government service. On his departure from India, his mantle, according to Dina Nath and Mr. J. M. Chatterji, descended upon the appellant Amir Chand, to whom such of his followers as had assembled at the Delhi Railway Station to bid him farewell were introduced and to whose house they all subsequently proceeded. It is clear from the evidence of these two witnesses that Amir Chand was regarded by all concerned as the successor of Hardyal, and that it was to him that they were thereafter to look for guidance and precept. It is also abundantly clear from the same evidence that the fathers of Dina Nath and Chatterji objected very

strongly to their sons' proceedings. Chatterji states that when he was staying at Lahore at Lala Lajpat Rai's house with Hardyal, his father arrived, sent for him and ordered him to go back home at once. Dina Nath's father, on hearing that his son was staying with Amir Chand, proceeded to the latter's house in Delhi and angrily asked him what he meant by "leading other people's children astray." Lala Raja Ram, Assistant Engineer (P. W. No. 41), corroborates Dina Nath as regards the visit of Gajju Mal, Dina Nath's father, to Amir Chand for the purpose of taking his son away, and he further adds that Gajju Mul complained to him that his son had been "misled by some political-mongers." Obviously, therefore, the views of Hardyal and presumably also those of his successor, Amir Chand, did not commend themselves to respectable and loyal Indian gentlemen of the type of these two fathers. It is quite in keeping with the character of this man Hardyal, as disclosed by the documentary evidence on the record, that he should not venture, while in India, to advocate violence, but there can be no doubt from his later writings that this was due rather to prudence than to moral scruples, and in any event it is evident that it was he who sowed the seed which afterwards fructified. After leaving India, he appears to have wandered about from place to place until he eventually settled down in the U. S. A. in February 1911, and during the whole of this period his letters which are on the record show that he was extremely cautious in expressing his views on political matters. But once he felt that he was himself quite safe "from the clutches of the American Law" and realised that after three years' residence by the rule obtaining in the U. S. he could not be extradited (see Exhibits P-24, O-3 and O-4) he published in America a newspaper in Gurmukhi and Urdu, which openly and defiantly advocates mutiny in India, and glorifies such murderers as Khudi Ram Bose, Parphan Chaki, Kanhaya Lal, the Egyptian Ali Wardani, and "that brave man of Bengal, Hemchander Das, who went to Paris and learned the art of bomb making and on his return to Calcutta, established a factory for bombs and began to teach other young men how to make them" [see Exhibits P-177 (1) and (2), copies of the *Ghadr* newspaper bearing dates respectively 1st and 8th November 1913]. In the light of his own conduct, it is somewhat curious to find him, from his safe retreat in California, ingenuously admitting that as "the harbinger of freedom," he preferred to direct a rebellion from abroad, but at the same time upbraiding his countrymen for being "a timorous lot" who can "only talk, who have a great deal of patriotism in them but are mortally afraid of the Police; they love freedom, but have a great dread of jail," Exhibit P177 (2).

I refer to these passages because there can be no doubt that it was Hardyal who originated the plan of campaign which in the course of time developed into a conspiracy to murder, though according to the defence this very Hardyal was an inoffensive, high-souled reformer whose teachings were opposed to all forms of violence, his gospel being described as one of mere passive resistance. None of the learned gentlemen who appeared before us for the appellants adopted the description given of Hardyal by Mr. Norton before the Sessions Court or referred to him as "a chivalrous gentleman", though we were told, on more than one occasion, that he was a man of high principles who would scorn to receive money from such "comparative strangers" as Hanwant Sahai. That is hardly the impression I get from the copy of the *Ghadr* printed as Exhibit P-177 (2), in which the following five duties are specified for the observance of his readers:

"Your *first* duty is that you should regularly remit money to us.....Your *second* duty is to carefully read the paper .....Your *third* duty is to make others read the paper..... Your *fourth* duty is to send the paper to India by placing it in a cover.....Your *fifth* duty is to prepare to fight and die in the rising." In other words, the reader's first four duties are to subscribe to the paper and to assist in extending its circulation, and the *fifth* duty (after having ensured the success of the paper) is to fight and die. That Hardyal is the author of these articles and that this pernicious newspaper, the *Ghadr*, is his property is abundantly clear from P-23-A, a letter from Hardyal to Hanwant Sahai, dated 4th September 1912 (admitted by Hanwant Sahai to be in Hardyal's writing)

and from the copies of the *Ghadr* printed as Exhibit P-24, O-3 and O-4. *Nemo repente fuit turpissimus*, and I find it difficult to believe that Hardyal, the author of Exhibit P-177 (1) and (2) and Exhibit P-177-A., was in 1908 a mere "passive resister," at all events to the knowledge of his more intimate friends, and it is proved by the evidence of his brother, Kishen Dyal (P. W. No. 167), that Amir Chand was one of those friends and had known Hardyal from boyhood. That Hardyal and his teachings exercised a very considerable influence upon his followers and that he was not forgotten even after he had left India are evident from the reference to him in the "Liberty" leaflet of the 2[illegible]th July 1913 (Exhibit P-13-A) and from the poem in his honour and praise found in Sultan Chand's copy-book [Exhibit P-13 (D) (1).] In 1909 after Hardyal's departure from India, another sinister character, Rash Bihari Bose, appears on the scene. In that year this man made the acquaintance of Mr. Chatterjee (P. W. No. 199) and by his importunity succeeded in obtaining from the latter the names of some of Hardyal's disciples, such as Dina Nath and Amir Chand. Chatterjee, whose innate disinclination for work led him (as he explains) to adopt the profession, first, of a *sunyasi fakir* and subsequently of a Barrister, went to England in 1910, and has no recollection of giving Rash Bihari Bose a letter of introduction to Dina Nath. But the latter deposes, and I can see no ground for refusing to believe him, that shortly before Chatterjee's departure, Rash Bihari Bose was given such a letter, and later on met him, by appointment, at the Lahore Railway Station. About two or three months later Dina Nath again met Rash Bihari Bose, this time at the Kali Bari temple in Lahore, and subsequently in or about March 1911, they met for the third time at Hardwar on the occasion of the Guru Kul anniversary. At this meeting (as the defence elicited by their cross-examination of Dina Nath, see page 324) Dina Nath understood Rash Bihari Bose to be connected with Bengal anarchists and states that the latter eulogised the deeds of the murderers, Khudi Ram and Kanhaya Lal. Chatterjee deposes that among the names of Hardayl's disciples which he gave to Rash Bihari Bose was that of Amir Chand and it is, I think, a fair inference from the fact that Rash Bihari Bose lost no time in making the acquaintance of Dina Nath that he would have been equally prompt to make the acquaintance of Amir Chand, a man of some importance and influence in Delhi. The question arises, whether if he took advantage of Chatterjee's reference to Amir Chand and actually introduced himself to the latter in the same way as he did to Dina Nath, he would have met with a favourable reception and been received by Amir Chand as a friend, or (to use the expression so frequently referred to in the evidence) as an *achha admi*. Upon this point, I can have no doubt. Amir Chand held the strong anti-English views that characterised Hardyal, and we know from the evidence of Canon Allnutt (P. W. No. 107) that in 1908 serious objection had to be taken by the College authorities to his conduct in attending political meetings, and that in 1910 he became a political suspect and was under Police surveillance. Amir Chand was thus the very man for Rash Bihari Bose's purposes. Imbued as he was with the views of Hardyal, his antipathy to British rule would certainly not decrease when he realised the irksome inconveniences of Police surveillance, and while his social position would make him an eminently desirable colleague from Rash Bihari Bose's point of view, the circumstances in which he found himself in 1910 would probably lead him to welcome an agitator whose policy was so robust and advanced. That Rash Bihari Bose must have been acquainted with Abad Bihari for some time prior to October 1912 is, I think, clear from Dina Nath's account of the meeting at the Agarwal Asharam at which Rash Bihari Bose introduced the two men to each other. It is very improbable that Rash Bihari Bose would have disclosed his murderous plan of campaign, except to men whom he had known for some time, already put to the test, and found not wanting. In 1912 and from 1909 Abad Bihari had been living in the house of Amir Chand and it is, I consider, a fair and legitimate inference that Rash Bihari Bose formed the acquaintance of Amir Chand and Abad Bihari shortly after he had obtained the name of former from Mr. J. M. Chatterjee, and that it was not long before he infused backbone into the

political views of his new friends. In March 1911 Dina Nath had no difficulty in realising that Rash Bihari Bose was connected with the Bengal anarchical movement and approved of bomb-throwing, in 1909 Rash Bihari Bose, when he practically forced his acquaintance upon Chatterjee, told the latter that he belonged to a Bengal "Yuguntar Ashram" and left upon him the impression of being either a member of a secret society or a "braggart."

Bearing all the facts in mind, I conclude that Rash Bihari Bose introduced himself to Amir Chand and Abad Bihari some time in 1910 and that it was not long thereafter that the political views of the two latter became decidedly more "advanced" and that in course of time the nucleus of the conspiracy to commit murder and to incite others to commit murder was formed. Of course it does not by any means follow, nor do I suggest, that a man who is opposed to British Rule in India or holds the views that India was intended for Indians is on that account prepared to advocate a mutiny or the murder of Europeans. Far from it. But there is clear documentary evidence on the record to prove that Hardyal and Amir Chand, so far from having any moral scruples in this respect, were quite prepared to advocate cold-blooded murder as a means to effect their ends. I have already set forth Hardyal's view as given in the copies of the *Ghadr* newspaper on the record, and, as regards those of Amir Chand, I need do no more than refer to the document admittedly written by him (Exhibit P 23-M) in which, after inquiring whether it is not "our imperative duty to get rid of the robbers, to struggle against the injustice and oppression of those who are not our well-wishers, whatever they may profess," he asserts that "half-hearted efforts, incomplete schemes, low aims will not do," and that "revolution and *a general massacre of all the foreigners, specially the English, will and can alone serve the purpose.*" Amir Chand does not deny the authorship of this article, but explains that being a man of impulsive nature and excitable temper, he wrote it at one sitting at a time when he was much annoyed at being refused an interview with the Chief Commissioner of Delhi with reference to Police surveillance. He adds that he originally thought of sending it for publication to the "Modern Review", but two or three days afterwards he reflected that the sentiments expressed in it did not really represent his "normal sentiments." He searched for it in order to make "the necessary alterations," but could not find it and forgot all about it. It is true that this document was written about January 1914, but a man, who could at any time incite his countrymen to massacre all foreigners, has obviously no innate moral objection to the shedding of blood. Amir Chand's explanation, that the article was written in a moment of anger and did not express his normal sentiments, cannot be accepted by any one who has seen the original document. The article was first written out, and revised no less than twice afterwards, once in red ink and once in pencil.

As I understand the case for the prosecution, the conspiracy developed in the manner I have suggested, but as members of a conspiracy work in secret and as in many instances persons join it from time to time, and not altogether on one precise date or at one particular meeting, it is clearly impossible for the prosecution to state in the charge the date on which the conspiracy came into existence or to give specific particulars as to the various persons who became members of it or as to the exact dates on which they respectively joined it. The prosecution do not allege that the conspiracy came into existence in October 1912 when Rash Bihari Bose, Dina Nath, Abad Bihari and Balmokand met at the Agarwal Asharam at Lahore. They assert that these persons, as well as others, had for some time prior to that meeting been agreed upon a policy of murder, but that nothing till then had been done to carry this policy into execution, and that the object of the meeting was to give practical effect to a plan of campaign already accepted, but till then not put into practical form or properly organised. They cannot adduce direct evidence in further support of their allegations, other than such evidence as Dina Nath is able of his knowledge to supply, but they ask

the Court to infer the existence of the general agreement from such acts and conduct of the various accused persons from time to time as they are able to prove. As observed by Mookerjee, J., in his learned judgment in *Pulin Behary Das* v. *Emperor* (2): "It must be remembered that direct proof can scarcely be afforded of a conspiracy..... hence the Courts have consistently held that the prosecution is not obliged to prove that the persons accused actually met and laid their heads together and, after a formal consultation, came to an express agreement to do evil. On the contrary, if the facts, as proved, are such that the Jury as reasonable men can say there was a common design and the prisoners were acting in concert to do what is wrong, that is evidence from which the Jury may suppose a conspiracy was actually formed. It is from this point of view that the overt acts may properly be looked to as evidence of the existence of a concerted intention; indeed, the conspiracy is usually closely bound up with the overt acts, because in many cases it is only by means of the overt acts that the existence of the conspiracy can be made out. But the criminality of the conspiracy is independent of the criminality of the overt acts." To a like effect are the remarks of Coleridge, J., [*Rex* v. *Murphy* (13)]: "It is not necessary that it should be proved that these defendants met to concert the scheme, nor is it necessary that they should have originated it. If a conspiracy be formed, and a person joins it afterwards, he is equally guilty." And in a recent case, Jenkins, C. J., [*Barindra Kumar Ghose* v. *Emperor* (1)], stated that, "though there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence, the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. So, again, it is not necessary that all should have joined from the first; those who come in at a later stage are equally guilty, provided the agreement is proved. Finally, we have the *dictum* of Grose, J. [*Rex* v. *Brisac* (14)] that "conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them, and which hardly ever are confined to one place."

In the case before us the prosecution allege that there was an agreement between the accused persons and others to commit murder and to abet the commission of murder. They are naturally unable to give direct proof of any such agreement, but they ask the Court to deduce the existence and nature of the agreement from the facts that certain members of the conspiracy actually did commit a murder; that in the house of another member of conspiracy a bomb cap was discovered, and that all the accused persons were concerned, directly or indirectly, with the distribution of literature which was intended to incite persons to commit murder. If it be found that all these facts are established, it would be a fair and justifiable inference that the alleged agreement between the parties accused did in fact exist, and each and every member of the conspiracy is responsible for an offence committed in pursuance of the conspiracy, and it is not necessary to show that a particular member actually concerted the offence with the member who committed it [*Kalil Munda* v. *King-Emperor* (15)]. Mr. Raghunath Sahai's argument, therefore, that Amir Chand is not proved to have been consulted with reference to the Lahore bomb outrage and should not for that reason be held liable for it, is erroneous. But, so far as *punishment* is concerned, a distinction must, I think, be drawn between the case of a person who joins a conspiracy before the actual crime which is the object of the conspiracy is committed, and the case of a person who joins it subsequently to the commission of such a crime. Section 120-B of the Indian Penal Code provides that "whoever is a party to a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, shall, when no express provision is made in this Code for the

(13) 6 Car. & P. 103.

(14) 7 R. R. 551; 4 East 164; 102 E. R. 792.

(15) 28 C. 797.

punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence." If, therefore, *A* and *B* conspire to commit murder and *B* subsequently does commit murder, *A* is punishable as if he had abetted that murder (section 109, Indian Penal Code). But if *B* has already committed a murder before *A* conspires with him to commit murder, *A* would, in my opinion, be liable to be punished (if in point of fact no other murder is committed) only to the extent provided in section 115, Indian Penal Code. But in every such case the offence committed by a member or members of the conspiracy prior to the entry of *A* into the conspiracy would be a relevant fact as indicating the nature and objects of the conspiracy (*cf.* Mookerjee, J.'s remarks at page 315 of *Pulin Behary Das*' case (2) *ubi supra.*)

Before leaving this part of the case, I have to advert briefly to the argumeut that the prosecution are in effect charging the accused persons with participation in several conspiracies, one being a conspiracy at Lahore, another at Delhi; one a conspiracy to commit murder or to abet the commission of murder and another a conspiracy to commit the offence punishable under section 124-A, Indian Penal Code. There is no foundation for this argument. The prosecution allege one general conspiracy, the object of which is to commit or to abet the murder at Delhi, Lahore and other places in British India. They do not allege that there was one conspiracy at Lahore and a separate and distinct conspiracy, though with similar objects, at Delhi; according to them there was only one conspiracy of which all the accused were members, and that this was nonetheless so because certain overt acts, in pursuance of the objects of the conspiracy, were committed at Lahore while other overt acts were committed at Delhi. Nor, again, do the prosecution rely on the "Liberty" leaflets for the purpose of proving an offence of disseminating seditious literature. The leaflets in question are, no doubt, of a highly seditious character, but they are something more, inasmuch as they are a panegyric on murderers of the type of Khudi Ram Bose and the language employed amouuts to a direct incitement to the commission of murder. It is with them in their latter character that the prosecution are concerned in this case, and it is not seriously urged that the accused persons and their Counsel were not fully aware of this.

(H). I next proceed to deal with a theory which appeared to me to be singularly unconvincing and baseless, but which was put forward strenuously by Mr. Sen and Mr. Raghunath Sahai both in the Sessions Court and before us. It is suggested that the whole case against Amir Chand, Abad Bihari, Hanwant Sahai, Balraj, Balmokand, Basant Kumar Biswas and Charan Das is the outcome of a wicked plot on the part of the Police in general and of the C. I. Department in particular; that the subordinate officers of the C. I. D. were much chagrined at their inability to trace the perpetrators of the Delhi and Lahore bomb outrages and realising that this failure on their part reflected seriously upon their efficiency devised a plan, whereby through the agency of their spy, Rash Bihari Bose (who was thereafter to be put forward as the leader of a dangerous anarchical society), literature and articles of an incriminating character were to be foisted upon unsuspecting persons; that in pursuance of this plot Rash Bihari Bose in January and February 1914 visited the houses of Amir Chand and Abad Bihari at Delhi, of Charan Das at Gurdaspur and of Khushi Ram at Lahore, was hospitably received as any inoffensive person who happened to be a friend or acquaintance would have been received, and that before his departure he in each case requited the hospitality he had received by concealing in their houses and among their own things such articles as "Liberty" leaflets, the bomb cap and the other articles which were found in their respective houses, but of which they repudiate ownership or knowledge, and that it was only after he had completed this business that the subordinate officers in question informed Mr. Petrie that the time was ripe for the searches of the houses at Delhi and Lahore.

The grounds upon which this theory is based are as follows:

(*i*) Mr. Petrie obtained warrants for the searches at Delhi from the Joint Magistrate of Alipur on the 4th February 1914; left Calcutta on the 5th February and instead of stopping at Delhi, proceeded to Lahore where he stayed till the 11th February; he reached

Delhi on the 12th February, but deferred the search of Amir Chand's house till the 16th February while Dina Nath's house at Lahore was not searched till the 18th February. The suggestion is that this delay was due to the fact that Rash Bihari Bose had not had time to complete the task allotted to him earlier, and it obviously implies that Mr. Petrie either knew or must have suspected that his subordinate officers were up to some trickery. His own explanation is simple and straightforward. The search warrants he had obtained on the 4th February were granted under the Press Act, Mr. Petrie having reason to believe that "Liberty" leaflets were to be found in the houses of Amir Chand and certain other Delhi people; he had also heard that leaflets had been sent to Lahore in November or December 1913 for distribution there, and before making any search at Delhi, he went on to Lahore to consult with the authorities there and to arrange that searches at Lahore should coincide with searches at Delhi; on his arrival at Delhi on the 12th February he decided to defer the search of Amir Chand's house as the local Police had informed him that they suspected certain other persons as well and he thought it better to effect all searches simultaneously. On the 16th February the houses of Amir Chand and Abad Bihari were duly searched and the bomb cap discovered in the house of the former, with the result that Amir Chand and Abad Bihari were arrested the same day. Before proceeding I may here note that, if Rash Bihari Bose was a Police spy, he was singularly remiss in giving information to his employers, as though he had completed his task at Delhi before the 5th February and had reached Lahore on the 13th February, having prior to his departure from Delhi left certain of his own belongings and (as the defence contend) such incriminating literature as the manuscript copy of the *Talwar*, Exhibit P-11, in Abad Bihari's house, Mr. Petrie on the 16th February was still under the impression that Abad Bihari was living with Amir Chand and, on discovering his mistake, had to hurry off from Amir Chand's house to get a warrant from the Deputy Commissioner, Delhi, for the search of Abad Bihari's house, the situation of which he discovered from Amir Chand.

In my opinion, Mr. Petrie has satisfactorily explained the delay in effecting the searches and I cannot for a moment entertain the suggestion that he would have lent himself to despicable trickery of the kind suggested. Nor can I believe that an officer of his standing and experience would have failed to discover the plot if his subordinates had attempted to delude him, by secretly and without his knowledge, concocting any such scheme.

(*ii*) No serious attempt was made by the Police to arrest Rash Bihari Bose and he was allowed to escape.

It appears that before making his searches at Delhi, Mr. Petrie obtained an order from the Chief Commissioner authorising the Post Master to intercept letters addressed to certain persons and to make them over to him. On the 17th February, the letter, Exhibit P-33, dated Lahore, 14th February 1914, addressed to Abad Bihari, was handed to Mr. Petrie and the latter, in consequence of a statement made to him by Abad Bihari, telegraphed the same day to Mr. Stead, P. W. No. 36, at Lahore, directing the arrest of Dina Nath and Rash Bihari Bose, who was "believed to be staying with Dina Nath." Exhibit P-33 purports to have been written by one "M. S." but was really sent by Dina Nath. It runs as follows:—

"DEAR BROTHER,

"NAMASTIN.

"Yours of the 12th instant to hand. I am glad to inform you that your friend has come here. He reached here yesterday morning safe and sound. His all letters should be sent to my address. There is no need of your coming here now. More in my next. Please remit money at your earliest convenience. Yours sincerely,

"M. S."

The "friend" referred to is Rash Bihari Bose and "M. S." was the *nom-de-plume* used by Dina Nath when corresponding with Abad Bihari (*cf.* Exhibit P-34). From Mr. Petrie's evidence it is quite clear that he was informed by Abad Bihari that the letter came from Dina Nath and that Rash Bihari Bose was "the friend," and from the purport of the letter Mr. Petrie must have concluded that Rash Bihari Bose was staying with Dina Nath. On receipt of Mr. Petrie's telegram, which was in cipher, Mr. Stead (P. W. No. 36) on the 17th February ordered Dina Nath's house to be searched

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and had Dina Nath arrested on the 18th. Rash Bihari Bose was not at Dina Nath's house and it was not until the 20th February that Mr. Stead received reliable information that Rash Bihari Bose had been in Lahore. When he received that information, he examined the accounts of the Kashmir Boarding House and being satisfied that his information was correct, at once endeavoured to effect the arrest of Rash Bihari Bose who had, however, fled from Lahore as soon as he heard of the search of Dina Nath's house. After reading this evidence, I can find no ground for supposing that Mr. Stead was deliberately conniving at Rash Bihari Bose's escape or that he made no serious effort to arrest him. Moreover, if it was intended by the Police that Rash Bihari Bose should escape, why did Mr. Petrie in his cipher telegram expressly direct his immediate arrest?

Both Mr. Petrie (P. W. No. 5) and Mr. Denham (P. W. No. 203) have sworn positively that they never heard of Rash Bihari Bose till February 1914. Mr. Petrie heard his name for the first time from Abad Bihari on the 16th February, and Mr. Denham when he received a telegram relating to the house searches at Delhi. It is incredible that these two officers should have remained in entire ignorance of the existence of the man had he really been a spy in the employment of their Department.

The sole foundation for this ingenious theory is that when His Excellency the Viceroy was staying in camp at Dehra Dun in July 1913, after the bomb outrage at Delhi, Rash Bihari Bose was introduced by one Dr. Mookerjee to Deputy Superintendent Shushil Chandar Ghose (P. W. No. 202) who, on a subsequent occasion, in July 1913 asked Rash Bihari Bose "about arrivals and departures of stranger Bengalis," but got no real information from him. Dr. Mookerjee is a well-known resident of Dehra Dun and as he had told the Deputy Superintendent that Rash Bihari Bose was well acquainted with Bengalis and could be relied upon, it is not surprising that the Deputy Superintendent tried to get information from him. This is far, however, from saying that Rash Bihari Bose was a spy in the employ of the C. I. D. As a matter of fact, Rash Bihari Bose made capital of his acquaintanceship with the Deputy Superintendent which was valuable asset to him, and enabled him to pose as a loyal and respectful citizen. He informed Atul Chandar Ghose (P. W. No. 176), the Manager of Tagore Villa, that he was on visiting terms with the Deputy Superintendent, and supplied him with information about the movements of Bengalis; he made himself prominent at a public meeting at Dehra Dun held for the purpose of denouncing the attempt on the Viceroy's life; and he even told the witness Shohindra Nath Chatterjee (P. W. No. 186) that he possessed a Police pass which enabled him to go into the Viceroy's camp. The defence frequently referred to this pass as if its grant to Rash Bihari Bose had been proved, whereas the sole evidence as to it is the statement of this witness S. N. Chatterjee who, however, says that all he knew about it is what Rash Bihari Bose told him, he himself having never seen it. But whatever object Rash Bihari Bose may have had for ingratiating himself with Deputy Superintendent Shushil Chandar Ghose and for posing at Dehra Dun in 1913 as that officer's friend and a loyal and trusted citizen, there is no evidence to support the theory that he was in fact a Police spy. Mr. Denham has deposed that, so far as this case is concerned, Shushil Chandar Ghose has had nothing whatever to do with the investigation, and it has not been shown that Rash Bihari Bose was known to any officer, subordinate or superior, who took part in that investigation, nor was any such officer questioned in cross-examination on the point.

(*iii*) The paper which formed part of the bomb cap was taken from a newspaper and in the piece used for the cap there is a reference to a resolution passed by the *Tali Jati San Milani* at Calcutta on the 28th December 1913. Deputy Superintendent Shushil Chandar Ghose deposes that Rash Bihari Bose visited him at Calcutta on the 28th or 29th December 1913 and we are asked to infer that it was Rash Bihari Bose who brought with him from Calcutta a newspaper containing an account of the aforesaid meeting and used part of it for making the bomb cap which he secreted in the room "Z" of Amir Chand's house.

Mr. Denham (at page 298 of the record) states that two newspapers, the "Bengali" and

the "Amrita Bazar Patrika" of the 30th December 1913 issue, contained "passages of the resolution exactly the same as on the paper of Exhibit 15" (the cap), and we find from the evidence of Mr. Petrie (at page 57) that the tin in which the bomb cap was concealed was wrapped in a piece of newspaper and that this piece was taken from a copy of the "Amrita Bazar Patrika" bearing date 20th November 1913. It is hardly likely that Rash Bihari Bose was travelling about with files of the "Amrita Bazar Patrika" upon him, nor is it suggested that he was in Calcutta on the 20th November 1913, and I think it far more probable that the person who made the cap was a subscriber to that paper and had copies of it lying about in his house. At all events there is nothing in this fact to support the suggestion that the cap must have been made by Rash Bihari Bose, and could not have been made by Amir Chand or Abad Bihari.

(*iv*) Puran Singh (P. W. No. 181) deposes that in 1913 he travelled in the same railway compartment with Rash Bihari Bose and that he (the witness) complained to Mr. Mercer that Rash Bihari Bose had put "impertinent questions" to him about his movements, 'just like a policeman." The inference we are asked to draw is that Rash Bihari Bose was acting as a spy for the C. I. D. and endeavouring to find out all he could about the witness. But there is absolutely nothing to show that Puran Singh was ever suspected by the Police or that they were keeping a watch upon his movements. On the other hand, he is the "Beloved Puran" of Exhibit P-14 (*a*) and an intimate friend of Amir Chand; he knew the witness J. M. Chatterjee and also Hardyal, and he was told by Chatterjee that he (Chatterjee) had become a disciple of Hardyal. It may be that Chatterjee mentioned his name among those of other disciples of Hardyal to Rash Bihari Bose and that the latter, who apparently lost no opportunity of getting acquainted with Hardyal's disciples, hoped to enlist him also as a member of the conspiracy, and with this object in view was importunate in the questions he put to him.

(*v*) A similar remark applies to Rash Bihari Bose's anxiety to discover from the witness Chatterjee the names of Hardyal's disciples. This occurred in 1909 or 1910, and even the defence do not suggest that so long ago as that Rash Bihari Bose was in the employ of the C. I. D. On the other hand, if he has been so many years in that employ and engaged in finding out important scraps of information about every one with whom he came into contact, it is impossible to believe that Mr. Petrie and Mr. Denham would have known nothing about so useful and so ubiquitous a spy.

(*vi*) The last ground is that the prosecution have produced a photograph, Exhibit P-118, of Rash Bihari Bose; but as they have not shown how they became possessed of it, the inference is that the latter gave it to them for the purposes of this case. I think the explanation of the Additional Sessions Judge, that this was an oversight on the part of the prosecution, is far more probable, and that it is just as likely as not that the photograph was found in Rash Bihari Bose's house or in that of his relation Shrish Ghose, at Chandarnagore, when Mr. Denham searched those houses in March 1914.

It appears to me that the theory propounded by the defence had nothing to support it, except improbable surmises and unjustifiable inferences. On the other hand, in addition to the express denials of Mr. Petrie and Mr. Denham, there are many facts which tell strongly against this theory.

In the *first* place, it is not explained how the Police spy, who had wormed himself into the confidence of Amir Chand, could, without the gravest risk of detection, make his way up to the top storey of his friend's house, enter the room "Z," which was generally kept locked, and there secrete the biscuit tin containing the bomb cap and the bottle of petrol (Exhibit P-18) which was found standing up. The witness Sultan Chand, P. W. No. 201, his mother and other ladies lived on this top storey and according to Amir Chand, the key of the room was kept either by Sultan Chand's mother or an old servant named Raghu. How, then, did Rash Bihari Bose who, as Amir Chand would have us believe, was an entire stranger and was visiting him for the first time at the end of January 1914, manage to get up to this room on the top storey, unlock the door, conceal the tin and bottle and then successfully make his way down again to his own

room? Would it not have been far easier for him and much more effective to conceal the articles in the room actually occupied by Amir Chand himself at a time when Amir Chand was not in the house? On the other hand, if it was Amir Chand or Abad Bihari, or both, who had made the bomb cap or had received it for safe keeping, the locked room at the top of the house, which was hardly ever entered by any one, would naturally suggest itself as the safest and most convenient place in which to keep so compromising and dangerous an article.

In the *next* place, there are certain letters on the record which are quite inconsistent with Abad Bihari's and Amir Chand's assertions that they met Rash Bihari Bose for the first time in January or February 1914, and that till then they had no knowledge of him. The letters I refer to are the following :—

(1) Exhibit P-33.—The letter, dated "Lahore, 14th February 1914," from Dina Nath to Abad Bihari, the terms of which I have given above. This refers to Rash Bihari Bose who is spoken of as "your friend."

(2) Exhibit P-34.—Another letter, from Dina Nath to Abad Bihari, dated Lahore, 16th February 1914.—Here, again, reference is made to "your friend" and Abad Bihari is informed that his friend has received his letter and intends to stay in Lahore for three or four days after which he will go direct to him.

As regards Exhibits P-33 and 34, Abad Bihari in his written statement professes to know nothing about their writers or their contents. Dina Nath swears that he wrote them, and if his is a lie, why did not Abad Bihari explain how such letters came to be addressed to him? They were written at a time when Dina Nath was at liberty and under no apprehension of arrest, so it cannot be said that he was induced by the Police to write them for the purpose of implicating Abad Bihari, and, as a matter of fact, until he received Exhibit P-33 from the Post Office at Delhi, Mr. Petrie had no knowledge that Rash Bihari was at Lahore while, according to Mr. Stead, the Lahore Police did not find out that Rash Bihari Bose was in Lahore until the 20th February. If then Dina Nath did not write these letters, who did and for what purpose?

(3) Exhibit P 35—This is a letter which has been proved by the evidence of Mr. Troup (P. W. No. 102) and Bala Dattjish (P. W. No. 103) to be in the handwriting of Rash Bihari Bose. It was sent by registered post, addressed to Abad Bihari, and was intercepted in the Post and handed over to Mr. Petrie. It bears date 16th February, begins with the words "Dear Brother," acknowledges receipt of a letter dated 14th from Abad Bihari (and as to this, compare Exhibit P-34), and is couched in terms which would be mysterious or unintelligible, except to a friend with whom the writer was on somewhat intimate terms. Would a comparative stranger understand, for example, the words "After keeping in hand Rs. 100 *for our business*, will you be able to spare another equal sum for *them*? It would be most advantageous if you can do that, *as they are having a very bad time there*. Of course, if it can't be helped, it does not matter and you need not trouble yourself for that." The prosecution suggest that the meaning of the passage is that Rs. 100 were to be kept for the purposes of the Delhi-Lahore Conspiracy and that another Rs. 100 were, if possible, to be contributed towards the fund of the Bengal conspiracy. This suggestion may or may not be correct; but it is difficult to believe that the writer would use such cryptic language if the letter were addressed to a mere acquaintance and comparative stranger. Finally, we have the fact that Rash Bihari Bose intended to leave Delhi by the early morning train on February the 3rd, but was stopped by a telegram (Exhibit P-100) sent by Dina Nath from Lahore at 7 P. M. on the 2nd February 1914 and addressed to Abad Bihari. It is proved, and indeed admitted, that on the 2nd February 1914 a ticket from Delhi to Lahore, *via* Bhatinda, was purchased by Amir Chand; that this ticket was not used, and that, on the 3rd February, Amir Chand applied to the Railway authorities for a refund of the amount paid by him. He explains that he had intended to go to Lahore on the date mentioned to visit Rai Bahadur Ganga Ram, but that he missed his train and had (in consequence of other

engagements) to give up all idea of this visit. Rai Bahadur Ganga Ram was not called as a witness to corroborate Amir Chand's statement, but it is, of course, not impossible that Amir Chand had not informed him of the intended visit. At the same time, knowing that he was pressed for time, it is hardly likely that Amir Chand would undertake a long journey to Lahore on the mere chance of finding Rai Bahadur Ganga Ram at home. On the other hand, it is proved beyond all doubt that Dina Nath did actually stop Rash Bihari from coming to Lahore on the 3rd February, and he explains in his evidence that he did so because he thought it would be unsafe for a Bengali like Rash Bihari Bose to be seen in Lahore so soon after the distribution of "Liberty" leaflets in January 1914. The reason why Amir Chand and Abad Bihari disclaim all knowledge of Dina Nath's action on this occasion is obvious, when we remember why it was that Rash Bihari Bose's intended visit to Lahore was deferred. Personally I have not the slightest doubt that Amir Chand and Abad Bihari were fully aware of the reason for Dina Nath's action and realised as keenly as he did the danger Rash Bihari Bose would run if he arrived at Lahore at so critical a time.

Taking, then, all these facts into consideration, and seeing how slender is the foundation upon which the defence theory is based, I have no hesitation in holding that there is no ground for suspecting that Rash Bihari Bose was a Police spy in the employment of the C. I. D., while there are very strong reasons for accepting the contention for the prosecution that he was an intimate political friend of the various accused persons and the active leader of the conspirators.

In this connection and before I pass on, I think it right to refer, and I do so with pleasure, to the repeated disclaimers by the learned gentlemen, who appeared for the accused persons, of any intention to impugn the absolute *bona fides* of the superior Police officers whose duty it was to conduct the investigation in this case. Mr. Beechey, Mr. Sen, Mr. Raghunath Sahai, Mr. Nanak Chand and Mr. Gokal Chand were at one in frankly acknowledging the fairness and impartiality of Messrs. Petrie, Denham and Stead, and on more than one occasion each of the learned Counsel repudiated the idea that any one of those officers had consciously been guilty of malpractice or unfairness. The learned Counsel deemed it necessary at times to suggest that the Police had been overzealous or culpably negligent in the discharge of their duties, but in no instance did they impute want of good faith to the three officers in question, and criticisms of the latter's proceedings was strictly confined to the suggestion that their subordinates had skilfully misled them and had, in their absence and without their knowledge, resorted to those devices for concocting evidence which, despite the efforts of their superior officers, Inspectors and Sub-Inspectors of Police are traditionally supposed to employ. In my opinion, there is no justification whatever in this case for such insinuations against the subordinate Police officers. On the contrary, I am satisfied that the investigation in these proceedings, which was of a particularly difficult and trying character, was conducted throughout by all the Police officers concerned with conspicuous ability and commendable fairness.

(I) My learned colleague in his order has dealt in great detail with the case of each of the accused persons and has, with characteristic lucidity of expression, given the reasons for the conclusions arrived at by him. With those conclusions I am in entire accord, and it is, therefore, not necessary for me to do more than to add one or supplementary remarks as regards each individual case.

(1) *Abad Bihari's case.* (*a*)—Abad Bihari is a young man of great intellectual ability. He stood second in the 1st division of the Punjab University B. T. Examination. There is, therefore, no inherent improbability in Dina Nath's statement that he was the author of the May and July "Liberty" leaflets.

(*b*)—That he was directly concerned in the matter of the various "Liberty" leaflets is proved by the fact that no less than 22 copies of the November leaflets [Exhibit 13 (*b*)], and 35 copies of the "OM" leaflets [Exhibit 13 (*c*)] were found in his box at Amir Chand's house [see Exhibits P-22 (*a*) and (*b*), and P-25]; and that he presented copies of the July, November and "OM" leaflets to the boy Sultan Chand (P. W. No. 201, see page 293, line 23). It is further to be noted as a fact, entirely opposed to the theory that these and other incriminating articles were placed in Abad Bihari's box by Rash Bihari or some

other Police spy, that the copies of the November and "OM" leaflets were given to Sultan Chand by Abad Bihari so late as February 1914 (page 294, line 27). Sultan Chand is, it is true, an approver, but there is no conceivable reason, nor has any been assigned, why he should give false evidence against his own adoptive father, Amir Chand, and the latter's intimate friend, Abad Bihari.

(*c*)—In the said box was also found Exhibit P-29 (*a*) described as a "Poison Manual." It is not too much to say that this is a document of the most atrocious character, and it is futile to argue that a person who kept such a document in his possession is an inoffensive, amiable student of a gentle disposition. It is certainly a striking coincidence that the studious Abad Bihari and that highly respected "educationalist" Amir Chand, who were living together for so many years, are found to be connected with literature which openly advocates murder, Abad Bihari being in possession of a vast number of "Liberty" leaflets and of this abominable "Poison Manual," while Amir Chand is the admitted author of that incitement to wholesale murder printed as Exhibit P-23 (M), which was also found in Abad Bihari's box.

(*d*)—Abad Bihari, in his written statement, asserts that he met Rash Bihari Bose for the first time in January 1914, but I have already referred to Exhibits P-33, P-33 (*a*), P-34 and P-35 as furnishing proof that the two were intimate friends of some standing and not mere casual acquaintances.

(*e*)—Finally, there is the significant admission by Abad Bihari (see page 307, line 50) that he can suggest no reason why Dina Nath should have invented "this long story against him." I agree, therefore, with my learned colleague, the Additional Sessions Judge, and the Assessors that the guilt of Abad Bihari has been fully established. There is no extenuating circumstance to be urged in his favour and he has very properly been sentenced to the extreme punishment awardable for the crime of which he has been convicted. His appeal is rejected and the sentence of death is confirmed.

(2) *Amir Chand's case*—My learned colleague's order has dealt exhaustively with this man's case. The Assessors were unanimous in finding him guilty and there can, I consider, be no doubt that he was one of the principals in the conspiracy. His learned Counsel laid great stress upon the reputation he enjoyed among respectable Delhi residents as a philanthropical educationalist of blameless character. But Canon Allnutt (P. W. No. 107) deposes that so long as 1907 or 1908 he had to warn Amir Chand, who was then a master in the Mission College and School, that he must desist from attending political meetings under pain of dismissal, and Mr. S. K. Rudra (P.W. No. 110) states that for the last eight or ten years he had lost touch with him and that on asking him the reason why they did not see more of each other, Amir Chand informed him their "business lay in different directions." This evidence *per se* only tends to show that Amir Chand had taken to "politics," but the true character of the man is disclosed when we refer to Exhibit P-23 (M) to which I have already made reference, and when we remember that it was to him that Hardyal's disciples were handed over; that Abad Bihari was his intimate friend; that Rash Bihari Bose was admittedly staying with him in his house in January and February 1914; that Ram Lal and Sultan Chand were being brought up by him as seditionists; that he took an active part in the preparation of the "Liberty" leaflets of November 1913, and that a bomb cap was actually found in a locked room in his house.

I agree that this man has fully earned the capital sentence. His appeal is accordingly rejected and the sentence of death confirmed.

(3) *Balraj's case.*—It has been satifactorily established that this appellant was a member of the conspiracy and was actively connected with the distribution of the "Liberty" leaflets of the 3rd and the "OM" issues. I have no doubt, moreover, that his visit to Khushi Ram's house at 10 P.M. on the 19th February 1914 (at a time when Dina Nath's cousin, Ram Saran, was also present) had reference rather to the affairs of the conspiracy than to a sudden desire to borrow a book from Khushi Ram. It is amply proved that Rash Bihari Bose was staying with Khushi Ram in February 1914 and the probability is that Balraj's visit was made at so unusual an hour with the object of discussing what had happened to the arch conspirator. My learned colleague has set forth in detail his

reason for finding that Balraj had joined the conspiracy by November 1913 and I agree with his conclusions. At the same time it is, I think, open to some doubt whether Balraj joined the conspiracy before the commission of the Lahore bomb outrage in May 1913. I see no reason to doubt Dina Nath's evidence as to his meeting Balraj at Nabha House in July or August 1911 and being introduced to him by Rash Bihari Bose, but *per se* this evidence does not show that Balraj was at that time a member of the conspiracy, as Dina Nath expressly states that the conversation that ensued was of "an ordinary kind." This would hardly have been the case had Balraj been at the time one of Rash Bihari Bose's disciples. As a matter of fact, the sole piece of evidence upon which the prosecution can base their allegation that Balraj joined the conspiracy before the 17th May 1913 is the letter addressed by him to Balmokand (Exhibit P-119). This letter is admitted by Balraj and bears date, "23rd May, morning 6 A.M." Both Mr. Ross Alston and Mr. Beechey are agreed that it was written in 1911, about one month before Balmokand's marraige took place, but while the former contends that its language necessarily suggests that Balraj and Balmokand were members of a criminal conspiracy, Mr. Beechey urges that it was a perfectly innocent letter written with the object of dissuading Balmokand, who was seriously ill at the time, from contracting a marriage tie. I have carefully considered the terms of the letter and the arguments addressed to us upon its real meaning. It is unquestionably a document open to grave suspicion and Balraj's explanation of the mysterious language used by him is by no means convincing, especially in view of the fact that Dr. Ram Gopal (D. W. No. 2) who was then treating Balmokand did not find him to be suffering from consumption. Before passing on, I might here note that the Additional Sessions Judge is in error in assuming that this letter was written in May 1913 (see page 31, last line but one). But while I concede that the equivocal language of the letter lends support to the prosecution theory, I am not prepared to hold that it necessarily implies that Balraj had joined the secret society in May 1911. It is susceptible of a more innocent construction as it is just possible that Balraj's florid language had no deeper or more sinister meaning than that now ascribed to it by him and his learned Counsel, and its intention may have been simply and solely to dissuade his friend from entering into a marriage which would be irrevocable and might lead to lifelong misery. It is also possible that Balraj, though not himself a member of the secret society, was aware that his friend had joined it and was on this account urging him to refrain from marriage. While, therefore, I agree that the letter creates grave suspicion against Balraj, I think that there is an element of doubt and that Balraj is entitled to the benefit of that doubt. I am much influenced in arriving at this conclusion by the fact that when some two or three months later Rash Bihari Bose introduced Balraj, at Nabha House, to Dina Nath, he did not attempt to discuss with them what were euphemistically termed "political matters." By that time Dina Nath had thrown in his lot with Rash Bihari Bose, and the latter, as we find from the evidence, lost no opportunity of impressing his very advanced views upon those whom he had (in Dina Nath's language) already "tested." Had then Balraj also joined his party before that meeting, I have no doubt that Rash Bihari Bose's conversation would not have been of "an ordinary kind."

I agree, therefore, with my colleague that it is not clearly proved that Balraj was a member of the conspiracy prior to the date on which Ram Padarath was murdered, and, for reasons already given by me above, I think his punishment must be limited to the period of rigorous imprisonment prescribed by section 115, Indian Penal Code. Balraj's appeal is, therefore, accepted *pro tanto* and his sentence reduced to one of seven years' rigorous imprisonment. This is the maximum sentence awardable under that section, but I agree that no lesser sentence would be adequate.

4. *Balmokand's case.*—This appellant was, in my opinion, one of the most prominent and active members of this conspiracy and I have nothing to add to the reasons given by the Additional

Sessions Judge and my colleague for convicting him of the offence charged and for inflicting the extreme penalty. The Assessors also were unanimous in their opinion that he was guilty. His main defence consisted in the *alibis* set up by him in order to prove that he was not in Lahore (1) on the 12th October 1912, when the Agarwal Ashram meeting was held; or (2) in October, when according to Dina Nath two bombs were made over to him for safe keeping and Dina Nath and Abad Bihari paid him a visit, in order that the latter might take away one of the bombs to Delhi; or (3) in November 1913 when Dina Nath is alleged to have consulted him about the distribution of the third "Liberty" leaflets. These *alibis* have been fully discussed by the Additional Sessions Judge and my colleague and I agree with them that the pleas have not been substantiated.

Balmokand's appeal is accordingly rejected and the sentence of death is confirmed.

5. *The case of Hanwant Sahai.*—This appellant is a Kaisth of Delhi, aged about 31 or 32, and a distant relation of Hardyal. He was originally a clerk in the Delhi and London Bank at Delhi, but left in 1907 or 1908 and since then appears to have been engaged in silk and other trade. His learned Counsel described him in argument before us as a "piece-goods merchant." Very unfortunately for him Hardyal appears to have taken special interest in him and his affairs (see Exhibits P-32-C, dated "Oxford, April 14th, 1907" and P-32 N-2 which, though undated, must have been written, as the last line shows, when Hardyal was in India in 1908); to have carried on a more or less continuous correspondence with him, and to have been indebted largely to him for monetary assistance at various times in the years 1910, 1911 and 1912. But his training was to be "gradual" (Exhibit P-32-H), and until we come to the later correspondence in 1913, there is very little to be urged against the advice which Hanwant Sahai received from Hardyal. No doubt, in P-32-N, he is told that the "Swaraj" of Allahabad "is good," and we have it from Mr. Sandys (P W. No. 153), that this newspaper has ceased to exist, its various editors having been convicted of sedition. But the letter was apparently written in 1908 and there is nothing to show that at that time the tone of the paper was seditious, and apart from the advice to read this newspaper, Hardyal's teaching, as set forth in his earlier letters to Hanwant Sahai, was directed mainly to a boycott of Government and of Government service (see P-32 N-2, P-32-H and P-32-J.).

So far, then, as the letters belonging to Hanwant Sahai (which are included in the Exhibit P-32 series and were found in the house of Radha Mohan) go, there is little, if anything, to suggest that at any time during the period covered by them (1907-1912), Hanwant Sahai was in any way connected with this conspiracy or on terms of intimacy with Amir Chand, Abad Bihari or any other of the accused persons. The utmost that can be said of him during this period is that he was a relation and pupil of Hardyal and was being taught to avoid Government servants and Government service, to eschew the career of a Pleader as "the worst of all evils" (P-32-J), and to prefer making money by begging to earning it by honest labour.

In April 1913 shortly before the time when Abad Bihari, Balmokand and Dina Nath were occupied in the preparation of the first series of "Liberty" leaflets, we find Hanwant Sahai at Lahore where he was staying for a few days with L. Panna Lall Mathur (P. W. No. 138), Professor of Philosophy in the Islamia College, Lahore. I see no reason whatever to doubt the general truth of the evidence given by Fazl Karim (P. W. No. 87), who was then a student in that College and deposes that he met Hanwant Sahai at Mr. Panna Lal's house on several occasions and that the latter told him that people should be taught "their glorious past" and urged to achieve national independence, the means employed being the formation of a secret society comprising three groups, one of which was "to be in charge fo terrorising by means of bombs." Fazl Karim's evidence is substantially corroborated by that of Abdul Kadir (P. W. No. 89), and if it is true, as I believe it in the main to be, it shows that Hanwant Sahai's political views had by April 1913 become pronounced and extreme. It is also proved by the evidence of Dina Nath, Fazl Karim, Mumtaz Al

(P. W. No. 90) and Maulvi Hakim Ali (D. W. No. 4 for Hanwant Sahai) that in May 1913 Fazl Karim received a packet of "Liberty" leaflets. The prosecution allege that this packet was sent to Fazl Karim for posting up in the Islamia College and for distribution among the students of that institution and that it was upon the suggestion of Hanwant Sahai that Fazl Karim was selected for this work. If such were the case, there can be no doubt that Hanwant Sahai must be held to have become a member of the conspiracy prior to the bomb outrage of May 17th, 1913, in the Lawrence Gardens, and that by this action on his part he had shown an active participation in the work of the conspirators.

But while Hanwant Sahai's conduct undoubtedly gives rise to suspicion, there is no proof on the record that it was he who suggested the name of Fazl Karim, or that he was at the time a member of the conspiracy. On the other hand, the evidence, so far as it goes, seems to suggest the contrary. In the first place, Dina Nath, who was certainly one of the ringleaders, had not then seen or heard of Hanwant Sahai nor did he meet him at Lahore in April 1913, and in his evidence he tells us distinctly that it was Balmokand who mentioned Fazl Karim as a suitable person for the distribution of the leaflets. It may be urged that Balmokand obtained the youth's name from Hanwant Sahai, but here again there is the difficulty that it is not shown that at this time Balmokand knew Hanwant Sahai. Abad Bihari, a resident of Delhi, probably did, but it is not Abad Bihari but Balmokand who instructs Dina Nath to send the parcel to Fazl Karim. Again, Dina Nath (page 17, line 12) is quite positive that it was 20 days before the May examination that he, Abad Bihari and Balmokand met and decided to prepare and distribute the leaflets. The examination commenced on May the 5th and accordingly this meeting must have taken place on or about, the 15th or 16th April, and Mr. Panna Lal, whose evidence I see no reason to doubt is clear that Hanwant Sahai left Lahore on the 11th April, two days before the "Prize-giving" (see page 226, line 23). It is possible, of course, that there was some earlier preliminary discussion among the conspirators about the preparation of the leaflet, but Dina Nath does not refer to any such, and so far as his evidence goes, we must take it that the first conversation on the subject took place at this meeting.

Furthermore, it is evident from the admission made by Fazl Karim and from the book and documents found in the rooms when searched that as a student he was interested in politics and somewhat notorious for his extreme views. Among the documents and books referred to were included a work on "Yoga Philosophy" and one on "Revolution and Inspiration" and a proscribed newspaper called "Al Islam." In the circumstances it is quite possible that Balmokand had heard of or about him from other persons and considered him a suitable youth for the purpose of distributing the leaflets. But in the absence of any evidence to show that Balmokand got Fazl Karim's name from Hanwant Sahai or that the latter was at that time in any way connected with the conspiracy, I do not think we are justified in inferring from the conversations that Hanwant Sahai had with Fazl Karim that Fazl Karim's name was suggested by Hanwant Sahai to Balmokand and that as a fact, Hanwant Sahai had knowledge at that time of the intended issue of the "Liberty" leaflets or of their contents. In all probability the draft was prepared by Abad Bihari some days after Hanwant Sahai's departure from Lahore.

I would, therefore, give Hanwant Sahai the benefit of the doubt and hold that he is not shown to have joined the conspiracy prior to the date when Ram Padarath was murdered in the Lahore Gardens.

But I see no reason whatever to differ from the Additional Sessions Judge's finding that Hanwant Sahai was at one time a member of the conspiracy, and that he joined it with full knowledge that it was formed for the purpose of committing and abetting murder and that a murder had actually been committed in pursuance of its policy. All the earlier correspondence with Hardyal, which was more or less of an innocent nature (the Exhibit P-32 series), was kept in the house of Hanwant Sahai's neighbour Radha Mohan and found there by the Police. His correspondence with Hardyal, subsequent to May 1913, is of a far different character and shows that Hanwant Sahai was then known

to Hardyal as ready and willing to take an active part in the work of the conspiracy [see Exhibit P-23 (A), dated 4th September 1913, a letter from Hardyal asking Hanwant Sahai to assist in extending the circulation of the newspaper which was to be published and which was subsequently published under the name of the *Ghadr*; Exhibits P-24-03, P-24-04 and P-177 are specimen copies of this newspaper]. We find further from this later correspondence (which it is to be noted was found in Abad Bihari's box in Amir Chand's house) that Hardyal had decided that Hanwant Sahai was to join him in America in March 1914, obviously for the purpose of assisting him in the publication of the *Ghadr* and in his efforts to terrorise the Government of India and Europeans in this country [see Exhibits P-23 (A) and P-23-D. J.]. But before leaving India Hanwant Sahai is "to finish the chief work" which he has to do there, namely, "to appoint such correspondents in the (Native) States as may always send true facts *re* the administration of those places," and also "separate agents for distribution". [P-23 (D. J.)]. He is, moreover, to send "addresses to which this newspaper (*i. e.* the *Ghadr*) is to be sent" [Exhibit P-23 (A)]. These and other documents belonging to Hanwant Sahai were found, as I have remarked, not in the house of his neighbour, Radha Mohan, but in Abad Bihari's box at Amir Chand's house and were obviously being kept there for him. In this connection it is a somewhat striking coincidence that Hardyal's letter asking for addresses was found in the box of Abad Bihari, the same conspirator who supplied Dina Nath with the list of addresses to which the November "Liberty" leaflets were to be sent (see page 22, lines 43-52).

Mr. Beechey argued, apparently in all seriousness, that Hanwant Sahai was a respectable "piece-goods merchant" and that the one and only object of his intended visit to America was to "sell curios" and to form agencies there for his business. This is also Hanwant Sahai's own explanation. But the explanation is palpably absurd. If he was going on his own business, why should Hardyal give him instructions as to when he was to leave India? "It is my intention that you should start from there in the month of March and come here," [Exhibit P-23 (A)]; "I shall send you full instructions for coming here, but not now. You should remind me about the month of March...You will live with me" [Exhibit P-23 (D. J.)]. Why, moreover, is a business man who proposes to visit America for the purpose of selling curios and of establishing agencies to pass some of his time as "a labourer, whether he needs it or not" because by living with labourers he wil "acquire new experience and new thoughts?" And what is the necessity for such a person to "continue the study of French which is very necessary" [Exhibit P23 (A)]? He is also informed that it is "very necessary" for him to read Taussing's "Principles of Economics" and Bliss' "Encyclopædia of Social Reform," a course of reading which can hardly be regarded as essential for the successful sale of curios. Hanwant Sahai's explanation is in fact ridiculous and there can be no possible doubt that it was under the orders of Hardyal that he was to go to America in order to assist Hardyal in the work of furthering the aims of the conspiracy in India. In my opinion, though there is some doubt as to whether Hanwant Sahai joined the conspiracy before the 17th May 1913, there is ample evidence on the record to show that at some time later that year he became actively associated with Abad Bihari and Amir Chand in India and with the work carried on in America by Hardyal for incitement to mutiny and murder in this country; and that he then joined the conspiracy with full knowledge of its aims and objects. As my learned colleague is prepared to accept my conclusions, Hanwant Sahai's appeal is accepted to the extent that his sentence is reduced to seven years' rigorous imprisonment (sections 120-B and 115, Indian Penal Code).

6. *Basant Kumar Biswas' case.*—All three Assessors were satisfied of the guilt of this appellant, and the Additional Sessions Judge and my colleague have, after full consideration of the evidence on the record and of the arguments urged on his behalf by his learned Counsel, given conclusive reasons for agreeing with the opinion

expressed by the Assessors. I myself have no doubt whatever of his guilt and my only surprise is that the Additional Sessions Judge refrained from inflicting the capital sentence which this appellant so thoroughly deserved. As stated by my colleague, we had the appellant brought up before us and we found it impossible to accept the description of him given by the Additional Sessions Judge. In appearance he is by no means a mere youth, and his age, as given at page 301 of the record, was 24 in July 1914. Abad Bihari and Balmokand were stated to be 25 years old in that month, and there is, thus, no great difference between their ages and his. He did not strike us as being in any way "physically less developed than might be expected" of a man of his age, and we are not informed on what ground the learned Judge assumed him to be less than normally developed mentally. He may not be the social equal of Balmokand, Abad Bihari and Amir Chand, but that fact in no wise extenuates the part that he took in causing the murder of Ram Padarath and in the other proceedings connected with the conspiracy of which he was so important a member. Nor is it correct to assume that he was acting under the influence of that "dominating personality," Rash Bihari Bose, as the latter (so far as we know) was not in Lahore when the conspirators made arrangements for the commission of the dastardly outrage in the Lawrence Gardens. In that crime he took, and took voluntarily and readily, a most prominent part, and a few months later brought to Lahore two more bombs obviously intended for the purpose of killing more persons. In these circumstances it is idle to urge that as he was "not admitted to the full dignity of membership of the committee," but was treated "more as a tool than as a colleague," he is deserving of leniency. This is a very dangerous doctrine and would, if accepted, palliate the offence of every hired assassin. The learned Judge admits that "he knew perfectly well what he was doing," and in the circumstances there was no possible justification for not awarding to him the punishment meted out to Abad Bihari, Balmokand and Amir Chand. His appeal is rejected and the application for enhancement of sentence preferred by the Local Government is accepted, the result being that, in lieu of the sentence of transportation for life, Basant Kumar Biswas is hereby sentenced to death.

7. *The case of Charan Das.*—The Assessors were of opinion that this man was guilty of the offence charged against him, but the Additional Sessions Judge acquitted him on the ground that it was not so clear that the confession made by him to Mr. Shaw, Magistrate, first Class, was "absolutely voluntary and spontaneous" so as to justify its acceptance in evidence, and that in its absence there was no sufficient proof that he was a member of the conspiracy. My learned colleague has dealt very fully with this case and I need say no more than that I am in entire agreement with him in holding that the confession, though subsequently retracted, is true, was made voluntarily and is open to no material objection. I also agree that quite independently of the confession there is ample evidence on the record to justify a verdict of "guilty." The appeal of the Local Government under section 417, Criminal Procedure Code, is accordingly accepted; and, setting aside the acquittal of Charan Das, we convict him of the offence charged against him, under sections 120-B, 302/109, Indian Penal Code, and sentence him to transportation for life.

Before concluding I must briefly advert to a matter which Mr. Broadway under instructions from the Local Government brought to our notice at the close of the hearing. In its issue, dated 23rd October 1914, a newspaper called "India" republished, under the heading "Delhi Sedition Trial," a letter from a correspondent signing himself "Onlooker," which appears to have been originally published on the 17th October 1914 in a paper called "The New Statesman." In this letter the findings of the Additional Sessions Judge are adversely criticised; the evidence of the approver is said, "judicially speaking," to have been insufficient "to hang even a cat on;" and the action of the Police in arresting, and of the Committing Magistrate in not releasing on bail, certain of the accused persons who happened subsequently to be acquitted by the Additional Sessions Judge, is severely animadverted upon. The writer further

asserts that "some persons were harassed from day to day until they agreed to give evidence for the prosecution," and makes other similar allegations against the Police.

The judgment of the Additional Sessions Judge was delivered on the 5th October 1914 and it is obvious, both from that fact and from the letter itself, that at the time when it was written, the writer had before him merely a Reuter cablegram giving the results of the learned Judge's findings and the sentences awarded to the various accused persons whom he convicted, and that he did not consider it necessary to defer his criticisms until he had had an opportunity of reading the judgment. The letter, in fact, is a somewhat puerile and prejudiced attempt of a partisan, ignorant of law and procedure, to vindicate his friends, and, so far as its author is concerned, might well be treated with contempt. But there was no possible excuse for the editors of the two papers, whose publication of this letter at a time when the case was still *sub judice* (as even on the absence of appeals by the convicts the three capital sentences had necessarily to come before this Court for confirmation) amounted to a gross violation of the accepted canons of respectable journalism. We can only regret our inability to do more than to express, in the strongest terms possible, our disapproval of this action on their part.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 634 OF 1914.

November 5, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Beachcroft.

HARE KRISHNA *alias* HARI MISRA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 330, 348—Direct evidence disbelieved, effect of - Conviction, legality of.

It is a dangerous precedent to convict a man on evidence of people who are found to be untruthful without any corroboration. [p. 796, col. 2.]

Appeal against the conviction and sentence of the Sessions Judge of Cuttack.

Babus *Dasarathi Sanyal* and *Debendra Narain Bhattacharya*, for the Accused.

Mr. *Sultan Ahmed*, Deputy Legal Remembrancer, Bihar and Orissa, for the Crown.

JUDGMENT.

FLETCHER, J.—The appellant before us Hare Krishna *alias* Hari Misra was tried along with three other persons before the learned Sessions Judge of Cuttack with the aid of Assessors for having committed certain offences under sections 348 and 330, Indian Penal Code. The Assessors came to the conclusion that none of the accused was guilty. The learned Judge, agreeing with the Assessors with regard to three of the accused, acquitted them but disagreeing with the Assessors with regard to the appellant before us convicted him and sentenced him to undergo 18 months' rigorous imprisonment. This is the interpretation placed by the learned Judge on the opinion of the Assessors. It may, however, be said that in the opinion of one of the Assessors, as would appear from the record, all four accused were guilty of wrongful confinement. The appellant before us is a young man aged about 20 years who is said to be a student apparently studying Sanskrit with a view ultimately to becoming a *pandit*.

The case is really an extraordinary one on the evidence, because the learned Judge has disbelieved all the witnesses in the case. In fact he described them as liars of varying degrees. But he has selected without any corroboration at all certain passages from the evidence which he believed to be the correct story; and on his own estimate as to whether that story is true or not he has convicted the appellant before us.

Now, in a case like this it is obvious that opinions of Assessors are entitled to considerable weight. They are gentlemen of the neighbourhood, knowing the language and habits of the people. Their opinion was that a portion of the case was not proved as against any of the accused. As regards the remainder of the case it may be that they differed in their opinions.

Now, the story itself is also an extraordinary one. Two of the accused, namely, Kunja and the appellant before us were

uncle and nephew living together jointly. The two other accused, Radha Gobinda and Krista, were also members of a joint family. These two families were apparently on terms of intimate friendship; and the story told is that certain alterations, were being made in one of the rooms in the house of one of these two families and that the two complainants Narsing and Moni, were engaged in doing certain excavation; and on the 7th May last, it is alleged, Narsing, one of the complainants, found in the course of his work a small earthenware vessel which was believed by Hari to contain treasure. The men at midday are said to have been kept from going to take their usual bath and refreshment and later on in the day they were alleged to have been tortured by having crowbars, which had been heated, placed against various parts of their skin. One of them is said to have been incapacitated for a certain length of time. That shortly is the nature of the complaint. The medical evidence certainly shows that there were some marks upon these two complainants. But the difficulty on the medical evidence is, again that it does not altogether corroborate the story of the witnesses whom the learned Judge has stated to be liars; because the medical evidence is that these injuries on the bodies of the two complainants had been caused not less than 72 hours before the time when the doctor saw them. As a matter of fact these injuries, if the story told is a true one, had been caused considerably less than 72 hours before they were seen by the doctor. Of course in an ordinary case one might not pay much attention to the opinion of a doctor on a matter like that. But when the direct evidence is disbelieved by the Judge or rather when the witnesses who gave the direct evidence were disbelieved by the Judge, it is a matter of importance that the medical evidence tends further to throw doubt upon the story as told by the witnesses. The other witness, who is said to corroborate in part the story told by the complainants, is the wife of Moni, Kamali. She again was believed not to be a truthful witness by the learned Judge. Personally, I do not remember ever having seen a man convicted on evidence of the nature of what the learned Judge describes as that of liars without any corroboration at all. It seems to me a dangerous precedent to convict a man on evidence of people who were found to be untruthful without any corroboration.

I think under the circumstances the case is much too doubtful for us to support the conviction passed solely on evidence of this nature and we ought to allow the appeal of the accused and set aside the conviction and sentence passed upon him.

BEACHCROFT, J.—I agree that the conviction based on the evidence of persons, the greater part of whose evidence has been found to be false by the learned Judge, cannot be sustained, especially in view of the great delay in lodging information, a delay for which no adequate explanation has been given.

Appeal allowed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 604 OF 1914.

December 22, 1914.

Present:- Mr. Justice Rattigan and Mr. Justice Scott-Smith.

KHEM SINGH—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Arms Act (XI of 1878), ss. 19, 20—Chhavi concealed in loin-cloth—Attending fair—Conviction under s. 20.

When at a largely-attended fair, where extra Police are sent on account of the large crowd, a person is found in unlawful possession of any 'arms' which he has taken the trouble to hide or conceal in his waist-band or loin-cloth, he 'has done an act mentioned in clause (*f*)' of section 19 of the Arms Act 'in such a manner as to indicate an intention that such an act may not be known to a public servant' within the meaning and for the purposes of section 20 of the said Act. [p. 797, col. 2.]

Appeal from an order of the District Magistrate, Amritsar, dated the 16th July 1914, convicting the appellant.

Mr. *Gobind Ram*, for the Appellant.

ORDER.

RATTIGAN, J.—(*October 9th*, 1914.)—The appellant, Khem Singh, *Jat*, aged 30, has been convicted by the District Magistrate, Amritsar, of an offence under section 20 of the Indian Arms Act, 1878, and has been sentenced to seven years' rigorous imprisonment. From his conviction

KHEM SINGH *v.* EMPEROR.

and sentence he has, through his Counsel, Mr. Gobind Ram, appealed to this Court.

The appellant is a resident of Kasur Tahsil in the Lahore District and admittedly a person from whom security for good behaviour has been taken under section 110, Criminal Procedure Code. The order of the District Magistrate sets out very clearly the facts as alleged by the prosecution witnesses (the Police constable, Munshi Ram, the *lambardar*, Bishen Singh, and the *sherbat* seller, Gujar Singh) and the defence set up by the appellant, and it is unnecessary for me to recapitulate the statements of the witnesses, especially as Mr. Gobind Ram did not seriously challenge the truth of the prosecution evidence. According to appellant, the charge against him is due to the fact that a female relative of his preferred a complaint against Inspector Amir Ali (Munshi Ram's superior officer) in November 1911. But the Inspector deposes that he had no personal knowledge of this complaint, and as the complaint was summarily disposed of on the very day on which it was presented, there is every reason to credit the Inspector's statement. Furthermore, the story told by the defence witnesses is inherently improbable, as it is not likely that a Police constable would select a crowded spot as suitable for the purpose of arresting an innocent person and in the presence of a large number of witnesses, of foisting upon his person a *chhavi*-head produced openly from his own pocket. Mr. Gobind Ram, seeing the hoplessness of attempting to substantiate the truth of the defence story, confined his argument to the legal question whether upon the prosecution evidence, the conviction under section 20 of the Act could be sustained.

According to the prosecution witnesses, the appellant was carrying in his hand a *dang* (or stick) which had had all the knots planed off and the latter fact aroused the suspicions of Munshi Ram, Police constable, who wished to examine it. The appellant thereupon ran off, but was eventually arrested and on being searched, was found to have a *chhavi*-head concealed in the loin-cloth which he was wearing.

Mr. Gobind Ram argues that upon this evidence, the conviction should have been one under clause (*f*) of section 19 of the Act, and that it could not be under section 20 of the Act; and in support of this argument, he relies upon a Single Bench ruling of this Court in Criminal Appeal No. 826 of 1913. I have referred to that ruling and find that it is certainly an authority in favour of the learned Counsel's argument. I also observe that in that case the learned Government Advocate, who appeared on behalf of the Crown, stated that he could not support the conviction under section 20 of the Act.

With every deference, however, I feel it difficult to accept that decision. It seems to me that when a person is in unlawful possession of any "arms" and that he has taken the trouble to hide or conceal those arms in his waist-band or loin-cloth, he has "done an act mentioned in clause (*f*) in such a manner as to indicate an intention that such an act may not be known to a public servant," within the meaning and for the purposes of section 20 of the Act. To carry a *chhavi* openly is the act punishable under section 19 (*f*); to carry it concealed on one's person, so that a public servant may not discover it, appears to me to be an offence under section 20. This question was not discussed in Criminal Appeal No. 810 of 1913, but I note that the learned Judge (Johnstone, J.), who disposed of that appeal, had apparently no doubt that in somewhat similar circumstances, the conviction under section 20 of the Act was good in law. In this last-mentioned case I find that the very same District Magistrate, who tried the present case, awarded each of the five accused persons five years' rigorous inprisonment for the offence under section 20, and as in that case it was amply proved that the accused persons were assembled in a body in order to commit dacoity, the offence was necessarily of a more serious character than that with which I am dealing. This Court, however, held that a sentence of five years (to run concurrently with a similar sentence under section 402, Indian Penal Code) was sufficient punishment and in the circumstances I would hold myself that a sentence of three or four years in the present case would meet the ends of justice. In view of the decision in Criminal appeal No. 826 of 1913 and of the learned Government Advocate's admission in that case, I am of opinion that the question whether the conviction under section 20

of the Act is sustainable should be decided by a Division Bench and I refer it accordingly. I would only add that upon the merits I hold that the prosecution evidence is true and that the sole questions referred to a Division Bench are: (1) whether upon that evidence the appellant has been rightly convicted under section 20, and (2) what sentence should be awarded to appellant.

JUDGMENT.—The facts of this case and the points referred to the Division Bench are fully set forth in the order of the referring Judge, dated the 9th October 1914. The first question is whether the offence committed by the appellant comes under section 20 of the Arms Act. Besides the previous cases discussed in the referring order we have referred to the following: —

(1) Criminal Appeal 506 of 1914. In that case a *chhavi* was found concealed in a man's house and the lower Court convicted the accused of an offence under section 20 of the Arms Act. This Court held, relying upon a case reported as *Crown* v. *Aziz* (1), that he could not be convicted under section 20 because though the possession was furtive it could not be held that the concealment was with the intention on the part of the accused that his possession should not be known to any public servant as defined in the Indian Penal Code. The case reported as *Crown* v. *Aziz* (1), is a Full Bench one from the Court of the Judicial Commissioner, Sind. In that case certain fire arms were found in the possession of the accused who had concealed them in a heap of straw in order that the visitors to his house should not see them. The Court remarked as follows:—"The possession was no doubt furtive, but it is not every act of furtive possession that is penal under first paragraph of section 20. The possession must be furtive as against public servants, railway servants, or public carriers, and such cases would generally occur where arms were being illicitly imported or transported. It is probable that the accused concealed the fire arms in order that visitors to his house should not see them and give information against him, but such a concealment would not fall under the first part of section 20. There is no reason to suppose that the accused anticipated a search of his house by a public servant, and if he had, he would probably have buried the fire arms." The facts of the present case are clearly distinguishable from this and from those of Criminal Appeal No. 506 of 1914; for in the present case the *chhavi* was found concealed on the appellant's person and not in his house.

(2) Criminal Appeal No. 478 of 1913. In this case the appellant was sentenced to five years' rigorous imprisonment under section 20 of the Arms Act and his appeal was rejected by this Court. The question at issue in the present appeal does not appear to have been argued before the Court in that case.

Now coming to the present case we find that the appellant was in possession of the *chhavi* at the *Amawas* fair at Tarn Taran. The fair in question is very largely attended and extra Police are probably sent there on account of the large crowd. Under the circumstances we consider the presumption is that the appellant concealed the *chhavi* about his person in order that his possession of it should not be known to the Police. We do not think it necessary to lay down any general rule as to what cases fall under section 20, and what cases under section 19 of the Indian Arms Act. Every case must, in our opinion, be decided on its own facts; and having regard to the circumstances of the present case we consider that the conviction under section 20, part I, was fully jusfitied. Mr. Gobind Ram, for the appellant, urges that the provisions of section 25 as to searches were not complied with in the present case and that the search was illegal. Section 25, however, refers to searches of houses or premises occupied by suspected persons, and not to searches of persons. Even if the search of the appellant was illegal it does not make any difference to the fact that he was in illegal possession of arms.

The sentence of seven years is no doubt a very heavy one, but the appellant is a man of very bad character. He has been previously convicted of offences under sections 414 and 457, Indian Penal Code. In 1908 he was bound over to keep the peace under section 107, Criminal Procedure Code, and in 1910 he was bound over to be of good behaviour under section 110 of the Code. He is, therefore, a thoroughly bad lot and he was

(1) 9 Cr. L. J. 259; 1 S. L. R. 18.

probably in possession of the *chhavi* for the commission of some serious crime. We, therefore, are not disposed to interfere with the sentence and we dismiss the appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 174 OF 1914.

September 9, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Teunon.

EMPEROR—APPELLANT

versus

SURATH AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 208, 438—Session case—Inquiry before Magistrate—Summoning of witnesses on date of committal—Proper procedure.

In an inquiry before a Magistrate preliminary to commitment to Sessions, the fact that an application was made on the date on which the accused was committed to the Sessions for the summoning of further witnesses, introduces no conditions which show that the provisions of section 208 of the Code of Criminal Procedure have not been observed.

JUDGMENT.

JENKINS, C. J.—This is a reference to the High Court by the Sessions Judge of Purnea under section 438 of the Criminal Procedure Code, and the suggestion is that the law as prescribed in section 208 of the Criminal Procedure Code has not been observed. That view has been supported before us by Mr. Chowdhuri, who has cited in support of it a decision in *Emperor* v. *Muhammad Hadi* (1). That case does not purport to go beyond the decision on which it is based, that is to say, the decision in *Queen-Empress* v. *Ahmadi*(2). But in fact it does enlarge the rule laid down in that case in so far as it applies the rule in the earlier case, which was limited to witnesses produced, to witnesses whom the accused might be prepared to produce, and this enlargement is in conflict with the express terms of section 208. I cannot myself see that the Magistrate has in any way failed to observe the provisions of that section. It is not suggested that he did not hear all the evidence produced before him,

(1) 26 A. 177; A. W. N. (1903) 215; 1 Cr. L. J. 357.
(2) 20 A. 264; A. W. N. (1898) 52.

and that is all that is required by the first paragraph. The fact that an application was made on the date on which the accused was committed to the Sessions for the summoning of further witnesses, appears to me to introduce no conditions which show that the provisions of that section had not been observed. It is important to notice that what was sought was that the Magistrate should allow reasonable time for filing documents and summoning witnesses. On that the Magistrate made the order "that the accused are committed to the Court of Session to-day, no further adjournment can be allowed." The application, therefore, was obviously too late, for the commitment had been made. More than that, I think, in the circumstances of this case, that the accused is not deserving of any great sympathy because an application could have been made at once to the Court under section 215 for the quashing of the commitment if the circumstances permitted it. But instead of doing that the accused waited until the case was called on at the Sessions and took this point a month after the event. In my opinion we ought not to uphold this reference and we direct the Sessions Judge to proceed with the trial of the accused.

TEUNON, J.—I agree.

Reference not accepted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 1154 OF 1914.

September 9, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Teunon.

SAROJBASINI DEVI—1ST PARTY—PETITIONER

versus

SRIPATI CHARAN CHOWDHURY AND OTHERS—2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 137—Nuisance—Conditional order—Objection—Proper procedure—Magistrate's duty.

Where a Magistrate made a conditional order under section 133 of the Code of Criminal Procedure to remove any unlawful obstruction from a way used by the public and the opposite party showed cause:

SAROJBASINI DEBI *v.* SRIPATI CHARAN.

Held, that the provisions of section 137 (1) must be observed and that the Magistrate should take evidence in the matter as in a summons case and should not at once drop the proceedings.

In such a case it is open to the Magistrate to consider, when that evidence is taken, whether there is a complete answer to the case against the opposite party or whether this is not a proper case where the parties should be referred to the Civil Court for the purpose of determining a matter which for some reason or other the Magistrate considers that he cannot decide.

Babus *Dasarathi Sanyal* and *Debendra Nath Bhattachariee*, for the Petitioner.

Babus *Atulya Charan Bose* and *Dwijendra Nath Mukherjee*, for the Opposite Party.

JUDGMENT.

JENKINS, C. J.—The proceedings which are called in question by the Rule now under consideration, arise out of action taken by the Magistrate under Chapter X of the Code of Criminal Procedure. Section 133 provides that whenever a Magistrate of the qualifications there described considers, on receiving a Police report or other information and on taking such evidence, if any, as he thinks fit, that any unlawful obstruction should be removed from any way used by the public, he may make a conditional order of the nature described in the section and may call upon the person affected to appear before himself and move to have the order set aside or modified. Here it appeared to the Magistrate that there was a public nuisance coming within the terms of that section and the nature of the nuisance was an unlawful obstruction of a way used by the public. He accordingly made a conditional order. The person affected undoubtedly appeared and showed cause, but notwithstanding that the Magistrate has allowed the proceedings to drop, without following the procedure prescribed by section 137, clause (1). It is this omission on the part of the Magistrate that has led to the Rule being granted calling upon the opposite party to show cause why the order complained of should not be set aside and such other and further order made as to this Court might seem fit.

We have been assured that there are a large number of cases which are in the direction of sanctioning what the Magistrate has done, though even the authorities do not go quite the length that he has. But whatever may have been decided, we cannot escape from the words of the Legislature until we are told by some higher authorities that we must. The Legislature in the event that has happened has directed that the Magistrate shall take evidence in the matter as in a summons case, and in so far as he has failed to do that, he has not performed the duty cast upon him by law. It appears to me that the Rule is rightly conceived.

It is said that it is open to the Magistrate to consider whether the claim by the opposite party in derogation of this asserted public right affords an answer or not. But in deciding that section 137 must be followed; we in no way deprive the opposite party of his right to show that the terms of section 133 do not apply or say that the Court should not apply them in the particular circumstances of the case, either by reason of real doubt as to the applicability of the section or otherwise. All we have to say is that the Magistrate having taken such measures as make the provisions of section 137 applicable, those provisions must be observed.

Therefore, we must make the Rule absolute and direct the case to go back to the Magistrate in order that he shall take evidence in the matter as in a summons case in the manner provided by section 137. It will be open to him, as I have indicated, to consider, when that evidence is taken, whether there is a complete answer to the case against the opposite party or whether this is not a proper case where the parties should be referred to the Civil Court for the purpose of determining a matter which for some reason or other the Magistrate considers that he cannot decide. But in saying that I do not wish to encourage the idea that the Magistrate should endeavour to escape from dealing with matters which legitimately fall within his jurisdiction.

There is one further matter that has been pressed upon us. It is that these proceedings are in some measure barred by the doctrine of *res judicata*. We are not satisfied that there is any room on the facts of this case for the application of this doctrine.

TEUNON, J.—I agree.

Rule made absolute.

MI SAW BWIN *v.* NGA SAN NYUN.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 331 OF 1914.

November 13, 1914.

Present:—Sir G. W. Shaw, KT., J. C.

MI SAW BWIN—PLAINTIFF—APPELLANT

versus

NGA SAN NYUN—DEFENDANT—RESPONDENT

Buddhist Law—Suit for bare divorce, maintainability of—Partition.

According to the Buddhist Law of divorce, a suit for bare divorce would not lie. [p. 801, col. 2.]

The Privy Council ruling in *Maung Pe* v. *Lon Ma Gale*, 11 Ind. Cas. 497; 6 L. B. R. 18; 15 C. W. N. 766; 8 A. L. J. 739; 14 C. L. J. 15; 13 Bom. L. R. 465; 21 M. L. J. 749; 38 C. 629; (1911) 1 M. W. N. 397; 4 Bur. L. T. 153; 10 M. L. T. 479, does not affect the decision in *Nga Chit Nyo* v. *Mi Myo Tu*, 8 Ind. Cas. 477; U. B. R. (1910) I, 30. [p. 802, col. 2.]

Mr. *C. G. S. Pillay*, for the Appellant.

Mr. *J. N. Basu*, for the Respondent.

JUDGMENT.—Plaintiff-appellant sued for divorce on the ground of the defendant-respondent's misconduct. The original plaint was written by a petition-writer and prayed for bare divorce. At the first hearing plaintiff appellant having obtained the assistance of an Advocate applied for an adjournment in order to file an amended plaint, the Advocate no doubt being aware that a suit for bare divorce, according to the ruling of this Court in *Nga Chit Nyo* v. *Mi Myo Tu* (1), would not lie. Plaintiff-appellant accordingly filed an amended plaint. This was not very well expressed, but I think it was intended to contain a prayer for divorce with partition. In paragraph 4 the plaintiff said that in view of the defendant's misconduct, she was entitled to divorce "either according to the method of divorce where the defendant is in fault, or according to the method of divorce by mutual consent," and in paragraph 5 that there was joint property according to the schedules attached, and in paragraph 6, that "if divorce were granted according to the method of divorce by mutual consent, the joint property should be divided equally." The prayer also ran: "Therefore the plaintiff prays for a decree against defendant for divorce either according to the method of divorce where there is fault (on the part of the defendant) or according to the method of divorce by mutual consent, together with costs." The amended plaint also had annexed to it schedules of property and debts.

(1) 8 Ind. Cas. 477; U. B. R. (1910) I, 30.

All this seems to indicate clearly an intention to claim partition according to the rule of Buddhist Law applicable to the particular circumstances of the case. If the Township Court had any doubt on the point it ought to have required the plaintiff at once to amend the plaint.

The defendant-respondent in his written statement admitted that there was joint property as alleged by the plaintiff-appellant though he denied some items, and filed a schedule of his own.

The Additional Judge of the Township Court framed two issues both badly expressed:—(1) "Is there any fault on the part of defendant to entitle plaintiff to a decree for divorce" and (2) "are the schedules presented by the plaintiff and the defendant true?

The first of these issues shows that the Additional Judge had not grasped the principles of the Buddhist Law of divorce as explained in the rulings of this Court. It ought, of course, to have been —was there any fault on the part of the defendant to entitle plaintiff to a decree for divorce with partition as in the case where the defendant is the offender (that is, where the whole of the joint property goes to the plaintiff), and then there ought to have been another issue: was there any fault on the part of the defendant to entitle plaintiff to a decree for divorce with partition as in the case of mutual consent [the rule applicable where the fault is less serious as in the case of *Nga Pye* v. *Mi Me* (2)]. The plaintiff might still have sued for a divorce with partition, resigning all the property to the defendant in the case where there was no fault on the part of the defendant [*Mi Kin Lat* v. *Ba So* (3)]. But she did not ask for this.

The Township Court found that there was no joint property and that "therefore a suit for bare divorce would lie" and holding that there was ill-treatment, granted a decree for bare divorce. This finding involved a misapprehension of what, as already explained, the actual nature of the suit as disclosed in the amended plaint was probably intended to be, and is not intelligible on the face of the pleadings and the evidence, or consistent with the rulings already referred to.

(2) U B. R. (1902-03) II, Budd. Law, Div. 6.

(3) U. B. R. (1904-06) II, Budd. Law, Div. 3,

MI SAW BWIN v. NGA SAN NYUN.

The defendant-respondent appealed to the District Court on the grounds that according to the evidence of both parties, it was clearly proved that there was joint property, that a suit for bare divorce without partition would not lie, and that the Court of first instance was wrong in granting a decree in favour of the plaintiff without any fault on defendant's part. The lower Appellate Court citing *Nga Chit Nyo's* case (1) held that a suit for bare divorce would not lie, and therefore "following that ruling," the Additional Judge allowed the plaintiff to amend the plaint by adding a prayer for partition and directed the plaintiff to pay the costs of the appeal. The learned Additional Judge, besides failing to notice that the amended plaint was apparently intended to claim a divorce with partition as already explained, allowed himself to be misled by the final order in *Nga Chit Nyo* v. *Mi Myo Tu* (1), as given in the printed report of the case. He omitted to observe that in that case the Courts below had not only granted a decree for divorce, but had decided which rule of partition was to be applied, and he failed to observe that his order allowing the plaintiff to amend the plaint could not be a final disposal of the appeal in the present case, where there had been no finding as to the method of partition to be applied. The order, however, as it stands is a final order and it was followed by a decree, and, therefore, the present second appeal undoubtedly lies in this Court.

The grounds on which the plaintiff-appellant comes here are that a suit for bare divorce does lie according to the ruling of the Privy Council in *Maung Pe* v. *Lon Ma Gale* (4), and that the lower Appellate Court ought to have decided the appeal on the merits and confirmed the decree of the Court of first instance.

On the first point, the learned Advocate for the plaintiff-appellant, as will be evident from what has gone before, seems to have misapprehended the real nature of the plaintiff-appellant's amended plaint, but he has also entirely failed to appreciate what points were in dispute before their Lordships of the Privy Council and what they actually decided.

(4) 11 Ind. Cas. 497; 6 L. B. R. 18; 15 C. W. N. 766; 8 A. L. J. 739; 14 C. L. J. 15; 13 Bom. L. R. 65; 21 M. L. J. 749; 38 C. 629; (1911) 1 M. W. N. 397; 4 Bur. L. T. 153; 10 M. L. T. 479.

If the view which I take of the amended plaint in the present case is correct, the question does not really arise. But as the plaint is not as clear as it ought to be, it seems necessary to explain the ruling in *Maung Pe* v. *Lon Ma Gale* (4) and to come to a decision as to whether it affects the ruling in *Nga Chit Nyo* v. *Mi Myo Tu* (1).

There had been a suit for bare divorce which had proceeded to decree, and the successful party had followed it up by a second suit for partition. It was this second suit which was before the Judicial Committee of the Privy Council. The plaintiff of course maintained that the decree in the first suit was a valid one, and the defendant took the ground that the first decree being valid, the second suit was barred by Order II, rule 2. It was not, therefore, the case of either party that the first suit was incompetent and the point for determination in the appeal before the Privy Council was, whether, *assuming the first decree to have been valid*, the second suit was barred by Order II, rule 2. Their Lordships decided that Order II, rule 2, did not apply to a case of the kind, and they made some general observations in regard to divorce and partition which probably apply to most systems of marriage law, but are not consistent with the peculiar provisions of the Burma Buddhist Marriage Law, which were explained in *Nga Chit Nyo* v. *Mi Myo Tu* (1). Those provisions were not brought to the notice of the Privy Council. They were not put in issue by either party and their Lordships did not consider them or come to any decision upon them. It follows that the intervention of the Privy Council was invoked on a point which, as explained in *Nga Chit Nyo's* case (1), cannot arise in a suit for divorce between Burman Buddhists. This is an unfortunate circumstance for which the parties in the Lower Burma case or their Advocates are responsible. But the result is that the decision in *Maung Pe* v. *Lon Ma Gale* (4) does not affect the decision of this Court in *Nga Chit Nyo* v. *Mi Myo Tu* (1).

The decree of the lower Appellate Court is set aside. The plaintiff-appellant is required now to amend the amended plaint slightly so as to make it quite clear that she is praying for divorce and partition, and the case is remanded under Order XLI, rule 23,

read with Order XLII, to the District Court for disposal of the appeal on the merits.

A certificate will be granted under section 13, Court Fees Act.

Costs will abide the final result.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

CIVIL RULE *Nisi* No. 1001 OF 1914.

February 1, 915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

Babu GOPAL LAL—PLAINTIFF—APPELLANT—PETITIONER

versus

KERANI GOPE AND OTHERS—DEFENDANTS—RESPONDENTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9—Sufficient cause to be shown—High Court, discretion of, if any—Deceased party, representatives of—Party, duty of.

Under Order XXII, rule 9, Civil Procedure Code, it must be proved that the appellant was prevented by sufficient cause from going on with the suit within the time allowed by law; otherwise, the appeal once abated shall not be revived; and the High Court has no discretion in the matter. [p. 803, col. 2.]

When succession to the estate of a deceased person is in doubt, a person litigating with the deceased should take every step to bring his representatives on the record. [p 804, col. 1.]

Syed Hossein Ali v. *Abdur Rahim*, 7 C. W. N. 529, referred to and followed.

Rule against appeal from Appellate Decree No. 2860 of 1910, being an appeal preferred against the decree of the District Judge of Bhagalpore, passed in Title Appeal No. 5 of 1910 and dated the 12th May 1910, affirming that of the Sub-Judge, first Court, Bhagalpore, passed in Title Suit No. 381 of 1909 and dated the 31st December 1909.

Mr. *Khurshad Hossein*, for the Petitioner.

Babu *Chandra Sekhar Prosad Singh*, for the Opposite Party.

JUDGMENT.

COXE, J.—This application arises out of an appeal preferred by Babu Gopal Lal, the plaintiff, against Kerani Gope and others. One of the respondents was Babu Ugra Mohan Thakur, who died on the 29th January 1914. On the 28th August 1914, the plaintiff applied that Mr. F. A. Savi, Babu Hem Chandra Mitra and Babu Suruj Mohan Thakur, a minor under the guardianship of his mother, Srimuty Sundari Debi Thakurani, should be substituted on the record as the legal representatives of the said Ugra Mohan Thakur. He obtained a Rule from this Court, calling upon the opposite party to show cause, why the substitution prayed for should not be made. Subsequently the minor's name was expunged from the Rule at the risk of the petitioner.

The application of the 28th August 1914 was clearly out of time, and it has been argued on behalf of the opposite party that this Rule must, therefore, be discharged. We think, however, that the application is in substance an application for an order to set aside the abatement of the appeal, as against Ugra Mohan Thakur's representatives, which took place *ipso facto* six months after Ugra Mohan Thakur died. To succeed the appellant is bound to show that he was prevented by sufficient cause from continuing the suit, which clearly means that he was prevented by sufficient cause from taking steps in time to avoid the abatement.

It has been said that we have discretion in the matter; but, in my opinion, we have no discretion at all. If sufficient cause is proved, the appellant is entitled as a matter of right to have the abatement set aside; if it is not proved, the respondent is equally entitled to have the application refused.

Now, the sufficient cause alleged is stated in paragraph 7 of the application which runs as follows:—"Because the two Wills and the appointment of the executors were *sub judice*, your petitioner's son, Babu Gulzari Lal, who looks after the aforesaid appeal, was advised by *mufussil* Vakils to wait till any decision was arrived at and that, therefore, no steps were taken towards the substitution." Evidently this is an extremely vague allegation. The petitioner says that he learnt of Ugra Mohan's death long after it had occurred. He does not say when he was given this somewhat surprising advice by the *mufussil* Vakils or whether this advice was given within the period of six months. In the end, as I have already pointed out, he did not apply to have the party whose application for Probate succeeded made the exclusive representative of Ugra Mohan. The executors of both Wills and the minor, who was

he beneficiary of one of the Wills, were all made representatives, and, I cannot see why the petitioner should not have made this application as it stands within a month of Ugra Mohan's death. It is clear that the final form of this application was not, as a fact, influenced by the decision in the Probate cases; for the unsuccessful parties in those cases, as well as the successful ones, were all made parties to it. I think it impossible to hold that, when succession to the estate of a deceased person is in doubt, a person litigating with the deceased need not take any steps to bring the representatives on the record until that doubt has been finally resolved.

The action which should be taken in such a case and which met with the approval of this Court, is described in the case of *Syed Hossein Ali* v. *Abdur Rahim* (1). In the present application, there is really nothing whatever to show that the petitioner took any steps at all of any kind within six months of Ugra Mohan's death. After that time he applied to this Court and obtained a fortnight's time, but no formal order seems to have been recorded and we have nothing with respect to that order except a mere note by a clerk. We cannot, therefore, feel certain that the learned Judges, who passed that order, considered themselves to be dealing with the matter as coming under Order XXII, rule 9, so that their decision would be binding upon us.

In my opinion, the appellant has not proved that he was prevented by sufficient cause from going on with this suit within the time allowed by law. That being so, the opposite party is entitled to a declaration that the appeal, which has abated as against them, shall not be revived against them.

The rule will be discharged.

SHARFUDDIN, J.—I agree.

Rule discharged.

(1) 7 C. W. N. 529.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 125 OF 1914.

October 19, 1914.

Present:—Sir G. W. Shaw, KT., J. C.

NGA E—DEFENDANT—APPELLANT

versus

NGA AUNG THEIN, MINOR, BY HIS GUARDIAN, NGA THWE—PLAINTIFF—RESPONDENT.

Buddhist Law—Inheritance—Eldest son—Widow—Widow's power—Creditors of widow.

Where the Dhammathats give the eldest son a right to one-fourth as against the mother on the death of the father they refer to the *orasa* son, or in other words, the eldest capable son. Hence, where all the sons are minors, there is no *orasa* son, and the right in question does not accrue. [p. 805, col. 2.]

With an *orasa* son, the widow would have full power to dispose of the remaining three-fourths, and on her death without alienating that share it would come down to her heirs. But her creditors proceeding against her estate would be at liberty to attach and sell it. [p. 805, col. 2.]

Mr. *Lutter*, for the Appellant.

Mr. *S. Mukerjee*, for the Respondent.

JUDGMENT.—On the 14th May 1913, appellant, Nga E, instituted a suit in the Township Court against Nga Kaung and three minor children of his deceased wife, Mi E Me, as Mi E Me's legal representatives and by guardian *ad litem* to recover Rs. 265-8 on two promissory notes purporting to be signed by Nga Kaung and Mi E Me.

The Court granted the appellant a decree for the amount claimed, directing that half should be paid by Nga Kaung and half by the estate of Mi E Me. This on the 28th May 1913.

On the 2nd June 1913, appellant applied for execution by the attachment of a house. On the 4th June the house was attached and on the 5th August following it was sold. Meanwhile on the 2nd June 1913, plaintiff-respondent by his next friend, Po Thwe, instituted a suit against his stepfather, Nga Kaung, and his minor brother and sister for a share of inheritance, claiming among other things a half of three-quarters of the house already mentioned which he valued at Rs. 200.

The Township Court excluded the house from the estate liable to partition on the ground that it was under attachment. This on the 30th July 1913.

On appeal by the plaintiff-respondent against the Township Court's findings in

respect to the house, the lower Appellate Court directed the appellant to be joined as a defendant and remanded the case for issues to be tried as to whether the house was attached for a lawful debt. The Township Court then joined the appellant as a defendant and tried issues, *viz.*, " for whose debt was the house attached" and " what amount was realized by the sale of the house", and found that the deceased, Mi E Me, raised loans jointly with Nga Kaung in order to cover the expenses of litigation in which Nga Kaung was engaged, and that the amount realized by the sale was Rs. 170.

The lower Appellate Court then modified the Township Court's decree by directing that Nga Kaung and the defendant-appellant should pay Rs. 42-8 to the plaintiff-respondent as his share of the price of the house.

The learned Additional Judge's reasoning is not very easy to follow. With an old Lower Burma Ruling in his mind instead of *Ma Min Tha* v. *Ma Naw* (1), he said that Mi E Me had an absolute right to dispose of a half-share of the house and consequently her creditors would be justified in attaching that half-share, but that as regards the other half she had only a right to take care of it and could not sell it except for her children's benefit : hence as the debt she contracted was not for the children's benefit the defendant-appellant could not attach it. He then proceeded to say that if Mi E Me had left the house intact and without any debt, then plaintiff-respondent and his brother as children of the first marriage would have been entitled to ¾ths of the house, but that if Nga Kaung and his son were allowed ¼th of the remaining half, an injustice would be done to plaintiff-respondent and his brother. For " had it not been for Nga Kaung's mischievous acts, plaintiff-respondent and his brother would have got ¾ths of the whole house." He, therefore, allowed plaintiff-respondent the value of ¼th of the house.

The first point for determination is whether plaintiff-respondent as the eldest son had a right to ¼th. If he had, Mi E Me of course could not have alienated that ¼th: and after her death the creditors could not attach and sell that ¼th as estate left by Mi E Me.

(1) U. B. R. (1892-96), II, 581.

I think it is clear on a perusal of the texts contained in section 30 of the Kin Wun Mingyi's Digest, Volume I, that where the *Dhammathats* give the eldest son a right to ¼th as against the mother on the death of the father they refer to the *orasa* son, or in others words, the eldest capable son [see *Tun Myaing* v. *Ba Tun* (2)]. It follows that where all the sons are minors there is no *orasa* son, and the right in question does not accrue. That is the case here. Plaintiff-respondent, the eldest son, was a minor.

The next point is as to the right of the widow. If the plaintiff-respondent had been the *orasa*, Mi E Me would have had full power to dispose of the remaining ¾ths. This was laid down authoritatively in *Ma Min Tha* v. *Ma Naw*(1), already cited, and the point was recently investigated anew and the previous conclusion affirmed in *Mi Saw Myin* v. *Mi Shwe Thin* (3). And when Mi E Me died without alienating that share, it would have come down to her heirs. But her creditors proceeding against her estate would have been at liberty to attach and sell it. The Additional Judge was altogether in error in supposing that Mi E Me could only dispose of her property for the benefit of her children, and still more so in supposing that a creditor proceeding against her estate could not attach and sell the property unless the debt was incurred for the benefit of the children.

As plaintiff-respondent had no right to ¼th, the whole of the house was Mi E Me's and descended to her heirs, and there was nothing to prevent defendant-appellant from attaching and selling the whole of it. It follows that plaintiff-respondent could not claim any share of the house or any part of the sale-proceeds from defendant-appellant. His rights along with his brother as a child of the former marriage as against his step-father so far as the house was concerned did not arise, as the whole house having been sold and the whole proceeds of the sale having been exhausted in satisfying defendant-appellant's debt nothing remained for partition between the children of the former marriage and their step-father.

In this view of the case it is unnecessary to touch upon other points that have been raised.

(2) 2 L. B. R. 292.
(3) 15 Ind. Cas. 919; U. B. R. (1912) I, 125.

MI HLAING *v.* MI THI.

The decree of the lower Appellate Court is set aside and plaintiff-respondent's claim so far as regards the house is dismissed.

Plaintiff-respondent will pay defendant-appellant's costs.

Decree set aside.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 61 OF 1914.

October 19, 1914.

Present:—Sir G. W. Shaw, KT., J. C.

MI HLAING—PLAINTIFF—APPELLANT

versus

MI THI AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhist Law—Inheritance—Eldest daughter—Her rights against mother.

The texts giving the *orasa* daughter the right to claim a one-fourth share after her father's death do not authorize her to claim one-fourth from her mother, at least where her mother has not married again. [p. 807, col. 2.]

Messrs. *Lutter* and *Tha Gywe*, for the Appellant.

Mr. *A. C. Mukerjee*, for the Respondents.

JUDGMENT.—Plaintiff-appellant sued her mother, brother and two sisters for one-fourth of the estate left by her father on his death.

The only point for determination is whether plaintiff-appellant as the eldest child and the eldest daughter is entitled to claim one-fourth of the estate from her mother, there being in existence other children including a brother. It has been alleged before me on behalf of plaintiff-appellant that her brother, defendant respondent Nga Thein, was a minor at the time of the father's death, four years before suit, but there is no material on the record to show what the age of the defendant-respondent Nga Thein was, and the plaintiff-appellant did not sue him as a minor. As the point seems to me to be immaterial it need not be further referred to.

The learned Judge of the lower Court, on the authority of *Ma Min Tha* v. *Ma Naw** and *Mi Saw Myin* v. *Mi Shwe Thin* † and some Lower Burma cases, and after referring to section 31 of the Kin Wun Mingyi's Digest, Volume I, decided against the plaintiff-appellant.

On behalf of plaintiff-appellant the following cases have been referred to:—*Mi Saung* v. *Mi Kun* (1), *Maung Po Lat* v. *Mi. Po Le* (2), *Ma On* v. *Shwe O* (3), *Maung Seik Kaung* v. *Po Nyein* (4), *Mi Thin* v. *Mi Wa Yon* (5), *Tun Myaing* v. *Ba Tun* (6), *Tha Tu* v. *Nga Bya* (7), *Mi Po* v. *Mi Swe Mi* (8), *Mi Min Din* v. *Mil Hle* (9).

(1) was a case in which the only point decided was that no children other than the eldest can claim a share of inheritance from the surviving mother on the death of the father. It was not decided in that case whether an eldest daughter can claim a one-fourth share.

In (2) also the right of an eldest daughter to claim a one-fourth share was not decided.

(3) was the decision of the Special Court, Lower Burma, declaring that on the death of one of the parents, the eldest son or daughter may claim a share and that the rest of the property vests in the surviving parent for himself or herself and the remaining children, etc. It was dissented from by Mr. Burgess in *Mi Min Tha* v. *Mi Naw** above cited. It did not declare that the eldest daughter is entitled to claim a one-fourth share from her mother.

(4) was a suit by an eldest son for a one-fourth share against his father who had married again. The right of an eldest daughter to claim a one-fourth share from her mother under any circumstances was not in issue and was not decided.

(5) was a suit by an only daughter, the only child, claiming a one-fourth share from her mother, on the mother's re-marriage, after the father's death. It affirmed the right of the daughter on the authority of

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* U. B. R. (1892-96), II, 581.

† U. B. R. (1912) I, 125; 15 Ind. Cas. 919.

(1) S. J. L. B. 115.
(2) S. J. L. B. 212.
(3) S. J. L. B. 378.
(4) 1 L. B. R. 23.
(5) 2 L. B. R. 255.
(6) 2 L. B. R. 292.
(7) 4 L. B. R. 181.
(8) U. B. R. (1897-01), II, 79.
(9) U. B.R. (1905-06), II, Buddhist Law, Inheritance, 11.

section 44 of the Kin Wun Mingyi's Digest. The present case is distinguishable, because not only is the plaintiff-appellant not an only child, but it is not alleged that the mother was re-married or intends to re-marry.

(6) had to do with the claim of a grandson, the son of the *orasa* son, and discussed the status of the *orasa* son. It does not help to a decision of the present case. The incidental remarks contained in it, to the effect that "it is settled law that on the death of one parent, it is only the eldest child that can claim a one-fourth share," cannot be regarded as an authority in support of the plaintiff-appellant's case.

(7) had to do with a claim by the eldest daughter to one-fourth of property inherited by her deceased mother against her father on his re-marriage. That was an entirely different situation from that of the present case.

Mi Min Tha v. *Mi Naw** is decidedly against the plaintiff-appellant. The plaintiff in that case was the eldest daughter, and she was held to have no interest in the property of her deceased father during the life time of her mother, who was the heir of her deceased husband. and not any of the children (but the eldest son who had a right to claim one-fourth) till the mother's death.

The question of the eldest daughter's right as against the mother was very fully investigated anew in *Mi Saw Myin v. Mi Shwe Thin*† with the result already stated. In the course of this investigation the texts contained in section 31 of the Kinwun Mingyi's Digest, Volume I, were examined, as well as several Lower Burma rulings.

The sections of the Kinwun Mingyi's Digest on which the plaintiff-appellant relies are 30, 31, 32, 33 and of these section 31 only is directly applicable. It has been stated in argument, however, that the plaintiff-appellant has been living separately and that assertion has not been contradicted. If it is correct, the section precisely applicable would seem to be section 33 and the texts contained in it are all against the plaintiff-appellant. But if the plaintiff-appellant has not been living separately and section 31 applies, I am of opinion that, as was held in *Mi Saw Myin's* case, the texts contained in that section, when carefully examined, furnish no support for the claim put forward by the plaintiff-appellant.

None of them give the eldest daughter the right to claim one-fourth.

The contention of the learned Advocates for the plaintiff-appellant is that the only advantage the eldest son has over the eldest daughter is that he can claim one-fourth whether he is the eldest child or not, whereas the eldest daughter can only claim one-fourth where she is also the eldest child. But I am unable to find in the texts of the *Dhammathats* any substantial support for this contention.

The rules relating to the eldest son's or eldest daughter's right to one-fourth must clearly be understood in both cases to refer to the *orasa* son, *i.e.*, the eldest capable son, and the *orasa* daughter, *i.e.*, the eldest capable daughter [*see Mi Min Din* v. *Mi Hle* (9)]. But this is not the point. The point is that the texts giving the *orasa* daughter the right to claim one-fourth do not authorize her to claim one-fourth from her mother at least where her mother has not married again.

This being so, it is unnecessary to consider whether the existence of other children and especially of a brother makes any difference.

The plaintiff-appellant did not base her claim on the rules contained in section 31 of the Digest giving the eldest (*orasa*) daughter the right to a share of slaves, buffaloes, etc.

These rules also were not to be applied except in certain circumstances, and are scarcely applicable at all to modern conditions of life.

My conclusion is that the lower Court was right and that plaintiff-appellant's claim against her mother for a one-fourth share is unsustainable.

The appeal is dismissed with costs.

Appeal dismissed.

KRISHNA RAO *v.* MUTHANGI BUCHI.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 20 OF 1912.

January 6, 1915.

Present:—Sir John Edward Power Wallis, Kt., Chief Justice, and Mr. Justice Hannay.

Sri Rajah K. R. V. KRISHNA RAO BAHADUR—DEFENDANT—APPELLANT

versus

Sri MUTHANGI BUCHI RAMMAYYA GARU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 63, 65, 144—Public document—Proof—Secondary evidence—Certified copy not preserved—Other evidence, whether admissible.

Where a certified copy of a lost public document is not preserved, other secondary evidence of the contents of it is admissible. [p 809, col. 2.]

In the matter of a collision between the "Ava" and "Brenhilda", 5 C. 568; 5 C. L. R. 331, *Kalandan* v. *Kunhunni*, 6 M. 80; 7 Ind. Jur. 77, followed.

Orders issued by public officers in the discharge of official duties kept together in a register in the usual course of business should be presumed to be accurate copies of the original public documents and are admissible in evidence as "secondary evidence" of such public documents under sections 63 and 65 of the Evidence Act. [p. 810, col. 1.]

Appeal against the decree of the Court of the Government Agent of Godaveri at Cocoanada, in Original Suit No. 1 of 1910.

Messrs. *N. Subba Rao*, *P. Narayanamurti* and *P. Somasundaram*, for the Appellant.

Messrs. *M. O. Parathasarathi Aiyangar*, *S. Srinivasa Aiyangar* and *T. Rama Chandra Row*, for the Respondents.

JUDGMENT.—This is an appeal against a decree of the Court of the Government Agent of Godaveri in a suit brought by the plaintiffs to recover possession of a village which, they allege, was granted to their predecessors by the predecessors of the defendant, the *zemindar* of Polavaram, by a permanent grant in the year 1797 and was confirmed to them by an ancestor of the present *zemindar* by a *takeed* of the year 1830. The Government Agent has written a very careful and exhaustive judgment in which the whole evidence is dealt with. The general effect of the plaintiffs' evidence is to show that they have held this village for a great many years on an annual payment of Rs. 8 and have claimed to hold it as a *mokhasa* village paying a *kattubadi* of that amount. We have Exhibit Y which is a deed of gift in 1846, in which it is styled their ancestral *mokhasa* property. We have Exhibit Z of 1885, a Will by which a share in this village was bequeathed, that Will was contested in a suit in which Exhibit AA is the judgment. Then, we have registered leases Exhibits A and H1, of 1872, by which the village was leased by Chotabi, the then respresentative of the family as per *mokhasa* property; and by Exhibit B in 1883, she sold it to the vendor of the present plaintiff. Chotabi died in the year 1892 and it was not for another ten years that the present defendant claimed to resume the village. On the other hand, the defendant relies upon the fact that the numerous *zemindari* accounts which he has put in evidence, including lists of the *zemindari* villages, nowhere treat this as a *mokhasa* village. In some earlier accounts, several *mokhasa* villages are entered but this is not. But in some of the later accounts, it is treated as an *ijara* village, that is to say, a village which has been leased under an *ijara* or lease-deed to the predecessors of the present holder.

It is not necessary to go into the whole of this evidence here. Roughly, the effect of it is that the village is not treated in the *zemindari* accounts and documents which have been put in evidence as a *mokhasa* village anywhere. In this state of things the plaintiffs rely upon secondary evidence of their title and the Agent has accepted that evidence. In 1866 the predecessors of the plaintiffs undoubtedly put in a claim before the *Inam* Commissioner that this village should be registered as an *inam* village, but they put it in through the wrong Tahsildar and the petition was returned for presentation through another Tahsildar, and it is impossible to say what became of it. The case for the plaintiffs is that with that petition they filed the original *patta* of 1797 and the *takeed* of 1830. Nothing has been found about the case in the records of the *Inam* Commissioner's office. I do not think that any inference can be drawn one way or the other from the fact that the *inam* was not enfranchised. There is nothing in the evidence to suggest any reason why this particular village should be exempted from liability for the payment of revenue to Government, whether that revenue was paid by separate assessment or by treating the village as part of the *zemindari*. However the plaintiff's case is, as I have said, that the *patta* of 1877 and the *takeed* are lost

and they claim to give secondary evidence of those documents.

They rely in the first place upon Exhibit EE which, the appellant strongly contends, is inadmissiable in evidence. Exhibit EE was produced in Court from the records of the Collector. The evidence is that the estate came under the management of the Court of Wards under Regulation V of 1804. The Collector was the agent of the Court of Wards and was the person who was in charge of the *zemindari* while it was under the management of the Court of Wards. Exhibit EE purports to contain copies of a number of orders relating to the Polavaram *zemindari* which, as the Government Agent states in his judgment, are dated from the 27th of December 1832 to the 20th of May 1833. It was produced in Court from the Collector's office about a year before the actual hearing on a summons taken out by the plaintiff and, therefore, the defendants had the fullest opportunity to examine it and detect any traces of forgery, and it was marked at the close of the plaintiff's case, apparently without objection. The Government Agent in his judgment is under the impression that its genuineness was admitted. Mr. Subba Rao who conducted the case has stated that this is not so, and we accepted his statement; at the same time we cannot think that the objection against its genuineness was very strongly pressed at that time as distinct from its admissibility. The Government Agent says "the register" (Exhibit EE) "is like numbers of similar ones in the Collector's office and was kept in the ordinary course of business as it was then carried on." My learned brother who is sitting with me has seen similar records from the Vizagapatam Government Agent's office and the Bench clerk's statement is to the same effect. I cannot but think that if its genuineness in this sense had been challenged, any number of registers might have been produced to show that it is, as the Government Agent says, "like numbers of similar ones in the Collector's office records and was kept in the ordinary course of business as it was then carried on". That it was kept in the ordinary course of business can, I think, be inferred from an inspection of the document itself. It is a record—a necessary record too one might say—of the orders passed by the Collector as Agent of the Court of Wards with reference to this Polavaram estate, which was then under his charge. Some of the orders purport to bear the signature of the Collector, A. Crawley. This particular order and some of the other orders do not purport to bear his signature. It was produced from proper custody and the defendants had abundant opportunity to inspect it and if there was anything suspicious about it, we have not the least doubt it would have been brought to our notice, more especially as in some other cases the interpolation of documents in the Collector's office has been brought to light. We see no reason whatever on an inspection ourselves of this document for doubtiug its genuineness.

The next question is whether it is admissible. The first objection taken to its admissibility was that under the Evidence Act this was a public document and that in the case of public documents under the terms of section 65 a certified copy of a public document, and no other secondary evidence, was admissible even when a public document had been lost. There is something to be said for this contention on the wording of the section, but this contention has been over-ruled in a very lucid judgment by Mr. Justice Wilson, which is reported in *In the matter of a collision between the "Ava" and the "Brenhilda"* (1), and this Court has taken the same view in *Kalandan* v. *Kunhunni* (2). It would, I need hardly say, be a most unfortunate state of the law if no secondary evidence of the contents of a lost public document were admissible unless a cetified copy happened to have been preserved. The Legislature can never have intended such a state of things and Mr. Justice Wilson has given good reasons in his judgment for holding that it is not the right construction of the section. If that be not so, then the case comes within the provision in the section that any secondary evidence of the contents of a document is admissible, because then it comes within clause (*c*) (of section 65), that is to say, the case where the original has been destroyed or lost.

(1) 5 C. 568; 5 C. L. R. 331.
(2) 6 M. 80; 7 Ind. Jur. 77.

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Then, Mr. Subba Rao contends that if this be so, still the secondary evidence must be secondary evidence of the nature defined in section 63. Now, section 63 says, "secondary evidence means and includes.....(3) copies made from or compared with the original". Mr. Subba Rao contends that in the present case it is not shown that this Exhibit EE is a copy prepared from the original. Mr. Rangachariar on the other side contended that the register was itself the original, but we are unable to accept that contention. We think, however, that it is shown that this document which is produced from the proper custody was a register of orders of the Collector relating to this *zemindari* which was kept in the ordinary course of business by the Collector as agent of the Court of Wards. Now, section 114 says that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case", and it is unnecessary to bring the case within any of the very numerous illustrations which are appended to it. In this state of things we feel justified in presuming that Exhibit EE is an accurate copy of the order which was actually issued by the agent to the Court of Wards. That order is not now forthcoming; notice has been given to the defendants to produce it, and they have not produced it, nor is there any reason to presume that it is in existence. In these circumstances we think that Exhibit EE may be admitted as secondary evidence of the order which was issued by the Collector as agent of the Court of Wards.

Turning to Exhibit EE, it sets out that the plaintiff's predecessor had presented a petition saying the said village was granted to her father as *inam* under a *patta* by Mangapathi Devu Garu, that is, the *zemindar* of the year 1797; since then, they had been enjoying it and owing to the death of the late proprietor, Jagayya Garu, that is the predecessor of the present defendant, the *taluq* was under attachment and that the Amin prevented the collection of rents, and prayed that her documents may be perused and orders issued for payment by the *ryots* as usual. In respect of this the following documents were produced, *viz.*, one *patta* granted in 1797 and a *kadayah* and one document by the late proprietor showing that the village was re-granted to the petitioner. It is, therefore, ordered that there should be no obstruction to the petitioner collecting the rents of the village and the *kattubadi* of Rs. 8, that is. the quit-rent payable by her should be entered in the accounts as the demand for the village. Thus the *mokhasa* title of the plaintiffs was asserted and recognized by the agent of the Court of Wards on a perusal of their title-deeds which are now lost.

As the Government Agent has pointed out, the genuiness of Exhibit EE is strongly corroborated by Exhibit DD which is a copy of a judgment of the District Munsif's Court of Seethanagran in the year 1835 in Original Suit No. 122. One half the page of this judgment has been destroyed but the other half remains perfectly legible and, therefore, it is possible to gather what the nature of the suit was from what remains, and there are also certain statements which clearly appear. The suit would appear to have been brought by the predecessors of the plaintiffs against the *ryots*, who apparently had refused to pay the plaintiffs and had attorned to the then *zemindar* who on that account was made the first defendant but did not trouble to appear. The fact that he did not appear goes to show that he admitted the plaintiffs' case. At page 97 of the printed documents; Exhibit DD clearly refers to the grant of 1797 and says that it fixed an annual payment of 5—probably pagodas—on the village ["and got a permanent *patta* written"] and it also mentions that a *takeed* was written, which evidently refers to the *takeed* of 1830 which is mentioned in Exhibit EE. And, as appears from the list of documents appended to the judgment, both these documents were then produced in Court. The second one is described as 'executed on the 24th September 1830, *Vikruti* . . . . by . . . . and Jagayya Garu'—that is, the defendant's predecessor. The judgment is given against the tenants and there is also some mention at the close of the judgment of '*kattubadi*' of the village, which is the proper term for the quit rent payable by a *mokhasa* village, but is not the proper term for rent payable under an *ijara*.

On this evidence, the Government Agent has come to the conclusion that the plaintiffs' case is right and that the village was the subject of permanent grant in 1797, which was confirmed in 1830 at a *kattubadi* of Rs. 8. This being so, the mere fact that the nature of this tenure is not recognised in the *zamindar's* accounts goes for very little and certainly cannot counterbalance the fact of the continuous assertion of title by the plaintiffs, confirmed as it is by this document, Exhibit EE, showing a recognition of the *mokhasa* tenure by the agent of the Court of Wards when in charge of the estate.

We may refer to another fact which the Government Agent relies on as strongly supporting the plaintiffs' case, that is, although the *zamindar's* accounts show the predecessors of the plaintiffs as *ijardars*, yet there was never any exchange of *pattas* and *muchilikas* between them as there was in the case of every other *ijara* in the estate. The explanation put forward that during most of this time, the *ijardars* were two Mohammadan ladies who sometimes lived at Rajahmundry and sometimes at Hyderabad seems altogether insufficient. These ladies were capable of executing other documents and were capable of executing *muchilikas* too, if they had recognized that the tenure was *ijara*.

The defendants rely upon Exhibit VIII, which is an *isthiharnama* or a sort of proclamation or public notice of the year 1853 which describes the plaintiffs' predecessors as holding under a cultivation lease. The Government Agent thinks this may have been a merely erroneous assertion, but, however this may be, we are not inclined to attach much importance to it.

The defendants also rely upon Exhibit XVII series—they are three receipts given by the defendants for the payment of Rs. 8 and they do undoubtedly treat this as *ijara cist*. Those receipts were produced apparently by cultivators who held under the lessees of the plaintiffs' predecessors and they are not documents which ever got into the plaintiffs' hands or got to their knowledge. We do not think that these three receipts can be sufficient evidence of the fact that the plaintiffs' predecessors agreed to hold under an *ijara* tenure instead of under *mokhasa* tenure, which they always claimed to hold under in all the documents which they executed and which, according to the evidence, in our opinion, has been proved to have existed.

On the whole, we agree with the conclusion arrived at by the Government Agent and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEALS NOS. 219 AND 241 OF 1910.

June 16, 1914.

Present:—Mr. Justice Stephen and Mr. Justice Mullick.

IN NO. 219 OF 1910

Raja GANGA NARAIN SINGH—DEFENDANT NO. 2—APPELLANT

versus

SHASHI BHUSAN RAI—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

IN NO. 241 OF 1910

THE NOWAGARH COAL COMPANY, LTD., DEFENDANT—APPELLANT

versus

SHASHI BHUSAN RAI—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Mining rights, transfer of—Rent-free—Brahmottar, *grant of, nature of, before Permanent Settlement—Mining rights, how far affected*—Zemindar *presumed owner of underground rights.*

A grant of a rent-free *brahmottar* of the whole of a *mouza* made before the Permanent Settlement by the *zemindar* did not transfer any mining rights to the grantee. [p. 815, col. 1.]

Hari Narain Singh Deo Bahadur v. *Sriram Chakravarti*, 6 Ind. Cas. 785; 14 C. W. N. 746; 11 C. L. J. 653; 7 A. L. J. 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; 37 C. 723; (1910) M. W. N. 309; 37 I. A. 136, followed.

On the title of the *zemindar* being established, he must be presumed to be the owner of the underground rights thereto appertaining, in the absence of evidence that he ever parted with them. [p. 815, col. 1.]

Durga Proshad Singh v. *Brojo Nath Bose*, 15 Ind. Cas. 219; 6 C. W. N. 432; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 I. A. 133; 39 C. 696; and *Megh Lal Pandey* v. *Raj Kumar Thakur*, 34 C. 358; 11 C. W. N. 527; 5 C. L. J. 208, referred to.

Jyoti Prosad Singh v. *Lachipur Coal Co.*, 12 Ind. Cas. 482; 14 C. L. J. 361; 16 C. W. N. 241; 38 C. 845, referred to.

Appeals against the decrees of the Subordinate Judge, Manbhum, dated the 28th of February 1910.

GANGA NARAIN SINGH *v.* SHASHI BHUSAN RAI.

IN No. 219 OF 1910.

Dr. *Rash Behary Ghose*, Babus *Lalit Mohan Ghose* and *Karunamoy Ghose*, for the Appellant.

Mr. *S. P. Sinha*, Counsel, Babus *Bepin Behari Ghose*, *Satish Chandra Mookerjee*, and *Hem Chandra Mookerjee*, for the Respondents.

IN No. 241 OF 1910.

Mr. *Graham*, Counsel, Babus *Monmotha Nath Mookerjee* and *Kunja Behari Sen*, for the Appellant.

Babus *Bipin Behari Ghose*, *Satis Chandra Mookerjee*, *Lalit Mohan Ghose* and *Hem Chandra Mookerjee*, for the Respondents.

JUDGMENT.—The plaintiff brought this suit to have the *mourasi* rent-free *brahmottar* title of his lessors, defendants No. 3 to 18, to the *mouza* Gobindpore established; and to have it declared that he has a right to mines in the *mouza* and that the first defendant has no such right. His case is that at some time before the Permanent Settlement the *mouza* in question was in the *zemindary* of *Raja* Jaga Mohun Singh, the ancestor of defendant No. 2, who granted it as *brahmottar* to the ancestor of the Chakravarty defendants (Nos. 3 to 18) by a *pattah*, dated the 26th May 1784 and on that being lost by a second *pattah*, dated the 10th December 1790. On the 14th of June and the 1st December 1907, the plaintiffs took a settlement of the underground rights of the whole *mouza* from the Chakravartys and commenced to exercise them by sinking a pit. In the following March the principal defendants opposed their doing so, and proceedings under section 145, Criminal Procedure Code, were instituted, which led to the defendants being declared to be in possession. Hence this action.

The defendants generally deny the plaintiff's title, and set up one of their own. This is that on the 25th January 1893, the second defendant made a settlement of the mining rights in the *mouza* to one Purna Chandra Dwan, who assigned them to the Kattras Jherriah Company who abandoned them in 1896. From that time till 1899, the Court of Wards, who had taken over the estate of defendant No. 2, tried to secure a lessee of the mineral rights, and eventually settled them with the first defendants on the 3rd October 1899, who say that they have since then been in possession. They also plead that the plaintiff is barred by limitation, as they say that he was not in possession of the mines or minerals for more than 12 years before suit. The defendants raised a further point during the hearing that the plaintiff's lease of 1907 conveys nothing to him, as the Chakravartys had let the same property to Dr. Saise in 1896 and that lease was still outstanding.

The suit was decreed by the Subordinate Judge of Manbhum, and both the defendants have appealed against his decree. They have appealed separately; but the two appeals have been heard together, and we need not distinguish between them.

The points raised before us by the appellants are as follows:—

1. There is no evidence of a permanent *lakheraj brahmottar* grant made in favour of the plaintiff's ancestor;

2. If there was any such grant it comprised only cultivated and not waste or *danga* land;

3. Such a grant, whether made before or after the date of the Permanent Settlement, could not pass any mining rights;

4. The suit is barred by limitation as the defendant and his lessees had been in possession of the mines in the land for more than 12 years;

5. The suit must fail because there was a lease to Saise prior to that of the plaintiff, which was actually subsisting at the time of the institution of the suit.

The evidence of a permanent *lakheraj brahmottar* grant in favour of the plaintiff's ancestors rests in the first place on the *patta* put forward by the plaintiff. This is dated the 27th *Aughran* 1197=the 10th December 1790, and contains a gift from the ancestor of defendant No. 2 to Lakshan Chakravarty of *mouza* Gobindpore as *brahmottar*. It also recites that the grantor had granted a *patta* to Bhagwat Chakravarty on the 15th *Jeyt* 1192=the 26th May 1784, but that as it was lost he granted a second *patta*. The lower Court has disbelieved the authen-

ticity of this document, and we are not prepared to accept it as authentic. The reasons for accepting it are that it is produced from proper custody; reference was made to it in the Settlement proceedings in 1871, in Registration proceedings in 1877, and in the proceedings under section 145, Criminal Procedure Code, in 1908, that we have mentioned. The reasons for disbelieving it given by the lower Court are that the writing and paper do not appear to be so old as they purport to be, that it was not produced either in the proceedings under section 145 or when this suit was brought. The plaintiff denied having seen it in his deposition in this suit, though he said the contrary in the criminal proceedings; the Judge disbelieves the evidence of Shashi Bhusan Chakravarty, who speaks to its custody and eventual discovery, for reasons with which we agree, and he gives good reasons for doubting the indorsements on the back of the document purporting to show that it was produced in the proceedings in 1871 and 1877. The defendant is not concerned to deny that there may have been a grant in 1784; but he suggests that as the terms of that grant were not such as would support the case now made by the plaintiff he has forged Exhibit 2 to take the place of the grant alleged to have been lost. For ourselves we can only say that the grant of 1790 has not been sufficiently well proved for us to be able to treat it as authentic.

The question then arises whether the plaintiff can make out a title in the Chakravartys, his grantors, apart from the discredited *patta*, and again we agree with the Judge who finds that the Chakravartys held the *mouza* under a rent-free *brahmottar* grant and not as a service tenure. We see no reason, however, for holding that the grant was made either before or after the Permanent Settlement. The evidence afforded by the *mulki* papers of 1843 (Exhibit 1) where the Raja returns Bhagwat Chakravarti as holding under a *brahmottar patta* of 1784, the *jammabandi* of 1854 (Exhibit B-2) where the manager of the Court of Wards shows Gobindpore as rent-free the return of 1861 (Exhibits 14-13) where the Raja describes Gobindpore as *brahmottar*, the claim by the Chakravartys in 1871 (Exhibit 5) to hold the *mouza* in rent-free *brahmottar* with its recognition by Mr. Rowlitt (Exibits 5 and 12), the admission in the road cess return of 1872 (Exhibit 19) that Gobindpore was *brahmottar*; even though it was made by a manager on behalf of the minor, largely outweigh any inference that can be drawn from the receipts (Exhibits B-30 to B-39) in which the Chakravartys are described as '*jimmas*,' while the application for the registration of the *mouza* as rent-free *brahmottar* and its rejection (Exhibit 7) do not, at least, tell against the defendants' contentions since it is not attempted to show that the land is free from payment of revenue, which it would have been for the application to have succeeded.

This brings us to the second point in the appellants' case, which is that the lands granted to the ancestors of the plaintiff's grantors were only the cultivated lands in the *mouza* and did not include the waste lands.

From Exhibit B-70, the general (*touzi*) register of revenue-paying lands in Manbhum, it appears that the area of Gobindpore, as it is now known, is 76 acres, which is about 220 *bighas*. Was the whole of this granted, in whatever manner, to the Chakravatys? The answer to this question depends in part on documents that we have already considered. Thus in the *mulki* papers of 1843 the area of the land referred to is stated to be approximately 54 *bighas*. The "remarks column" is provided to show "how many *bighas* of the said *mouza* are *patit* lands, how many *bighas* cultivated, whether inhabited or without habitation;" and it does show that "in this *mouza* there are 24 *bighas* of cultivated land, 30 *bighas* of *danga* land not inhabited." It also gives boundaries, which on the evidence of both parties, in the opinion of the lower Court, are boundaries of the entire *mouza*, and the correctness of this finding has not been disputed before us.

In 1861 the *thakbust* map was being prepared. The Raja made a return (Exhibit 13) "that the *mouza* is *brahmottar*," saying nothing of any distinction between the waste and the cultivated land. A deposition by Ram Kanai Chakravarty (Exhibit 17) seems to show that measurement was made of the *asli-mouza* and no other *tola* was included, and that the entire *mouza* was given to Bhagwat Chakravarty, the grantee in 1784. In settling the *thakbust* boundaries it seems (Exhibit 18) that the matter was left entirely to the Chkravartys, and that the Raja con-

GANGA NARAIN SINGH *v.* SHASHI BHUSAN RAI.

tented himself with making the return, Exhibit 13, which we have already referred to. The *hadbust* map itself (Exhibit 16) indicates the extent of the *mouza* as only 9 *bighas* 10 *cottahs*, and the boundaries do not seem to have any relaton to those given in *mulki* papers. This does not fit in with the case made by either party and leads to the conclusion that the map is not to be relied on and measurement of whole *mouza* was made by Ram Krishna Mistri (Exibit 12) in 1871 when he found that it contained 59 *bighas* in all. We agree, however, with the Subordinate Judge that, for the reasons he has given, there may have been waste lands outside the *mouza*. The road-cess return of 1872 (Exhibit 19) made by the Tahsildar of the Court of Wards in 1872 (Exhibit 19) and subsequent returns made by the Chakravartys are all made without any reference to the existence of waste lands which, if the law contained in Act IX of 1880 B. C., had been complied with, would have been an indication that no waste lands existed in the *mouza*. We find it difficult, however, to attach much weight to this argument in face of the reasons for not doing so advanced by the Subordinate Judge and the evidence to which he refers.

In the proceedings in 1871, when the Chakravartys applied to have their *brahmottar* released from rent it does not appear that either they or Mr. Rowlett, the Manager for the Court of Wards, recognised the *mouza* as containing more than the 59 *bighas* mentioned in the measurement papers of that year. In the application for registration made by the Chakravartys in 1877 (Exhibit 7) we find that it is stated that the area of lands, which include Gobindapore, has not been found out by measurement; but that a measurement by *murris*, that is by a unit of cultivated land, is given, a fact which supports the view taken by the Judge of the road-cess papers.

In 1904 we have a curious petition from Akshoy Kumar Chakravarty (Exhibit B) in which he complains that the Katras Jherriah Coal Company called the Bird Coal Company is "unjustly possessing the surface lands of Gobindpore and another *mouza* under a right derived from the Raja's estate"; as a result of which an order was made (Exhibit B 25) by the Court of Wards disallowing the claim made to the waste lands of Gobindpore. The order itself was based on the road-cess returns and is of no importance; but as the Katras Jherria Company were in possession of the land merely for mining purposes, the limitation of the complaint in the partition to surface rights is certainly curious.

In the land acquisition proceedings in 1905 there seems to be no doubt that the manager for the Raja received all the compensation for waste land that was acquired, while the Chakravartys obtained compensation only as cultivators. The Raja's rights to the waste land seem thus to have passed uncontested, a conclusion highly adverse to the full claim made by the plaintiff. The Judge, however, points out that the acquisition proceedings were based on a mistake, as the Chakravartys were supposed to have a *kheraji* and, not as they in fact had, a *lakheraj brahmottar*; that the Chakravartys may not have known that the *danga* lands were being ascribed to the Raja and that the amounts in question were not large enough to make litigations profitable. This conclusion depends in part on the evidence of Shashi Bhushan Chakravarty, whom elsewhere the Judge has not been inclined to trust, and in view of the fact that he was a party to the proceedings and in fact received compensation under them, it is difficult to believe that he did not know that it was also paid to the Raja, as he swears it was not.

This concludes all the evidence on which we must decide this part of the case; and we feel that any decision we come to must be open to considerable doubt; and necessarily so, because it is probable that for many years both the Chakravartys and the Raja regarded the lands as of no value, and both sides may well have exercised rights over them without attracting the notice of the other. On the whole, however, we feel disposed to attach more importance to the earlier than to the later documents before us: and while we regard the *mulki* papers as ambiguous as to the point before us, we attach a good deal of importance to the Raja's return of 1861 and to the fact that the Raja did not care to take any part in settling the *thak* map, which he probably would have done had the *mouza* been divided between the Chakravartys and himself. On

the other hand, we should not like to depend much on the road-cess papers and though the Land Acquisition proceedings have to be carefully considered, we cannot consider that they outweigh the conclusion we draw from the earlier proceedings. Under these circumstances we hold, though with considerable doubt, that the waste lands were included in the *brahmottar* granted to the Chakravartys.

We have next to deal with the most important point in the case, which on the findings that we have come to is as follows: Did a grant of a rent free *brahmottar* of the whole of a *mouza* made before the Permanent Settlement pass any mining rights? From this point of view we consider that the case is covered by the decision in *Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti* (1). In that case the Subordinate Judge and the High Court both held that the defendants had a permanent tenure at a fixed rental in the plaintiff's *zemindary*; there was nothing to show how the tenure originated, or that anything had or had not been settled about mineral rights at that time. The first Court held that the minerals did not pass to the grantee, partly, it appears, because of the low rent that was reserved. This Court set aside that finding, holding that the *zemindar* had divested himself of everything except the nominal proprietorship and turned his right practically into a perpetual annuity of the amount of the rental. This decision was reversed in the Privy Council. The finding as to the nature of the tenure created is not overruled and seems to be accepted; the inference drawn by the Subordinate Judge from the smallness of the *jama* is noticed, and it was held that on the title of the *zemindar* being established he must be presumed to be the owner of the under-ground rights thereto appertaining, in the absence of evidence that he ever parted with them. We are unable to distinguish that case from the present. It then seemed probable that the tenure was created after the Permanent Settlement. The present tenure may according to our view have been created either before or after that event. If, however, it was granted before the Permanent Settlement, the case for the appellant is stronger than if it were granted afterwards, as the *zemindar's* interest at the time of the grant must have been restricted to a ten years' Settlement, which may lead us to suppose that he would have been unlikely to deal with the minerals even if he had the power to do so. In the former case the *jama* reserved was low; here no *jama* at all is reserved. The area of the holding affected in *Hari Narayan Singh's* case (1) does not appear from the judgment, and in the present case the point does not help us, as we have held that the whole *mauza* was transferred. Had only a small proportion, such as 54 *bighas* out of 200, been affected, it might have been argued that the *zemindar* would not have parted with his mineral rights on so small a scale, as we are admittedly deciding the case by imputing intentions to the parties, which in their ignorance of facts known to us they could never have formed: and it is this that makes the second point we have decided one of essential importance.

The rule laid down in *Hari Narayan Singh* v. *Sriram Chakravarty* (1) was afterwards followed in *Durga Proshad Singh* v. *Brojo Nath Bose* (2), reversing the decision in this Court, [see *Brojanath Bose* v. *Durga Prosad Singh* (3)] but nothing else was then decided that bears on this case. In *Megh Lal Pandey* v. *Raj Kumar Thakur* (4), it was held that the insertion of such general words as *mai hak hakak*, with all rights in the original grants, would pass the minerals, and it is suggested that it was this decision that led to similar words being inserted into Exhibit E, the *patta* in this case. On our findings, however, the terms of that document are of no importance. The present case closely resembles *Jyoti Prosad Singh* v. *Lachipur Coal Company* (5), where it was held that the

(1) 6 Ind. Cas. 785; 37 C. 723; 14 C. W. N. 746; 11 C. L. J. 653; 7 A. L. J 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; (1910) M. W. N. 309; 37 I. A. 136.

(2) 15 Ind. Cas. 219; 39 C. 696; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 415; 23 M. L. J. 26; 39 I. A. 133.

(3) 34 C. 753; 5 C. L. J. 583; 12 C. W. N. 193.

(4) 34 C. 358; 11 C. W. N. 527; 5 C. L. J. 298.

(5) 12 Ind. Cas. 482; 38 C. 845; 14 C. L. J. 361; 16 C. W. N. 241.

zemindar retained a right to the minerals; as also the case of *Kunja Behari Lal* v. *Raja Durga Prasad Singh* (6), decided on the 7th May 1914, where Fletcher, J., treats the decision in *Hari Narayan Singh's* case(1) as governing the relations of a *zemindar* and any one deriving a title from him whether as a tenure-holder or a *ryot*, a construction in which we quite agree.

In the result we hold that the *zemindar* did not transfer any mining rights to the predecessors of the Chakravartys.

There remain only two points to be noticed on neither of which we need say much.

The *first* is that the suit is barred by limitation, as the defendant and his lessees had been in possession of the mines in the land for more than twelve years. As to this we agree with the findings of the lower Court, though we think that on the facts of the case his finding is not strong enough, as the mining operations of the Katras Jherriah Company before 1896 were obviously of the slightest possible kind.

The *second* remaining point is that the suit must fail because there was a lease to Mr. Saise prior to that of the plaintiff and that it was subsisting at the time of the suit. This point was raised at the "very last stage" of the trial, the onus of proving the lease and its continuance up to the date of the trial was on the defendant, and he has not discharged it. We, therefore, agree with the lower Court that the lease cannot stand in the plaintiff's way.

The result is that both the appeals before us are decreed with costs.

Appeals decreed.

(6) 25 Ind. Cas. 819; 20 C. L. J. 304; 19 C. W. N. 203.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 176 OF 1914.

February 26, 1915.

Present:—Mr. Justice Chamier.

BADRI DAS AND OTHERS—APPLICANTS

versus

SHEO NATH SINGH—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 13—Receiver—Sale-proceeds realized before adjudication of judgment-debtor as insolvent—Claims of Receiver on such sale-proceeds.

Where the sale-proceeds in execution of a decree are realized before the judgment-debtor is adjudicated insolvent, the *interim* Receiver has no claim to such proceeds.

Civil revision petition against an order of the Small Cause Court Judge of Cawnpore.

Mr. *Uma Shanker Bajpai*, for the Applicants.

JUDGMENT.—The applicants obtained a decree against the respondent, Sheo Nath, in the Court of Small Causes, in execution of which they brought certain property to sale on July 16th, 1914. An order was made that the proceeds of the sale should be paid to the decree-holders, less the costs of the sale. One month before this the judgment-debtor had applied to be declared insolvent, and an *interim* Receiver had been appointed under section 13 of the Provincial Insolvency Act. On July 18th, that is, two days after the sale, the *interim* Receiver made a report to the Court on which an order was passed that the proceeds of the sale were not to be paid to the decree-holders, and a few days later the Court ordered that the money should be given back to the purchasers of the property and that the sale should be set aside. This is the order against which the present application is directed. The case is covered by the decision of this Court in *Sri Chand* v. *Murari Lal*(1). The sale proceeds were realized before the judgment-debtor was adjudicated insolvent. Therefore, the Receiver had no claim to them. I am informed that the judgment-debtor has not upto date been adjudicated insolvent. However that may be, he had not been adjudicated insolvent when the proceeds of the sale were realized. I allow this application and set aside the order of the Court below. The applicants will get their costs from the respondent, judgment-debtor.

Application allowed.

(1) 16 Ind. Cas. 183; 10 A. L. J. 252; 34 A. 628.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

PILLADI VENKANNA *v.* PILLADI GANGAMMA.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 115 OF 1913.

February 8, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Hannay.

PILLADI VENKANNA, MINOR, BY NEXT FRIEND PILLADI VENKATA-RATNAM—PLAINTIFF—APPELLANT

versus

PILLADI GANGAMMA—DEFENDANT—RESPONDENT.

Hindu Law—Partition, evidence of—Presumption—Burden of proof.

Where the evidence relied on to prove a partition is merely oral and not documentary and where it is against the interests of one of the parties to the partition to effect it, the presumption is that no such partition took place. [p. 818, col. 1.]

The burden of proof in such circumstances is on the party who asserts that the partition took place. [p. 818, col. 1.]

Appeal against the decree of the District Court of Kistna at Masulipatam, in Original Suit No. 64 of 1911.

FACTS.—Suit to declare a Will void and inoperative. The properties dealt with by the Will belonged to joint Hindu family composed of the plaintiff, a minor, and his uncle and the Will was by his uncle, the defendant. The wife of the testator asserted a partition. The District Judge upheld the partition and the Will and the appeal is against that decree.

Mr. *N. S. Narasimhachariar*, for Mr. *V. Ramadoss*, for the Appellants, contended (1) that the story of a partition was improbable and unlikely, (2) that a partition between an infant of tender years as the plaintiff in this case and his paternal uncle who had no issues was improbable, (3) that it was not in the interest of the minor, (4) that there was no motive for the partition, (5) that there was no antecedent quarrel or misunderstanding between the infant's mother and the paternal uncle which alone generally would lead up to a partition in Hindu families, (6) that the recital contained in a lease of the entire properties, admittedly genuine, to the effect that what was being leased out was "our half share" was strong evidence negativing the partition as the document came into existence subsequent to the alleged partition, and (7) that in the absence of any documentary evidence, oral evidence was unreliable and worthless. The Will was not genuine because it was not registered till six weeks after the death of the testator, for which no adequate explanation was forthcoming and that the testator being a "marksman", oral testimony could not be relied on to prove the Will.

Mr. *T. Rangachariar*, for the Respondents, argued (1) that the Will was a natural Will, that there was plenty of oral evidence in the case as to the partition which the District Judge had believed, (2) that the plaintiff's mother being a young widow would naturally have wished to live separately from the uncle, (3) that the absence of any motive did not matter, and (4) that the onus of proving the partition and the Will had sufficiently been discharged by the defendant.

JUDGMENT.—This is in effect a suit brought by the plaintiff, a minor, for a declaration that the suit property was the joint family property of himself and his undivided uncle, now deceased, and that the alleged Will of the undivided uncle is void and inoperative. The District Judge on a very careful examination of the evidence has come to the conclusion that the alleged partition between the plaintiff and his uncle has been proved. There are, however, certain facts in the case which appear to us to be deserving of more weight than he has attached to them. In the first place, the alleged partition does not appear to be a very probable one. The family consisted of the husband of the defendant and the minor. It is not alleged that the minor's uncle, who was then the manager of the family, was wasting the property or that it was otherwise to the interest of the minor that a partition should take place. The uncle died in diabetes within two years from the date of the alleged partition and as he had no issue, it was decidedly against the interest of the minor that a partition should take place. It is said that the young mother of the minor may have wanted a partition for purposes of her own. It is unnecessary to consider the limits of a mother's authority to enter into a partition, as the question has not been argued before us, because we think that in circumstances such as those I have mentioned, the partition should be proved by very clear and satisfactory evidence and on the whole we are not satisfied that it has been so proved

There is no direct evidence in writing of the partition. It is admitted that both the uncle and the minor continued to live in the same house after the alleged division. Six months later an agreement, Exhibit D, was entered into with the minor's maternal uncle under which the whole of the family property was leased to him for seven years on condition that he was to discharge certain debts of the family, that he was to pay grain worth of Rs. 40 a year to the uncle and to pay Rs. 244 for the marriage of the minor which he was to get celebrated himself. This direction is explained as due to the fact that the intention was that the minor was to marry the daughter of the lessee. In this agreement, Exhibit D, the property leased is referred to as "our one half share" and that seems to us to be very extraordinary language to use if there really had been a partition. The defendant relies upon the fact that Exhibit D is said to have been made between the lessee and the uncle and the minor by his guardian and mother, whereas in the case of certain previous documents, Exhibits B, C-1 and C-2, they are said to have been executed in favour of the uncle and "*his undivided son*," the minor, through his mother, guardian. Then reliance is placed upon a document, Exhibit I, which was drawn up by the plaintiff's 1st witness. According to his evidence that document was drawn up at the time when Exhibit D was executed. His explanation is that, as the lands were to be put in possession of the lessee for seven years the deceased wanted a memorandum of his share. We do not think that this is entitled to much weight as evidence of partition. That is all the documentary evidence in the case. There is a certain amount of oral evidence to prove the partition, and the plaintiff relies upon certain slight discrepancies in that evidence. We do not attach so much importance to that, as we do not think it is safe to act upon oral evidence of that kind in support of a partition such as is set up in this case, a partition which appears to us to be contrary to the interests of the minor and exceedingly unlikely to have taken place. We do not think that the defendant has satisfied the onus which was upon her to establish such a partition.

So far as the Will is concerned, as there was no partition and as, therefore, the property bequeathed under the Will is joint family property, the Will, even if genuine, is inoperative and the plaintiff is entitled to a declaration that it is not binding on the suit properties.

We, therefore, allow the appeal and decree the suit with costs throughout.

Appeal allowed;
Suit decreed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 411 OF 1913.

February 26, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

Srimati Rani KUARMANI SINGHA MANDHATA—PLAINTIFF—APPELLANT

versus

HIS HIGHNESS THE HON'BLE IHTISHAM-UL-MULK, RAIS-UD-DOWLA AMIR-UL-UMARA NAWAB ASAF QADER SYED SIR WASIF ALI MURZA *Khan Bahadur*, MAHABAT JUNG, K.C.S.I., K.C.V.O., *Nawab Bahadur*—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 4, O. XIV, r. 2, construction of—Limitation Act (IX of 1908), ss. 6, 8, 9, 22, Sch. I, Art. 91—Minority, insanity and idiocy—Limitation, disqualifications to save—Court of Wards, position of—Suit, right of—Representative capacity, suit in—Plaint, amendments made in—Properties belonging to idols, transfer of, by Court of Wards—Court of Wards Act (IX of 1879), s. 18, scope of.

Order XIV, rule 2, Civil Procedure Code, does not only apply to cases in which the issues of fact have not been settled, but also to cases where the Court has not postponed the settlement of the issues of fact. [p. 819, col. 2.]

Rai Yatindra Nath Chowdhury v. *Hari Charan Chowdhury*, 26 Ind. Cas. 954; 20 C. L. J. 426, not followed.

Under the terms of the Indian Limitation Act, 1908, no other cause of disqualification than those mentioned in the Act, *viz.*, minority, insanity and idiocy, can be admitted to save limitation and time runs against a disqualified proprietor whose property is taken under the Court of Wards. [p. 820, col. 1.]

No one except the disqualified proprietor can bring a suit in relation to property taken charge of by the Court of Wards. [p. 820, col. 1.]

Order VII, rule 4, Civil Procedure Code, does not require that where the plaintiff sues in a representative capacity that fact should be stated in the cause-title of the plaint although, no doubt, that is a convenient place to state it. [p. 820, col. 2.]

KAURMANI SINGHA *v.* WASIF ALI MURZA.

The amendments made in the plaint by the leave of the Judge cannot, in any view, amount to an addition or substitution of a new plaintiff within the meaning of section 22 of the Indian Limitation Act. [p. 820, col. 2; p. 821, col. 1.]

Where certain properties belong to idols the conveyance of those properties by the Court of Wards, is a nullity, and Article 91 of the Limitation Act does not apply. [p. 821, col. 1.]

The Court of Wards can only deal with the property of the ward the in manner provided by section 18 of the Court of Wards Act (IX of 1879.) [p. 821, col. 1.]

Appeal against the decree of the Subordinate Judge, first Court of Midnapur, dated the 16th of May 1913.

Babus *Dwarka Nath Chakravarti* and *Kali Kumar Chakravarti*, for the Appellant.

Dr. *Rash Behary Ghose*, Babus *Hemendra Nath Sen* and *Naresh Chandra Singha*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against a judgment of the learned First Subordinate Judge of Midnapore, dated the 16th of May 1913, dismissing the plaintiff's suit.

The plaintiff brought the suit for a declaration that a *kabala*, dated the 7th June 1890, executed by the Collector on behalf of the Court of Wards in favour of the late father of the defendant, and that a subsequent *kabala*, dated the 11th February 1901, executed in manner aforesaid in the like favour, are invalid and illegal, and for an order restoring the plaintiff to possession of the properties comprised in such *kabalas* and for certain alternative and consequential relief.

The issues of law and fact were settled by the learned Judge on the 9th of December 1912.

The defendant, on the 16th of February 1913, applied to the learned Judge for the trial of the 1st three issues under the provisions of Order XIV, rule 2, Civil Procedure Code. The learned Judge assented to that application. The first three issues were in the following terms: 1. Is the suit barred by limitation? 2. Is the suit bad for not making the Secretary of State for India in Council and the Court of Wards parties to the suit? 3. Is the suit maintainable, in respect of the properties said to be *debutter* in the plaint, in the present form? For the purpose of determining these three issues the learned Judge assumed, as he was bound to, the correctness of all the allegations contained in the plaint.

These allegations of fact so far as material to the present appeal are very simple.

On the 30th July 1886 upon her own application the plaintiff was declared to be a disqualified proprietor and the Court of Wards took charge of her estate. On the 7th of June 1890 by a *kabala* the Court of Wards sold and conveyed to the father of the defendant the property to which this suit relates other than and except the *Mouzas* Sakdubi and Pirote. By a further *kabala*, dated the 11th of February 1901, the Court of Wards conveyed to the father of the defendant the two *Mouzas* Sakdubi and Pirote. The plaintiff does not state whether this second *kabala* was executed for consideration or by way of further assurance or otherwise.

The Court of Wards, on the 1st of August 1911, released the property of the plaintiff from its charge. The present suit was instituted on the 31st of May 1912. The plaintiff on the present appeal before us has urged that the course the learned Judge adopted in disposing of the first three issues of law was illegal. The argument is based upon the terms of Order XIV, rule 2, Civil Procedure Code It is argued that the rule only applies to cases in which the issues of fact have not been settled. The wording of the rule is opposed to such a construction. The words "for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined" clearly indicate that the rule also applies to cases where the Court has not postponed the settlement of the issues of fact.

It is said that the decision in the case of *Rai Yatindra Nath Chowdhury* v. *Hari Charan Chowdhury* (1) is in accordance with the argument put forward on behalf of the plaintiff. But as I read that decision all that was decided in that case was that the course adopted by the trying Judge in that particular case was highly inconvenient and his procedure ought to be set aside by the Appellate Court. I think there is no force in this argument raised

(1) 26 Ind. Cas. 954; 20 C. L. J. 426.

on behalf of the appellant. The next argument is as to whether the suit is barred by limitation as regards the lands comprised in the *kabala* of the 7th of June 1890. It is argued that as the plaintiff was a disqualified proprietor whose estate was under the charge of the Court of Wards time did not run against her during the period the Court remained in charge.

Under the terms of the Indian Limitation Act, 1908, no other cause of disqualification than those mentioned in the Act can be admitted to save limitation. The only disqualifications that sections 6, 8 and 9 of the Act recognise are minority, insanity and idiocy. It is argued that notwithstanding this when the plaintiff was declared a disqualified proprietor and the Court of Wards Act (IX of 1879, B. C.) vested the right of possession of her property in the Court of Wards, and that the possession of the defendant and his father could not become adverse as regards the plaintiff until the Court of Wards released the property of the plaintiff on the 1st of August 1911.

This argument in substance rests upon the wording of section 35 of Act IX of 1879. No doubt the words "directing that possession be taken of such person and property" occur in that section. But the whole scheme of the Act, as is manifest from many sections, is the taking of the property of the disqualified proprietor under the charge of the Court of Wards. The position of the Court of Wards being that of a guardian of the disqualified proprietor, the possession of the guardian would be that of the ward and the plaintiff in that view was in possession when the Court sold the property in June 1890. Moreover, the Act preserves the right of suit of the disqualified proprietor. No one except the disqualified propietor can bring a suit in relation to property taken charge of by the Court of Wards. It is true that by Part VII of the Act restrictions have been placed upon the right of the disqualified proprietor to sue. The fact, however, remains that no one except the plaintiff could have maintained a suit with reference to the property taken charge of by the Court of Wards.

I think, therefore, that the learned Judge came to a correct conclusion when he found that the plaintiff's suit as regards the properties comprised in the *kabala* of 7th of June 1890 was barred by limitation under Articles 91 and 142 of the Indian Limitation Act. I may mention in passing that the learned Vakil for the appellant informed us that he makes no case to bring the plaintiff's suit within section 18 of the Indian Limitation Act, the case of the plaintiff being that she knew of the fraud all along and applied to the Court of Wards for release of her property in order to institute a suit.

I will now proceed to deal with the case so far as it relates to the two *Mouzas* Sukdabi and Pirote. In the cause-title of the suit as given in the plaint as originally presented to the Court, the character in which the plaintiff brought the suit as regards these two *mouzas* was not given, although it is manifest from the body of the plaint and the prayers thereto that the plaintiff was suing to recover possession of the two *mouzas* comprised in the *kabala* of the 11th February 1901 as the *shebait* of certain idols. On the 12th of April 1913 the plaintiff applied to the learned Judge for leave to amend the plaint by stating in the cause-title that she sued on behalf of herself and as *shebait* of the idols and for making the necessary and consequential amendments in the body of the plaint. The learned Judge gave the necessary leave and the amendments were duly made. By reason of such amendment the learned Judge has held that there has been the addition of a new plaintiff to the suit and, therefore, the suit as regards the two *mouzas* is barred under Articles 91 and 142 of the Indian Limitation Act. I am unable to agree with the view taken by the learned Judge. It seems to me abundantly clear on reading the plaint as originally filed that the plaintiff was suing as *shebait* of the idols as regards these two *mouzas*. Order VII, rule 4, does not require that when the plaintiff sues in a representative capacity that fact should be stated in the cause-title of the plaint, although no doubt that is a convenient place to state it. The amendments made in the plaint by the leave of the Judge cannot, in any view

I think, amount to an addition or substitution of a new plaintiff within the meaning of section 22 of the Indian Limitation Act. Nor am I able to agree with the view of the learned Judge that this suit, so far as regards the two *mouzas*, is governed by Article 91 of the Limitation Act. The case the plaintiff sets up in her plaint is that these two *mouzas* belonged to the idols and that the conveyance of them by the Court of Wards to the defendant's father was a nullity. Obviously Article 91 does not apply to such a case. I think that there is a case which ought to be tried so far as relates to these two *mouzas*. How or why they were transferred to the father of the defendant by the *kabala* of 11th of February 1901 does not appear and that, of course, will be a material matter to inquire into in the course of the trial. The Court of Wards could only deal with the property of the plaintiff in manner provided by section 18 of the Court of Wards Act (IX of 1879.)

I think, therefore, we ought to reverse the decree passed by the lower Court and remand the case for trial on the issues so far as they relate to the two *mouzas* Sukdubi and Pirote comprised in the *kabala* of the 11th of February 1901.

The decision of the learned Judge as to the suit being barred by limitation so far as regards the property comprised in the *kabala* of the 7th of June 1890, will remain unaffected by this order of remand. The costs of the present appeal will be costs in the suit.

TEUNON, J.—I agree.

Decree reversed; Case remanded.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 261 OF 1914.

November 17, 1914.

Present:—Mr. McColl, J. C.

MI THE O—PLAINTIFF—APPELLANT

versus

MI SWE AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhist Law—Inheritance—Eldest daughter, her interest during mother's life-time.

Under the Budhist Law the eldest daughter during the life-time of her mother has not such an interest in the estate of her deceased father as is contemplated in section 91 of the Transfer of Property Act [p 825, col. 1.]

The rule appears to be as follows:—

1. The eldest daughter can only claim one-fourth of the bulk of the estate if her mother dies first and she is capable of replacing her mother in the house-hold. [p. 824, col. 2.]

2. Sometimes the eldest daughter on marrying and leaving the parental roof is given her share of the estate during the life-time of both parents. In that case she has no further claim on the estate. [p. 824, col. 2; p. 825, col. 1.]

3. If this has not happened the eldest daughter on the death of her father is entitled to certain specified property and her mother gets the bulk of the estate. [p. 825, col. 1.]

4. If on the death of the father the mother marries again the eldest daughter is further entitled to one-fourth of her father's wearing apparel and ornaments, but her mother still retains the bulk of the estate. [p. 825, col. 1.]

Mr. *Tha Gywe*, for the Appellant.

Mr. *A. C. Mukerjee*, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued for the redemption of some land which she alleged had been mortgaged by her grandmother, Ma Swe Mi. She is the only child of Ma Swe Mi's deceased son, Maung Lu Pe. The lower Appellate Court dismissed the suit on the ground that as her mother, Ma Yo, was still alive, the plaintiff-appellant had no such interest in the land as would entitle her under section 91, Transfer of Property Act, to redeem it.

The plaintiff-appellant has appealed to this Court, and it is urged in the *first* place that as Maung Lu Pe's eldest daughter she has a vested interest in his estate and, *secondly*, that as her mother, Ma Yo, has married again plaintiff-appellant has a right to an immediate partition with her mother and has, therefore, a right to redeem. It has been pointed out that it was held by the Judicial Commissioner of Lower Burma in *Me On* v. *Ko Shwe O* (1) and in *Ma Me* v. *Ma Myit* (2), that on the death of one parent the eldest child, whether son or daughter, could claim one-quarter of the estate from the surviving parent and that in *Ma Gyi* v. *Maung Po Hmyin* (3), it was practically held that not only the eldest child but the younger children obtain an interest in their parents' estate on the

(1) S. J. L. B. 378.
(2) P. J. L. B. 48.
(3) 8 Ind. Cas. 439; 3 Bur. L. T. 45,

death of one parent—an interest which will be recognized by the Courts.

The arguments on which these rulings are based are, however, vitiated by the fact that mistranslations of the texts from the *Dhammathats* were relied on, as I pointed out in *Mi Saw Myin* v. *Mi Shwe Thin* (4).

The rule as to when the eldest son or the eldest daughter can claim one-quarter of the bulk of the estate has been clearly pointed out by Chan Toon and is as follows: On the death of the father, the eldest son, if competent to take his father's place, can claim one-quarter of the bulk of the estate, because he is so competent. But (as he cannot replace her) if his mother dies before her husband, he cannot claim one-quarter of the bulk of the estate but only certain specified property. Similarly it is only when the mother dies first that the eldest daughter can claim one-quarter of the bulk of the estate: against her mother she can only claim certain specified property, as I pointed out in *Mi Saw Myin's* case (4).

There is ample authority that the rule is as stated. I pointed out some of the authorities in that case and I shall incidentally refer to others when dealing with the next point. I have so far been referring to cases where the surviving parent does not marry again. When there is a re-marriage the case is not so simple. In the present case Ma Yo is said to have married again, and the question is whether her only daughter can on that account claim a share of property which her father inherited during the marriage. Of course, if Maung Lu Pe had pre-deceased his mother, Ma Yo would have no claim to the latter's property and the plaintiff-appellant would be the sole heir, but it is clear that Maung Lu Pe died some years after his mother and so his share of her estate became the *lettetpwa* of himself and his wife.

The learned Counsel for the plaintiff-appellant relies on *Ma Thin* v. *Ma Wa Yon* (5), in which a Full Bench of the Lower Burma Chief Court held that a daughter being an only child was entitled to claim a one-fourth share of her parents joint estate from her mother, when the latter re-married after the father's death. The judgment was delivered by Mr. Justice Birks and he clearly indicated that the question was by no means an easy one. He said that the matter was dealt with in section 44 of U Gaung's Digest in which texts from 12 *Dhammathats* were collected and that of these seven *Dhammathats* allowed the daughter to claim a share whilst the *Manukye*, *Manu* and *Amwebon* were against this rule. I think it likely that there is a misprint in the judgment. There does not appear to be such a *Dhammathat* as the *Minja* and though there is a *Dhammathat* called the *Kaingza* no text from it appears in section 44 and I think it not unlikely that "*Kaingza, Minja*" is a misprint for "*Kungyalinga*." Thus six only of the texts collected in section 44 are apparently in favour of a partition on the mother's marrying again. Mr. Justice Birks apparently overlooked the *Dhamma* when he said that the *Manukye*, *Manu* and *Amwebon* seemed to say that the eldest daughter was merely entitled to a quarter share of the father's clothes and ornaments. So of the 12 texts collected in that section six are in favour of a partition and four against one: the other two do not refer to daughters at all. Furthermore these six texts do not agree amongst themselves as to whether all the children can claim a partition or only the eldest daughter. Mr. Justice Birks also referred to the *Vilosa*, *Rasi* and *Kyetyo Dhammathats* and said that as according to texts from them collected in section 31 the eldest daughter was entitled to one-fourth of the estate on the death of her father, whether her mother married again or not, no texts from these *Dhammathats* appeared in section 44. I shall refer to these *Dhammathats* later.

Mr. Justice Birks did not explain what induced him to accept the rule laid down by the six *Dhammathats* referred to above rather than that laid down by the other four *Dhammathats*; he did not say that he would decide according to the numerical majority and he did not go into the question of the weight to be attached to the individual *Dhammathats* and the *Manukye*, which by common consent has

(4) 15 Ind. Cas. 919; U. B. R. (1912) 1, 125.
(5) 2 L. B. R. 255.

greater weight than any other *Dhammathats* is one of the minority.

After referring to section 44 of the Digest Mr. Justice Birks quoted at length section 159 of the *Attasankhepa Dhammathat* which is certainly in favour of a partition on either parent marrying again, and apparently it was this text that proved the deciding factor, though Mr. Justice Birks did not say so. Beyond saying that as a matter of fact partition of property was usually effected on a second marriage, he gave no reason at all for selecting one rule rather than the other. He merely said, "there is certainly ample authority in the *Dhammathats* for holding that a single daughter is entitled to claim one-fourth share of the joint estate from her mother on the death of the father when the mother re-marries." This is quite correct, but unfortunately there is also ample authority in the *Dhammathats* for holding the contrary and the question is what principles are to be followed in choosing between contradictory texts.

The *Attasankhepa Dhammathat* was compiled by the late Kinwun Mingyi, U Gaung, and is entitled to much weight. No doubt the law as administered when it was compiled was not exactly the same as it was when the earliest *Dhammathats* were written 1,000 years previously. Nevertheless, I believe it is correct to say that the various *Dhammathats* do not really lay down the case-law as it stood at the time they were written, but the opinions of the compilers as to what the law had originally been. Every now and then we come across indications that this is so. There is one in section 44 itself. In the *Yazathat* the compiler, after laying down the rule that the eldest daughter can claim one-fourth of the estate and that the younger children can only get their shares on the death of the surviving parent, goes on to say: "Although the above is the statement of the law in the *Dhammathats*, yet as the surviving parent has not remained single controlling the children as he or she ought to do, the younger children should be given half the deceased parent's share". Thus the compiler first states the law as he believes it to be according to ancient authorities and then says how in his opinion the law ought to be altered. Unfortunately there is nothing to show whether his opinion was adopted; the instances of case-law are few and probably for the most part legendary. Consequently the date of a *Dhammathat* furnishes practically no clue to its authority and the *Attasankhepa* cannot, therefore, claim special authority merely because it is the most modern of all the *Dhammathats*. In the "introduction" to the translation it is stated that the work contains the views of U Gaung on the law as it actually stood at the time of its compilation, but as it is also stated that it was prepared on consideration and comparison of all the available texts, it would appear that the compiler's views were based not on practice but on theory, not on case-law but on ancient texts. The unknown author of this introduction goes on to say: "It (the *Attasankhepa*) is not to be regarded as the ultimate authority on questions of Buddhist Law, but the Courts will find it useful as a work of reference and it may fitly be consulted as explanatory of the older *Dhammathats*."

Now if section 159 of the *Attasankhepa* be read in the light of these remarks, it will be seen that it is an attempt to reconcile numerous very conflicting texts. It must be considered as a commentary and not as an authority in itself and in my opinion, the attempted reconciliation of the conflicting texts is not successful.

How conflicting those texts are was, I think, hardly realized by the learned Judges who decided *Ma Thin* v. *Ma Wa Yon* (5).

For instance the text from the *Panam* cited in section 44 runs as follows: "Children can claim partition of inheritance, when after the death of the father the mother marries again." But the text from the same *Dhammathat* given in section 33 runs: "The daughter living with the mother shall inherit the estate on the death of the mother. She has no right to protest should the estate be exhausted by the mother during her life-time in the maintenance of herself and *her subsequent husband*." Of course, the most natural attempt to reconcile these two texts would be to assume that the first of them refers to children living apart from their parents, and a distinction *is* drawn in the *Attasankhepa* between children who continue to live with their mother

after her marriage and those who live separately, but the rules laid down there apparently have no place in any of the other *Dhammathats*, they are an agglomeration of contradictory texts with the addition of other rules invented apparently for the purpose of harmonizing them. Anyone attempting to reconcile these two contradictory texts from the *Panam* as suggested above would find on reading section 36 of the Digest that his attempt was a failure, because the text from the *Panam* in that section runs as follows: "On the death of the father, the daughter living separately from the parents shall get such property as ornaments and cups used in the performance of a ceremony and given her by both parents at the time of performing it. She should be given a dowry commensurate with the means of the parents, when she is given in marriage and she leaves the parental roof with her husband." Clearly she is not to get one-fourth of the estate.

To take some other *Dhamathat* relied on by Mr. Justice Birks. The following four texts are from *Vilasa*:

Section 34, "Children other than the eldest child are entitled to partition of inheritance only when both parents are dead."

Section 36, "On the death of the father the rule of partition betwen the mother and daughters living separately is as follows: The daughter shall get the property such as gold.....given her ..... when she was young.....On the death of the father the mother alone is entitled to all the property. The daughter living separately can get only what is given her by the mother through affection."

Section 38, "On the death of the father the mother gets the whole estate. The daughters living with the mother shall not get anything while the mother is still living. The mother has the right of use of the estate for life for the maintenance of herself and *her subsequent husband*."

Section 46, "After the death of the husband the wife shall not say to her children that partition shall be made only on her death. The children shall have their inheritance, although she may not marry again."

It will be seem that these texts all from the same *Dhammathat* are hopelessly conflicting: there is no possibility of reconciling them. The *Rasi* on which Mr. Justice Birks also relied is not a whit more consisent. On the other hand the *Dhammathats* which Mr. Justice Birks rejected, *viz.*, the *Manukye*, the *Dhamma*, the *Manu* and *Amwebon* are not self-contradictory and agree with each other. To the texts from these *Dhammathats* quoted in section 44 may be added the following text from the *Dhammathatkyaw* given in section 36: on the death of the father the rule of partition between mother and *eldest* daughter who lives apart from the parents, is as follows:

"The daughter shall get such proprty as necklaces, anklets, bracelets, earrings, hair-pins, gold, silver and slaves and bullocks, buffaloes, lands, etc., given her by both parents, when she was young, at the ceremony of placing her in the cradle, of first tying the hair into a knot, and at the time of her marriage. Such property has become her separate property. She shall also get the property given her when she set up a separate establishment. On the death of the father the mother obtains all the property. Should it be exhausted by her on her maintenance or on that of herself and her subsequent husband or in the performance of works of merit let it be so: the children living with her are entitled to the residue if there is any."

It must be recognized that it is impossible to reconcile the different *Dhammathats* and I think that those of them should be rejected which are inconsistent with themselves. This is obviously necessary, because if it were decided to rely on one of them it would be impossible to decide which of the contradictory texts to accept as binding. The other *Dhammathats* are not self-contradictory and they agree very well with one another, and it is a matter of satisfaction that one of them should be the *Manukye* which has generally been considered to have special authority.

The rule then appears to be as follows:—

1. The eldest daughter can only claim one-fourth of the bulk of the estate, if her mother dies first and she is capable of replacing her mother in the household.

2. Sometimes the eldest daughter on marrying and leaving the parental roof is given

her share of the estate during the life-time of both parents. In that case she has no further claim on the estate.

3. If this has not happened, the eldest daughter on the death of the father is entitled to certain specified property and her mother gets the bulk of the estate, as explained in *Ma Saue Myin* v. *Mi Sham Thin* (4)

4. If on the death of her father the mother marries again, the eldest daughter is further entitled to one-fourth of her father's wearing apparel and ornaments, but her mother still retains the bulk of the estate.

In the *Manukye Dhammathat* there is a further provision that if the mother marries again, the eldest daughter's share of the whole estate shall be publicly made known and shall be kept in the custody of the mother. This clearly indicates that the eldest daughter cannot claim this share during her mother's life-time, and there are so many texts permitting the mother to exhaust the whole of the property in maintaining herself and her second husband, that it seems clear that the eldest daughter does not obtain a vested interest, as defined in section 91 Transfer of Property Act, in this share until her mother's death. It looks as if this provision was meant to safeguard the eldest daughter's share as against her own brothers and sisters and the possible offspring of the second marriage.

I am, therefore, of the opinion that the plaintiff-appellant has not such an interest in the propery sought to be redeemed during the life-time of her mother as is contemplated in section 91, Transfer of Property Act, and that, therefore, the decision of the lower Appellate Court is correct.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 162 OF 1912.

March 5, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

Hakim MUHAMMAD HAMID ALI KHAN —PLAINTIFF—APPELLANT

versus

MUHAMMAD ASGHAR ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Sale-deed of mortgagee rights—Consideration, whether mortgagor can question the passing of—Sale-deed, necessity not mentioned in, effect of.

If the assignee of a mortgagee right brings a suit on the basis of the mortgage, the mortgagor or his transferees cannot question the passing of the consideration of the assignment between the mortgagee and the plaintiff. [p. 828, col. 1.]

Ahmad-ud-din Khan v. *Sikandar Begam*, 18 A. 256; A. W. N. (1896) 52, referred to.

The absence of any mention of necessity in the bond on which the loan is taken is no ground for holding that the transaction is fictitious. [p. 827, col. 2.]

First appeal from the decision of the Subordinate Judge of Bareilly, dated the 19th February 1912.

Mr. *B. E. O'Conor*, (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant to enforce a mortgage said to have been given by Hakim Vilayat Ali Khan, a large landed proprietor of Aonla, to one Nazir Ali in 1895. The deed of mortgage purports to have been executed on August 30th, 1895, on behalf of Hakim Vilayat Ali Khan by Daud Ali under a special power-of-attorney. The plaintiff-appellant claims to have purchased the mortgagee rights of Nazir Ali by a sale-deed dated January 24th, 1900. Hakim Vilayat Ali Khan and Nazir Ali are both dead. The claim was brought against eight persons, the first two of whom are legal representatives of Hakim Vilayat Ali Khan, the third is the purchaser under a private sale-deed of a portion of the mortgaged property, the fourth, fifth and sixth are auction-purchasers of another portion, and the last two are the legal representatives of Nazir Ali. One of the latter died during the pendency of the suit and his heirs were brought on the record by an order dated February 25th, 1911. The first six defendants contested the suit on various grounds. They denied the genuineness of the mortgage of 1895 and the sale of 1900 as also the special

authority of Daud Ali. They further pleaded that the mortgage in suit was effected by Daud Ali in collusion with Nazir Ali for no consideration without the knowledge of Hakim Vilayat Ali Khan, and that if it was executed by the latter, he executed it to defraud his creditor, Rai Durga Prasad, the ancestor of defendants Nos.4 to 6. It was also alleged that no consideration passed on the mortgage in suit or on the sale-deed of January 24th, 1900. The learned Subordinate Judge of Bareilly in whose Court the suit was filed, while upholding the special authority of Daud Ali and the execution of the mortgage-deed of 1895 and the sale-deed of 1900, found that both were "bogus and paper transactions." He was of opinion that in the present case where the plaintiff was enforcing a mortgage against *bona fide* purchasers for value who denied its genuineness, it was for the plaintiff to prove in the first instance both the execution and the *bona fide* character of the deed; that the recital in the deed of 1895 as to the passing of consideration was no evidence against the purchasers who were third parties; that the indebtedness of Hakim Vilayat Ali Khan, the absence of any mention of the necessity for which the loan in suit was taken, the want of proof of passing of consideration on the the deeds of 1895 and 1900 (the evidence on the point having been disbelieved), the doubtful means of Nazir Ali to advance a sum of Rs. 5,000 and the sale of the mortgagee rights to a close relative of the mortgagor these were the reasons which made the learned Subordinate Judge hold that the transactions of 1895 and 1900 were fictitious. He accordingly dismissed the claim. The plaintiff has preferred this appeal. He contends that he has proved the genuineness of the mortgage in suit as also of the sale of 1900. In fact as to the latter he maintains that the question of the passing of consideration does not arise in the present case as between himself and the contesting defendants. The question of the character of the transactions of 1895 and 1900 depends upon the credibility of the evidence. To take up the mortgage in suit first. It was executed, as has already been remarked, by Daud Ali on behalf of Hakim Vilayat Ali Khan under a special power-of-attorney. Daud Ali has been examined and he deposes to the execution of the mortgage and the receipt of Rs. 5,000. One Nazir Husain deposes to the same effect. He swears that Rs. 5,000 were paid in his presence as consideration for the mortgage. There is nothing in the evidence of Daud Ali or Nazir Hussain to make us discredit it. The defendants-respondents would, however, ask us to reject the evidence of Daud Ali and Nazir Hussain for the reasons given by the learned Subordinate Judge. It is said (1) that if Hakim Vilayat Ali Khan executed the mortgage in suit he executed it with the object of defrauding his principal creditor, Rai Durga Prasad, and that is borne out by the heavy indebtedness of the Hakim; and that as a matter of fact the Hakim never executed the mortgage. Daud Al in collusion with Nazir Ali, a man of straw, fabricated the deed and practised a fraud on the Hakim. In support of the latter allegation the defendants-respondents examined three witnesses, namely, Sarup Narain, Ram Chander and Sheo Chand. The last two state that they saw a notice in the possession of Daud Ali from the Hakim calling upon the former to return the mortgage-deed of Nazir Ali. Ram Chander also says that he saw a draft of a plaint on behalf of the Hakim by which the cancellation of the mortgage-deed of Nazir Ali was sought. He admits that he saw the draft of the plaint in 1910 at the house of his master in the possession of one Wahid Ali Khan, a nephew of the Hakim, and the notice two years after in 1912. Daud Ali showed him the notice, because he, Daud Ali, wanted to sell himself and make money, as the production of the notice would have been a complete answer to the claim of the plaintiff. Ram Chander is a servant of the defendants-respondents Nos. 4 to 6, the sons of Rai Durga Prasad, and his evidence is not disinterested. Besides his evidence, even if credible, is not conclusive. He does not say that the drafts of the notice he saw bore the signature of the Hakim. If Daud Ali is a person of such a character as Ram Chander makes him out to be it is quite conceivable that Daud Ali showed a forged notice purporting it to be, from his former master in order to make some money from the defendants-respondents Nos. 4 to 6. But it is scarcely credible that Daud Ali would venture to play such

a trick after having given evidence on oath almost two months before in support of the genuineness of the deed of 1895. He was examined as a witness for the plaintiff on November 17th, 1911, and according to Ram Chander the draft of the notice was shown to him on January 4th, 1912. Wahid Ali Khan who is said to have shown the draft of the plaint has not been examined on behalf of the defence. The other witness, Sheo Chand, is a man of no status. He was at one time in the service of Durga Prasad and on his own admission he is a mere acquaintance of Daud Ali. He also says that Daud Ali showed him the notice and a letter from the Hakim with the object of getting him, the witness, to persuade the defendants-respondents to buy them. The witness was promised 10 per cent. on the decree presumably in favour of the defendants-respondents Nos. 4 to 6. The same remarks apply to the evidence of Sheo Chand as to that of Ram Chander. Sheo Chand deposes to a letter which he saw in possession of Daud Ali from the Hakim. The letter was to the effect that Daud Ali was to obtain a sale-deed of the mortgagee rights of Nazir Ali in favour of the plaintiff, because Durga Prasad had taken out execution of his decree. Now such letter, if genuine, would be inconsistent with the allegation of the fabrication of the mortgage in suit by Daud Ali. The witness does not say what date the letter bore or that it was signed by the Hakim. He says that he saw the letter three years ago, that is, some time in February 1909. It is not shown that any decree of Durga Prasad was in execution at that time. Besides it is difficult to see how the decree of Durga Prasad could be defeated by the assignment of the mortgagee rights of Nazir Ali to the plaintiff. The evidence of Ram Chander and Sheo Chand Rai is both inconclusive and unreliable. The evidence of Sarup Narain, Pleader, is much too vague to base on an inference that Daud Ali fabricated the deed of 1895. We, therefore, hold that the mortgage of 1895 was executed by Hakim Vilayat Ali Khan. The arguments advanced for the defence against its genuineness are also, in our opinion, of no force. The chief argument is the indebtedness of the Hakim at the time the mortgage was given. As there was no satisfactory evidence on the record about his financial condition, we remitted two issues to the lower Court for trial by which findings on the indebtedness of the Hakim and the value of his estate were called for.

The lower Court has now returned findings on the issues to the effect that the Hakim was indebted in 1895 to the extent of Rs. 89,000 including some doubtful debts, and that his estate at that time was worth Rs. 2,75,000. It has not been shown to us on behalf of the defence that the debts of the Hakim amounted to a larger sum than that found by the Court below. As to the valuation of his estate, even if the valuation arrived at by the lower Court be not accepted, that given by the defence would show that the Hakim was not in financial difficulties in 1895. According to the defence the value of the Hakim's estate in 1895 was Rs. 1,77,682. It cannot be said that a man who has an estate of that value and is indebted to the extent of about Rs. 90,000 only creates a mortgage for Rs. 5,000 in order to defeat his creditors. The absence of any mention of the necessity for which the loan was taken is no ground for holding that the transaction was fictitious. A man of the position of the Hakim would not proclaim his private affairs by mentioning the need in the bond for raising the loan. The allegation that Nazir Ali was a man of no means has not been made out by the defence. It is true that four bonds have been produced on behalf of the defence which go to show that Nazir Ali with some other persons from March 1895 to December 1895 borrowed small sums. This evidence, if not explained would, no doubt, make it questionable whether Nazir Ali could advance such a large sum as Rs. 5,000 in 1895. But his brother, Ali Nabi, who has been examined in the case gives a satisfactory explanation of the said bonds. He says that his brother, who was *Nazir* in the Rampur State and through whom the salaries of the petty officials of the State used to be paid, used to stand surety for the said officials when they raised small loans. The creditors always asked him to stand surety as he could guarantee to them the re-payment of the loans by deducting from the salaries of the debtors the amount of the loans. The evidence of Daud Ali and Nazir Husain proves that consideration passed on the mortgage in suit and, as we have said before, we see no reason to reject

their evidence. Besides the mortgage was put forward in 1908 in the life-time of the Hakim in execution of the decree against him by Durga Prasad and it was not denied by the Hakim. We hold that the mortgage in suit was genuine and for consideration.

As to the sale-deed of 1900 its execution is not disputed. The objection is that no consideration passed on it. Mumtaz Hussain, a marginal witness to the sale-deed in question, has been examined for the plaintiff and deposes to the passing of consideration. He has not been believed by the lower Court, because in its opinion the sale of 1900 was a part of the fraud that originated with Daud Ali in 1895. The lower Court considered the evidence of Mumtaz Hussain not on its own merits, but in the light of the circumstances which in its opinion showed the mortgage transaction of 1895 to be fraudulent. As it has been shown that the said circumstances do not exist and do not prove the transaction of 1895 to be fictitious, the objection to the evidence of Mumtaz Hussain disappears. We see no reason to discredit his evidence and find it proved that consideration passed on the sale of 1900. Besides the failure of consideration on the sale in question would not defeat the claim of the plaintiff. The question of consideration on the sale is one that concerns the vendor of the plaintiff and his representatives have not denied the receipt of consideration. The defendants-respondents cannot raise the question in the present case, *vide Ahmad-ud-din Khan* v. *Sikandar Begam* (1).

We, therefore, allow the appeal, reverse the decree of the lower Court and decree the claim of the plaintiff for the amount claimed up to the date of suit, with costs in both Courts including in this Court fees on the higher scale. In default the property will be sold. The usual decree under Order XXXIV, rule 4, will be prepared. We allow six months from this date for the payment of the money. Interest at the contractual rate is allowed up to the date of payment. Considering the great delay in bringing the suit we allow no interest after the date fixed for payment.

Appeal allowed.

(1) 18 A. 256; A. W. N. (1896) 52.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 218 OF 1912.

February 1, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

NARAYANAN CHETTIAR—PLAINTIFF—APPELLANT

versus

RATNASABAPATHY AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Plaint, amendment of—New cause of action set up—Amendment not allowed—New relief but on facts already alleged, ground for amendment.

An amendment of a plaint should not be permitted when it entirely changes the cause of action and when the suit, if brought on the plaint as amended, would be barred by limitation. But there is no bar to an amendment where it does not set up a new cause of action but prays only for an additional relief, based on facts already alleged in the plaint. [p. 829, col. 1.]

Sevugan Chetty v. *Krishna Aiyangar*, 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139; *Kumara Venkata Perumal* v. *Velayuda Reddi*, 24 Ind. Cas. 195; 27 M. L. J. 25; *Weldon* v. *Neal* (1887) 19 Q. B. D. 394 at p. 396; 56 L. J. Q. B. 621; 35 W. R. 820, distinguished.

Periasami Mudaliar v. *Seetharama Chettiar*, 27 M. 243; 14 M. L. J. 84; *Mohumud Zahoor Ali Khan* v. *Musammat Thakooranee Rutta Koer*, 11 M. I. A. 468 at p. 485; 9 W. R. (P. C.) 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320; 20 Eng. Rep. 177, followed.

Second appeal against the decree of the District Court of the North Arcot in Appeal Suit No. 51 of 1909, preferred against that of the Court of the District Munsif of Vellore in Original Suit No. 251 of 1907.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.—The plaint, as originally presented, asked merely for a declaration that the decree obtained by the plaintiff in Original Suit No. 295 of 1901 against the father of the defendants was binding on the defendants. Subsequently a prayer was allowed to be added by way of amendment of the plaint. The prayer so added asked for a direction that the defendants do pay the amount of the said decree.

The lower Courts have held that the suit was barred because at the date of the amendment the decree was more than six years old and a suit, such as the present suit became after the amendment, would have been barred, had it been instituted at the date of amendment. *Periasami Mudaliar* v. *Seetharama Chettiar* (1).

(1) 27 M. 243; 14 M. L. J. 84.

In our opinion the lower Courts have misunderstood the law applicable to the facts before them. The plaintiff did not seek to plead any new facts when he applied for leave to amend the plaint. All he desired to do was to be allowed to ask for a fresh relief on the facts already pleaded. The relief that has to be granted on the facts alleged and proved has to be fixed by the Court and we agree with the decision in *Sevugan Chetty* v. *Krishna Aiyangar* (2). The first portion of the judgment in that case is applicable to the facts of the present case without any material alteration.

Our attention has been drawn to the remark made in *Kumara Venkata Perumal* v. *Velayuda Reddi* (3) by the present Chief Justice (then Wallis, J.) with reference to the decision in *Sevugan Chetty* v. *Krishna Aiyangar* (2). That remark is based on *Weldon* v. *Neal* (4). As the lower Appellate Court has also referred to that decision we may point out that Lord Esher, M. R., qualifies his opinion by saying that as a general rule, it would be, in his opinion, improper and unjust to allow an amendment setting up a new cause of action, a writ in respect of which cause of action would be barred at the date of the amendment. He goes on to state that there were no peculiar circumstances of any sort to constitute the case he was deciding an exception to the rule he stated. The Lords Justices agree with the Master of the Rolls. There is no reason why what is stated as a general rule (evidently admitting an exception) in cases where a new cause of action is set up, should be given effect to as a rigid principle to be invariably applied and why it should, moreover, be applied to a case where no new cause of action is being set up but a relief that was omitted in the first instance is added. In *Mohummud Zahoor Ali Khan* v. *Musammat Thakooranee Rutta Koer* (5), their Lordships of the Privy Council, far from referring to the bar of limitation as an absolute answer to any application for amendment, refer to the fact that the plea of limitation would be set up as a defence to a new suit, and make that their reason for permitting the amendment.

We will, therefore, reverse the finding of the lower Appellate Court on the 4th issue and remand the case for being disposed of in accordance with law. The respondent will be entitled also to have his memorandum of objections heard and determined if he so desires. Costs will abide the result.

Appeal allowed; Case remanded.

(2) 13 Ind. Cas. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.

(3) 24 Ind. Cas. 195; 27 M. L. J. 25.

(4) (1887) 19 Q. B. D. 394 at p. 396; 56 L. J. Q. B. 621; 35 W. R. 820.

(5) 11 M. I. A. 468 at p. 485; 9 W. R. (P. C.) 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320; 20 Eng. Rep. 177.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 321 OF 1912.

February 9, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Hannay.

Srimat PARAMAHAMSA PARASAMAYA KOLARINATHA SRI RAJA RATNA SWAMIGAL MATADHIPATHI—PLAINTIFF—APPELLANT

versus

YAVADRAKSHAKI AMMAL, DECEASED, AND OTHERS—DEFENDANTS—RESPONDENTS.

Religious endowment—Head of a mutt—*Succession—Custom of election to be definitely proved.*

There is no presumption with regard to the properties in the possession of the head of a *mutt* either that they are or are not *mutt* properties. [p. 831, col. 1.]

Setharamaswamy Iyer v. *Meruswami Iyer*, 4 Ind. Cas. 76; 20 M. L. J. 108; 34 M. 470; 6 M. L. T. 319, followed.

In order to succeed in a suit for declaration that the plaintiff is the properly elected *matadhipathi* of a *mutt* the custom of election for the office must be definitely established. [p. 831, col. 2.]

Vidyapurna Tirtha Swami v. *Vidyanidhi Tirtha Swami*, 27 M. 435; 14 M. L. J. 105, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Original Suit No. 12 of 1911.

FACTS.—One Raja Ratnaswami brought a suit for declaration that he was the properly constituted *matadhipathi* of Parasamaya Kolam *Mutt* in Tinnevelly having been duly elected by the *sishyas* of the *mutt*, *viz.*, the five classes of the Viswa Brahma descendants throughout the Presidency. The plaintiff's case was that the last holder of the *adheenam*, one Muthukumaraswami, died in 1904, his wife at the time being pregnant. She gave birth to a child who died three months later. Ten days after the child's death she con-

sented to the *adheenam* being managed by a committee of 17 members, seven of whom were to go about the Presidency to choose a proper boy for the *adheenam* to be adopted. The plaintiff was chosen in 1906. His *acharya abhishekam*, his marriage, and *makutabhishekam* were performed in 1910 whereby he became head of the *mutt*.

The 5th defendant, the principal defendant in the case, contended that he was the properly constituted *swami* having been adopted by Muthukumaraswami's widow in 1910. He further contended that Muthukumaraswami's widow adopted a boy in November 1905 under an authority to adopt given by Muthukumaraswami before his death, that that son died, empowering his mother to adopt the fifth defendant, and that he was consequently adopted in 1910. He also pleaded that the suit property was the private property of Muthukumaraswami and, therefore, descended to him, the 5th defendant, as his heir.

The lower Court agreeing with the contention of the defendant held that Muthukumaraswami was only a priest of the *Viswakarma* caste, that the plaintiff had not made out that election was the proper mode of selecting the *matadhipathi*, that even if it was, the usage to select the *matadhipathi* by the *sishyas*, the plaintiff was not duly elected and that the 5th defendant was duly adopted by the widow of Muthukumaraswami. On these findings, the Subordinate Judge of Tinnevelly dismissed the suit with costs.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant, contended that the pleadings and issues proceeded on the ground that there was a *muttam* and *adheenam* and that the plaint properties were endowments attached to the *muttam*. He further urged that the plaintiff was elected by the majority of *sishyas* as was the usage, as understood by the *Viswakarma* caste, of the plaint *mutt*.

Mr. *K. Srinivasa Aiyangar*, with Mr. *C. A. Seshagiri Sastri*, for the Respondent, argued *contra*.

JUDGMENT.—The first question to be decided in this appeal is, to use the language employed by Subramania Aiyar and Davis, JJ., in Appeal No. 12 of 1903, whether the deceased Muthukumaraswami was the occupant of a religious foundation to which the properties in his possession were attached as endowment. That appears to us to be an accurate way of stating the issue, whether in this case it has been proved that there was a *mutt* owning the suit properties or some of them. If that question be decided in the affirmative, the next question which arises is whether the present plaintiff has proved his right to succeed to the *mutt* and the *mutt* properties.

The Subordinate Judge in a very lengthy and careful judgment has found practically that there was no religious endowment in this case at all, that the deceased was the *guru* or spiritual head of the large body of some two hundred thousand people in various parts of the Presidency who styled themselves *Panch Brahmans*, but that the property which he enjoyed was the private property of his family. There is no doubt that this office has descended from father to son for some time in this family, and that when this Muthukumaraswami died in 1904 his wife was expecting her confinement and nothing was done to fill up the vacancy until her child died shortly after its birth in October 1905. As I say, the Subordinate Judge has found that the property was the private property of the family. If that be so, the plaintiff would clearly have no right to succeed. On this point we find considerable difficulty in agreeing with the Subordinate Judge. The evidence which goes back as far as the year 1779, the date of Exhibit SS, in our opinion goes to show that there was a religious foundation here which was possessed of property and that part, at any rate, of the suit property belonged to that foundation. Exhibit SS is a deed affecting some land said to adjoin the present *mutt* in Tinnevelly and one of the boundaries given is "the site given by us" (*i. e.* the temple) "to Parasamaya Kolarier," which is the religious name of this priest. Then in 1825 by Exhibit DDD-2 fourteen persons were appointed to look after his affairs. In Exhibit QQ his position is recognized and Exhibits GGG-1, and GGG 2 of the year 1848 are *pattas* which were granted to the *mutt* and which show that at that time the suit lands stood in the name of the *mutt*, and we think this evidence is entitled to considerable weight when taken with the other evidence. Then we find the *mutt* buildings being executed by public subscription (Exhibit HHH) and then Exhibit EEE of the year

1868 is the account of the repairs to the shrine of the *Swami* belonging to the *mutt* of this priest. In Exhibit YY in the year 1889 the late Muthukumaraswami pleaded that he "possessed a *mutt* from time immemorial to which the plaint land belonged" and Exhibit TT shows that he successfully secured exemption from payment of income tax, which could only mean that he came within the exception to section 5 (*e*) of the Act, on the ground that his income was derived from property solely employed for religious or public charitable purposes. In Exhibit Q of the year 1904 he pleaded that the emoluments were attached to the hereditary office. Mr. Ramachandra Aiyar also relies upon the fact that the evidence shows that the property descended by primogeniture, which negatives the contention that they were private property. As regards this it has been held in a case, *Setharamaswamy Iyer* v. *Meruswami Iyer* (1), to which I was a party, that there is no presumption with regard to the properties in the possession of the head of the *mutt* either that they are or are not *mutt* properties. But there is sufficient evidence in this case as to some of these properties. The plaint lands as to which there are *pattas* exhibited would appear to be *mutt* property. On the other hand the recital in Exhibit W does not show that the property acquired under it was acquired to the *mutt*. Then there are some *sorandai* lands in the plaint which we are inclined to think are *mutt* properties, because the evidence of the *patta* shows that the *mutt* had properties in that village and it is not shown that these are not *mutt* properties or that they were acquired in any other way. Some reliance was placed on the evidence of P W. No. 7 on behalf of the defendant. But we do not think that it amounts to much against the plaintiff's case on this point. If it were necessary we should be disposed to hold for the purposes of this case that this is an undoubted religious institution and that certain of these properties belonged to it.

But assuming this to be so, it is necessary for the plaintiff to establish that he is the properly elected head of the *mutt*. That is a question of some difficulty, but having very carefully considered it, we have come to the conclusion that there is not sufficient ground for differing from the conclusion which the Subordinate Judge has arrived at in paragraphs 33 and 34 of his judgment that the plaintiff has not proved either the custom of election by the *sishyas* or disciples, or that he was in fact elected by a majority of the *sishyas*. Reliance has been placed upon a passage in the well known judgment of Bashyam Aiyangar, J., in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha swami* (2), in which he lays down that in default of nomination in the usual way, election falls to the disciples. But he was speaking there of a *sanyasi mutt*, a *mutt* of a very different type to this. Here the *sishyas* or disciples are said to number about two hundred thousand people spread all over the Presidency and there is no evidence of their ever having exercised the right of election and we think, as the record in the case sufficiently shows, that there are great practical difficulties in the way of their exercising it. What happened was that in 1904 the widow of the deceased Muthukumaraswami, while she was expecting the birth of a child, sent out a notice asking for subscriptions to repair the *mutt* and asking the disciples to be present at a meeting to make arrangements to look after the affairs of the *mutt* (Exhibit B). On the 26th October 1905 shortly after the death of the child which was born to her, she issued a notice (Exhibit C) in which she proposed that at as early a date as possible a *swami* of tender age should be selected and adopted for the said Gurupeetam from a family possessing high character and learning and that a *karbari* should be appointed to easily collect the yearly *kanikkai* or offerings. Then, Exhibit C says, a meeting had been called, that there was a large attendance of men from the villages adjoining the Tinnevelly *adheenam*. This is signed by her and by a large number of people. However, four days after sending this notice she sent a notice to the Collector saying that she had adopted a son pursuant to the orders of her husband and that she enclosed a copy of his Will (Exhibit S). Subsequently in Exhibit R-2 she denied ever having made an adoption;

(1) 4 Ind. Cas. 76; 34 M. 470; 20 M. L. J. 108; 6 M. L. T. 319.

(2) 27 M. 435; 14 M. L. J. 105.

and in the present case only two witnesses are called to speak to an oral authority to adopt and there is no evidence as to this Will, a copy of which she purported to read to the Collector. Obviously that is a fact which must tell greatly against the case of adoption now set up. But the question in this case is whether the plaintiff has established his right to the succession. On the 19th November 1905 a *yadast*, Exhibit D, was signed by this senior widow and the other widow "agreeing to abide by the action that might be taken by the residents of the town in selecting another *guruswami* and *karbari* for the management of all the other affairs pertaining to the *adheenam*." Then replies to Exhibit C were received, Exhibit E series, most of which agreed to the proposal that some boy was to be selected. Exhibit C says that he was to be selected for adoption and the defendants contend that this means "for adoption by the widow." Then on the 28th December 1905 (Exhibit F) there was a meeting of the disciples in which it was decided that it was necessary that a *swami* should be adopted for the *adheenam* and that he must be a child of tender years and that the people in the villages in Tinnevelly should make the necessary arrangements and that others too should report to them and information should be sent all round about it and "thus a decision shall be arrived at upon the approval of the people by a meeting to be convened". That is to say, practically the *swami* was to be chosen and subsequently approved by the people at a meeting to be convened. In Exhibit J, on the 22nd January 1906, the widow complained that they had done nothing and urged them to hurry up. At length on the 12th December 1906 (Exhibit K) the committee appointed under Exhibit F reported that they had selected a boy, the plaintiff. On the 18th December six days later the widow appears to have issued a counter-notice, which is not exhibited, disputing their right to appoint and announcing that she had herself appointed one Minakshisundaram, who died before the institution of the present suit. This was followed by Exhibit M and Exhibits O series, in which these people complained of the widow questioning what had been done by them and disputed this adoption and set up the rights of the plaintiff. During the life-time of Minakshisundaram some members of the caste instituted a suit for an injunction to prevent Minakshisundaram from being married in the capacity of head of the *mutt* and to remove the obstruction to the plaintiff's marriage in the *mutt* and this suit abated owing to the death of Minakshisundaram, and that led to the present suit. We have considered very carefully whether we could come to the conclusion that this custom of selection was proved in the case or that there could be said to have been a selection or acceptance by the caste of the plaintiff as the head of the *mutt*. Speaking for myself, I am rather inclined to regret that is not possible to do so. I should have been glad to find it in the affirmative if I thought the evidence justified it, because it would settle the matter finally, whereas a contrary finding would lead to disputes. But we regret to say that we do not feel it possible to differ from the conclusion at which the Subordinate Judge has arrived, that the custom is not proved. There is no instance of anything of the kind having occurred before and even if we were to raise a sort of implied custom, there is not sufficient evidence to prove, as the Subordinate Judge has found, that the present plaintiff has been elected by the majority of the caste. The effect of the evidence is set out in paragraphs 33 and 34 of the Subordinate Judge's judgment and it is unnecessary for us to re-state it. On the whole, therefore, we think that the appeal fails and must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 304 OF 1912.

February 23, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

THE TINNEVELLY SIVA DEVASTHANAM COMMITTEE, THROUGH ITS MEMBERS N. PIRAMANAYAGAM PILLAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sri AMBALAVANA PANDARA SANNADHI AVERGAL AND ANTOHER—DEFENDANTS—RESPONDENTS.

Religious Endowments Act (XX of 1863), s. 3—Trustee, nomination of, by head of Thiruvaduthurai Mutt—*Recognition of appointment by Government and Committee—Accounts, submission of, to Government and Committee, whether evidence of right of appointment of trustee in Committee.*

In a suit by a Temple Committee for a declaration that the suit temple was subject to its control and should be managed by a trustee appointed by it, the plaintiff Committee must prove that the right of appointing the trustees was vested in it. Merely showing that the Government officials exercised supreme control over the management of the temple would not be enough. [p. 834, col. 2.]

In the absence of other evidence, the fact that the Government have appointed trustees is insufficient to prove the right of appointment. [p. 834, col. 2.]

A wrongful assumption by the Government of the power to appoint a trustee is not sufficient to bring a temple within section 3 of Act XX of 1863. [p. 834, col. 2.]

The mere fact that a man styled himself a trustee is no evidence of management by him. [p. 835, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Original Suit No. 55 of 1910.

FACTS of the case appear clearly from the judgment.

Messrs. *S. Srinivasa Iyengar* and *A. Swaminatha Iyer*, for the Appellants:—There is no evidence that the trusteeship was vested in the Pandara Sannadhi of the *Thiruvaduthurai Mutt* before 1842. At about that time trustees were appointed by the Government, though at the recommendation of the Pandara Sannadhi. Subsequently also every appointment was similarly made. From 1864 to 1898 the management was carried on under the supervision of the Committee. The right of appointment is vested in the Committee as the temple comes under section 3 of Act XX of 1863.

Messrs. *T. Rangachariar* and *S. Muthia Mudaliar*, for the Respondents, argued *contra* and contended that there was no evidence to show that the right was vested in the Committee and that the acts relied upon did not amount to an exercise of the right of appointment but only to a recognition for revenue purposes of the appointment by the Pandara Sannadhi, who alone had the right to appoint a trustee.

JUDGMENT.—The plaintiffs, the Siva Devasthanam Committee of Tinnevelly, appeal against the decree of the Subordinate Judge of Tinnevelly dismisssing their suit brought for a declaration that the temple of *Sri* Subramaniaswami at Kurukkathurai in Tinnevelly is subject to their control and superintendence and should be managed by a trustee appointed by themselves.

The Subordinate Judge found that before the year 1842, there is no evidence that any trustee was appointed by Government, that the trusteeship was vested in the *Thiruvaduthurai Mutt* of which the defendant is the head and that the management was carried on by the agents of the *mutt* living at Isanamatam. In 1842, one Sundaralinga Thambiran and Ramalinga Pillai, who were respectively the local agent of the *Thiruvaduthurai Mutt* and his accountant, were appointed managers and the management of the temple was in their hands. In 1852 Sundaralinga Thambiran, on account of old age, gave up the management and the Pandara Sannadhi of the *mutt* appointed one Muthia Thambiran to manage the affairs of this *adhinam*. The Government officials recognized him as the manager of the temple and took a *muchilika* from him. When the Act XX of 1863 came into force, the Pandara Sannadhi asserted his claim to the Dharmakartaship, though his agents were submitting the temple accounts to the Committee then appointed under the Act from 1865. In 1885 one Saminatha Thambiran was appointed by the Pandara Sannadhi to succeed Muthia Thambiran. That appointment also was recognised by the Committee from 1885 to 1895. Saminatha Thambiran continued in management and he submitted the usual account to the Committee and carried on the management under the superintendence of the Committee. Saminatha Thambiran died in 1897 and Vythialinga Thambiran was appointed by the Pandara Sannadhi

to manage the temple and that appointment was recognized by the Committee in 1898. No accounts were sent to the Committee after the death of Saminatha Thambiran and from that time there were disputes between the Committee and the Pandara Sannadhi. These are the facts found by the Subordinate Judge.

On appeal before us, it is contended that there is no evidence that the trusteeship was vested in the Pandara Sannadhi before the year 1842, that in 1841-42 three trustees were appointed by the Government when the Revenue Board divested themeslves of the management of the temple, that Muthia Thambiran, Saminatha Thambiran and Vythialinga Thambiran were only recommended for appointment by the Pandara Sannadhi of Thiruvaduthurai but that the appointment itself was made by Government officials, that from 1864 to 1898 the management was carried on entirely under the supervision of the Committee, and that a fair inference, therefore, from the evidence is that the right of appointment of the trustees was in 1863 vested in the Government or that the appointment could be made only subject to their approval. It is argued that the temple, therefore, falls within the scope of section 3 of Act XX of 1863, and is, therefore, subject to the control of the Committee. That the Isanamatam at Tinnevelly was entirely under the control and superintendence of the *Thiruvaduthurai Mutt* is not denied. In 1807, the *inam* register shows that it was the Kaviraj Thambiran of this *mutt* who received the money payable to this temple from the Government. His successor was one Nagalinga Thambiran, also of the Isanamatam. He was succeeded by one Namasivaya Thambiran also of the Isanamatam. The title-deeds of properties belonging to the temple stood in the names of these Thambirans. In 1841-42 the Revenue Board gave up the management of these temples which were till then under their control and they took a *muchilika*, Exhibit B, from three persons, Sundaralinga Thambiran, his accountant, Ramalinga Pillai, and Kanthimathinatha Pillai, as the *dharmakartas* on the 1st September 1842. We are not prepared to attach much weight to acts of interference by the Revenue Officials till that time, because it appears that in the Tinnevelly District their control and interference extended "almost over everything connected with the Pagoda, from the collection of its revenues from whatever source derived and the management of its lands to the regulating of its daily usual expenses, its periodical festivals, its repairs." It appears also that the "accounts in detail, including every item of receipt and expenditure, were kept and controlled and the appointment and dismissal of the temple servants were made by the officers of Government." This appears from the Collecter's letter, dated 22nd April 1842, to the Board of Revenue. Though the Government officials thus exercised supreme control over the temple management, the plaintiffs have to prove that the right of appointing trustees was vested in them. In cases that have come before this Court, *cf.* Second Appeal No. 644 of 1884, we have held that though there was evidence that the Government appointed the trustees, that is in itself insufficient to prove the right of appointment in the absence of other evidence, because, under the Common Law, the Sovereign's right to appoint trustees was recognized when there were not found persons competent to make such appointment. A wrongful assumption by the Government of the power to appoint a trustee is not sufficient to bring the temple within section 3 of Act XX of 1863. In this case there is no evidence whatever of any intervention by Government in the appointment of a trustee before 1842 and it is matter for fair comment that in a district, where, according to the opinion of the Collector, interference was so general, there is no evidence of such interference in the matter of the appointment of the trustee. As to what took place in 1842 there is dispute between the parties. The plaintiffs have filed a *muchilika* to show that the Government appointed three trustees, Sundaralinga Thambiran of Isanamatam, his accountant, Ramalinga Pillai, and Kanthimathinatha Pillai. Kanthimathinatha Pillai was undoubtedly a stranger. His appointment, therefore, supports the contention of the plaintiffs. But it is argued on behalf of the defendant that he never acted as

trustee and that the only two men who were really appointed trustees and acted as such were Sundaralinga Thambiran and Ramalinga Pillai. Kanthimathinatha Pillai died a few years after appointment. It is not suggested that in his stead any successor was appointed. When certain disputes arose after his death between Ramalinga Pillai, one of the trustees, and the other trustee in 1855, the *muchilika* under which they were acting was stated by the officials to have been executed on the 15th August 1842 and was referred to as the "*muchilika* executed by these two persons, *viz.*, Sundaralinga Thambiran of Isanamatam *Ilaka* and Ramalinga Pillai, accountant of the said *mutt.*" This was the *muchilika* submitted by the Tahsildar to the Collector and returned afterwards by the Collector to the Tahsildar. There is no suggestion of any *muchilika* like Exhibit B. When a successor was appointed in 1855, the *muchilika* that was cancelled was that of the 15th August 1842. See Exhibit V. The only evidence that has been referred to by the appellants' Pleader to prove Kanthimathinatha Pillai's management is Exhibit C. That is an order by the Collector, apparently to the Tahsildar, forwarding a petition presented by the "*Darmakarta* Kanthimathinatha Pillai, etc." It is possible that this man may have styled himself *dharmakarta* but it is not evidence of any management by him. We have also a report of a Tahsildar in 1852 (See Exhibit H) that Sundaralinga Thambiran and Ramalinga Pillai were the persons appointed for the management of the temple and that they were in management. Considering that it was the Thambirans of Isanamatam who managed the temple before 1841, and it is only those connected with the Isanamatam who have been shown to have managed the temple affairs subsequently and the other two trustees named in Exhibit B were a Thambiran and an accountant of Isanamatam and that there was a *muchilika*, dated August 1842, recognizing these two alone as Pandara Sannadhis, we are not prepared to hold on the strength of Exhibits B and C alone that Kanthimathinatha Pillai acted as a trustee.

The next appointment was made in 1852. Sundaralinga Thambiran and Ramalinga Pillai were managing the temple affairs till that date. Sundaralinga Thambiran desired to retire and he said that he had represented to the *Thiruvaduthurai Mutt*, * * * * * * *, to appoint a manager in his place and that the latter had appointed Muthiah Thambiran to succeed him; Sundaralinga Thambiran, therefore, prayed "that orders should be issued directing removal of his name and entry of his (Muthiah Thambiran's) name instead, and payment to him of the *paditharam*, etc., amounts." The Collector accordingly directed that a *muchilika* should be taken from Muthia Thambiran. No *muchilika* from him is, however, produced. This was clearly no appointment by the Collector, but only a recognition of the appointment made by the Pandara Sannadhi.

What followed next supplies still stronger evidence against the plaintiffs. Ramalinga Pillai had ceased to be an accountant in Isanamatam in 1843, but he continued to co-operate with Sundaralinga Thambiran in signing with him receipts for allowances paid by Government. When Muthia Thambiran was appointed, the latter declined to co-operate with Ramalinga Pillai, who had ceased his connection with Isanamatam. Muthia Thambiran claimed that he alone should be recognized as manager and all payments should be made to him, as Ramalinga Pillai's name was entered in the *muchilika* on account of his being an accountant of the Isanamatam and there was another man, Subramania Pillai, who has been appointed as the accountant, who ought to take the place of Ramalinga Pillai and if the *dastik* is not to be paid to him alone, it might be paid to him and Subramania Pillai, the present accountant. Ramalinga Pillai, on the other hand, claimed to be *dharmakarta* by virtue of his appointment by Government in 1842 ond contended that he continued to be *dharmakarta*, though he might have ceased his connection with the *mutt*. The Collector, after consideration of the *muchilikas*, direcetd the name of Ramalinga Pillai to be removed and entered Subramania Pillai's name instead. Ramalinga Pillai thus ceased his connection with the temple. If Ramalinga Pillai had been a trustee appointed by Government in 1842, and he derived his

right independently of his connection with the Isanamatam, there was no reason to remove him. His removal can only be explained on the ground that it is only persons connected with the Isanamatam, acting under the orders of the *Thiruvaduthurai Mutt*, who had any right to manage the temple. No other explanation has been offered of this incident by the learned Pleader for the appellants. Muthiah Thambiran ceased to be the trustee of the temple in 1885. The then Pandara Sannadhi, Subramania Desikar, appointed Saminatha Thambiran in his stead and intimated the fact to the Committee. There is an endorsement on this letter by the Committee that they did not admit that the temple was attached to the *Thiruvaduthurai Mutt*. But there is no evidence to show that this opinion of the Committee was ever communicated to the Pandara Sannadhi. The probability is that no reply was sent as the Pandara Sannadhi had to write again to the Committee (Exhibit H-4) to recognize Saminatha Thambiran as *dharmakarta*. On receipt of this letter the Committee passed the following proceedings: "At the request of the Thiruvaduthurai Pandara Sannadhi and on his responsibility Saminatha Thambiran is appointed *dharmakartha*." Saminatha Thambiran continued in management, submitted the accounts to the Committee, and carried on the management generally under the superintendence of the Committee. He died in April 1897.

On the 1st June 1897 the 1st defendant, who had succeeded Subramania Desikar as the head of the *Thiruvaduthurai Mutt*, appointed Vythialinga Thambiran as the manager of the temple in the place of Saminatha Thambiran and intimated this fact to the Committee.

Thereupon, they passed proceedings that they had appointed Vythialinga Thambiran, the 2nd defendant, at the request and on the responsibility of the 1st defendant, Pandara Sannadhi.

No accounts were submitted to the Committee after Subramania Thambiran's death.

From these facts it appears clearly that persons were appointed to manage the temple only by the Pandara Sannadhi. Those appointments were notified to Government or to the Committee. They were accepted by the Government. The Committee passed equivocal orders to the effect that they appointed persons as managers on the responsibility of the Pandara Sannadhi. Whether these proceedings were communicated to the Pandara Sannadhi, it does not appear. But there is no evidence of any assertion of their right to make the appointment themselves having been communicated to the Pandara Sannadhi. There is also evidence that on one occasion the Pandara Sannadhi removed a manager, Ramalinga Pillai, appointed by him and the Collector recognized his right of dismissal. The fact that accounts were submitted to them and the management generally carried on under their superintendence is strongly relied upon by the appellants' Pleader. But, as has been repeatedly pointed out by this Court, for many years after the passing of the Act XX of 1863, hereditary trustees also were under the impression that they had to submit their accounts to the temple Committee and carry on the management under their supervision. It does not, therefore, indicate on their part any consciousness of the right of the Committee to appoint trustees. We are not, therefore, satisfied that the right of nominating trustees to the temple was vested in the Government in 1842 or 1863 and we are not, therefore, prepared to hold that the Judge is wrong in deciding that when Act XX of 1863 was passed the temple did not fall within section 3 of the Act. We confirm the decree and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2730 TO 2733 OF 1913.

January 12, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

CHILAMAKURTI NAGANNA AND OTHERS—DEFENDANTS—APPELLANTS

versus

KAVIPURAPU RAMA ROW—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 3 (2)—Village site—Right of landlord to evict tenants.

KESHAB CHANDRA PRAMANIK *v.* AJAHAR ALI BISWAS.

A village not lying within the ambit of an "estate", as defined in section 3 (2) of the Estates Land Act, is no part of an estate and the Estates Land Act (I of 1908) cannot apply.

A landlord is entitled to evict tenants let by him into possession even if the land is classed as "village site."

Second appeals against the decrees of the Court of the District Court of Kistna at Masulipatam, in Appeal Suits Nos. 490 and 504 to 506 of 1912 respectively, preferred against those of the Court of the Additional District Munsif of Masulipatam, in Original Suits Nos. 112 to 115 of 1911 respectively.

Mr. *V. Ramadoss*, for the Appellants.

Mr. *P. Nagabhushanam*, for the Respondents.

JUDGMENT.—It is found that the village in which the suit lands lie is not a part of an estate under the meaning of section 3 (2) of the Madras Estates Land Act: so that enactment will not apply.

Dealing with the case under the ordinary law no reason has been shown for differing from the view of the District Judge that plaintiff was entitled to evict defendants. It is found that plaintiff has been in possesion of the suit lands since 1866 and has let defendants into possession as his tenants. The fact that the land was classed as village site, though not used for building purposes, will not affect plaintiff's right to evict in such circumstances.

The second appeals are dismissed with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 318 OF 1913.

December 22, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

KESHAB CHANDRA PRAMANIK—JUDGMENT-DEBTOR—APPELLANT

versus

AJAHAR ALI BISWAS—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60—"Saleable," meaning of—Permanent lease—Tenant, no right of, to transfer—Court sale, no immunity from—Court auction, validity of.

The word "saleable" in section 60 of the Civil Procedure Code means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties. [p. 837, col. 2.]

Golak Nath v. *Mathura Nath*, 20 C. 273, followed.

Where a landlord does not impose on a holding, under a permanent lease an immunity from Court sales, the tenant has no right to complain if the land is sold by Court. [p. 838, col. 1.]

Vyankatraya v. *Shivrambhat*, 7 B. 256, referred to.

Appeal against the order of the District Judge, Nadia, dated the 13th of May 1913, reversing that of the Munsif, Chuadanga, dated the 13th of January 1913.

Babu *Surendra Kumar Bose*, for the Appellant.

Babu *Ambicapada Chowdhury*, for the Respondent.

JUDGMENT.—The appellant held a permanent lease of some lands on which he had his huts. There was a condition, however, in his lease that if he made any transfer of the lands the landlord would re-enter. The respondent having attached this land and the huts, the appellant objected that the land was not saleable and the huts were exempt from sale as being huts occupied by an agriculturist as such. The Court of first instance upheld these objections but the lower Appellate Court repelled them, holding that the condition in the lease did not prevent a compulsory sale by the Court and the huts were not occupied by an agriculturist as such. The present appeal is against that decision.

It is contended that under section 60 of the Civil Procedure Code such lands only can be sold as are saleable and belong to the judgment-debtor and as the judgment-debtor could not sell the lands, the Court cannot sell the same. This argument is based on a misapprehension of the word "saleable" used in the section. The word evidently means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties. The lease in this case forbade a sale by the tenant but did not prevent a sale by the Court. This view is in accord with the opinion expressed in the case of *Golak Nath* v. *Mathura Nath* (1), and we have no reason to differ from the same. The landlord might perhaps have imposed on the holding an immunity from Court sales as was done in the case of

(1) 20 C. 273.

Vyankatraya v. *Shivrambhat* (2), but he did not, and the tenant has no right to complain. The first ground, therefore, fails.

The reasoning upon which the learned District Judge holds that the appellant is not an agriculturist may not be sound and is certainly open to criticism, but it is a finding of fact with which we cannot interfere.

The appeal, therefore, must be dismissed and we dismiss it with costs, one gold *mohur*.

Appeal dismissed.

(2) 7 B. 256.

CALCUTTA HIGH COURT.
CIVIL RULE No. 556 OF 1914.
June 19, 1914.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

HARCHAND RAY GOBORDHON DAS —PETITIONER
versus
THE BENGAL-NAGPUR RAILWAY CO.—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. III, r. 1—Recognised agent, whether has any right of audience.

A recognised agent as such has no right of audience.

Rule against an order of the Small Cause Court Judge, Sealdah, dated the 15th May 1914.

Dr. *Rash Behary Ghose*, Babus *Biraj Mohan Mozumdar* and *Probodh Chandra Roy*, for the Petitioner.

Babu *Kali Mohan Sen*, for the Opposite Party.

Babus *Ram Charan Mitra* and *Trailokhya Nath Ghose*, for the Vakils' Association.

JUDGMENT.—A recognised agent as such has no right of audience.

We must, therefore, discharge the rule with costs (hearing fee, one gold *mohur*) payable to opposite party. Bengal-Nagpur Railway Company.

Rule discharged.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 426 OF 1914.
March 4, 1915.
Present:—Mr. Justice Rafique.

MAHABIR PROSAD—PLAINTIFF—APPELLANT
versus
RAM TAWAKAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 194—Lambardar, whether can sue alone for arrear of rent.

A *lambardar* can sue alone, without joining the other co-sharers of the village, for the recovery of the entire rent due from a tenant.

Gulzari Mal v. *Jai Ram*, 24 Ind. Cas. 178; 12 A. L. J. 606, 36 A. 441, followed.

Second appeal from the decision of the District Judge of Benares, dated 16th January 1914.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. B. E. *O'Conor* (with him Mr. *L. M. Banerji*), for the Respondents.

JUDGMENT.—The two appeals Nos. 426 and 427 are connected and they arise out of two suits brought by the appellant, who is the *lambardar* of the village. He sued as *lambardar* for the recovery of the entire rent due for the year 1319 *Fasli* and part of the year 1320 *Fasli*. One of the pleas in defence was that under section 194 of Act II of 1901 the plaintiff could not sue alone. This objection was allowed by the first Court and the claim was decreed to the extent of the plaintiff's share. On appea the learned District Judge affirmed the decree of the first Court. The *lambardar* has come up in second appeal to this Court and contends that he can sue alone without joining the other co-sharers of the village. He relies on the full Bench case of *Gulzari Mal* v. *Jai Ram* (1). The contention for the appellant must prevail in view of the case relied on by him. I, therefore, accept the appeal, set aside the decree of the lower Appellate Court and remand the case for trial on the merits. Costs of this appeal will abide the event.

Appeal allowed; Case remanded.

(1) 24 Ind. Cas. 178; 12 A. L. J. 606; 36 A. 441.

KRISHNA KANTA GHOSH *v.* JADU KASYA.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3718 OF 1913.
February 5, 1915.
Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Greaves.
KRISHNA KANTA GHOSH—PLAINTIFF—APPELLANT
versus
JADU KASYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 182—Raiyat—*Under*-raiyat—*Homestead*, raiyat *holding land under a different landlord—Incidents of tenancy.*

The plaintiff was a *raiyat* and his holding consisted partly of agricultural and partly of homestead land. He let out the homestead portion to the defendants who held certain lands as *raiyats* not under the same landlord but under a different landlord and in a different village contiguous to the homestead land:

Held, that section 182 of the Bengal Tenancy Act applied, and that the provisions of the Act applicable to a *raiyat* would regulate the incidents of the tenancy of the homestead, though the defendants had only the interest of an under-*raiyat* with respect to it. [p. 840, col. 1.]

Second appeal from a decision of the Subordinate Judge, Dinajpur, dated the 3rd July 1913, affirming that of the Munsif, Balurghat, dated the 12th August 1912.

Babus *Mohini Mohan Chakravarty* and *Abinash Chandra Chakravarty*, for the Appellant.

Babu *Bimal Chandra Das Gupta*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment of the defendants, who are the respondents in this appeal, from a piece of homestead land, under section 49, clause (*b*), of the Bengal Tenancy Act. The plaintiff-appellant is a *raiyat* and his holding consists partly of agricultural and partly of homestead land. He let out the homestead portion to the defendants. Although that portion is not agricultural, the incidents of the sub-lease held by the defendants would be governed by the provisions of the Bengal Tenancy Act having regard to the nature of the original tenancy of the plaintiff, and not by the Transfer of Property Act [see *Babu Ram Roy*, v. *Mohendra Nath Samanta*, (1) and *Abdul Karim* v. *Abdul Rahman* (2)]. The defendants are, therefore, under-*raiyats* and are *prima facie* liable to be ejected under section 49, clause (*b*) of the Bengal Tenancy Act. The defendants, however, hold lands as a *raiyat*, not under the same landlord, but under a different landlord and in a different village contiguous to his homestead land. The Courts below have held that as the defendants are settled *raiyats* of the adjoining village, they have acquired a right of occupancy in the homestead under the provisions of sections 20 and 182 of the Bengal Tenancy Act. The plaintiff has appealed to this Court.

Now section 182 of the Bengal Tenancy Act lays down that "when a *raiyat* holds his homestead otherwise than as part of his holding as a *raiyat*, the incidents of his tenancy of the homestead shall be regulated by local custom or usage and subject to such local custom or usage, by the provisions of this Act applicable to land held by a *raiyat*."

The meaning of the section is not clear. It is not easy to see why the rights of persons who have nothing to do with the holding held by the *raiyat* should be affected in the manner mentioned in the section when a *raiyat* takes from such a person a settlement of his homestead, the incidents of which would, but for the section, be governed by the provisions of the Transfer of Property Act, subject to custom or local usage. The Bengal Tenancy Act regulates the incidents of the holding of a *raiyat*, and does not appear to concern itself with relations which the *raiyat* may enter into with regard to properties other than the holding with other persons who have nothing to do with the holding. The words used in the section, however, are "a *raiyat*," without any qualification, and it has been held in several cases that the provisions of the section are applicable to the homestead of a person who is a *raiyat*, although he does not hold his homestead under the same landlord under whom he holds his holding, and although his holding may be in a village different from that in which his homestead is situate, see *Kripa Nath Chakrabutty* v. *Sheikh Anu* (3) and *Harihar Chattopadhyaya* v. *Dinu Bera* (4), and we are bound by these decisions. See also *Protab Chandra Das* v. *Biseswar Pra-*

(1) 8 C. W. N. 454.
(2) 13 Ind. Cas. 364; 16 C. W. N. 618; 15 C. L.J. 672.
(3) 10 C. W. N. 944; 4. C. L. J. 332.
(4) 10 Ind. Cas. 139; 14 C. L. J. 170; 16 C. W. N. 536.

manick (5) (judgment of Geidt, J.) and *Golam Mowla* v. *Abdool Sowar Mondul* (6).

The learned Vakil for the respondent sought to distinguish the above cases on the ground that in those cases the incidents of the tenancy of the homestead would, but for section 182, have been regulated by the provisions of the Transfer of Property Act, and as the intention of the Legislature is that the incidents of the homestead as well as that of the holding should be regulated by the Bengal Tenancy Act, section 182 is applicable to those cases, but that in the present case, as the defendant holds his homestead as an under-*raiyat*, the provisions of the Bengal Tenancy Act are applicable to the homestead, apart from section 182. And as the Bengal Tenancy Act provides for ejectment of an under-*raiyat*, those provisions should be made applicable, and that great anomalies would arise if the under-*raiyati* of the homestead were to be governed by the provisions of the Act applicable to land held by a *raiyat*.

Section 182, however, provides not merely that the provisions of the Bengal Tenancy Act would apply, but that the provisions of the Act applicable to land held by a *raiyat* shall regulate the incidents of the tenancy of the homestead. If section 182 applies, as we must hold that it does, having regard to the decisions cited above, the provisions of the Bengal Tenancy Act applicable to a *raiyat* would regulate the incidents of the tenancy of the homestead, though the defendant has only the interest of an under-*raiyat* with respect to it. It may lead to some anomalous results, but so would the application of section 182 to the cases cited above, and the present case cannot be distinguished on principle from the said cases.

It is unnecessary to consider in the present case whether the defendants have acquired a right of occupancy in the homestead, because if the incidents of the homestead are to be regulated by the provisions of the Act applicable to land held even by a non-occupancy *raiyat*, the defendants cannot be ejected under the provisions of section 49.

(5) 9 C. W. N. 416.
(6) 9 Ind. Cas. 922; 13 C. L. J. 255.

The appeal is dismissed, but we make no order as to costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 902 OF 1913.

November 5, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PERUMAL GRAMANI—DEFENDANT—APPELLANT

versus

MAHAMAD KASIM SAHIB—PLAINTIFF—RESPONDENT.

Trust, religious—Permanent lease, whether valid—Custom, validity of—Transfer of Property Act (IV of 1882), s. 51—Improvements—Compensation, right of—Estoppel—Trust—Conduct of trustees.

The permanent lease of a religious trust property which is neither necessary nor beneficial to the trust, is beyond the power of a trustee and a custom which would give him this right, is not a valid custom. [p. 841, col. 1.]

Nataraja Desikar v. *Palaniappa Chetty*, 20 M. L. J. 969, followed.

The right to claim compensation for improvements under section 51, Transfer of Property Act, exists only in favour of a person who makes improvements believing that he is absolutely entitled to the property and not in favour of one who merely believes he has got a permanent right of occupancy in it for building purposes. [p. 841, cols. 1 & 2.]

A religious trust will not be estopped by any act or conduct of its trustee committed in breach of trust. [p. 841, col. 2.]

Second appeal against the decree of the District Court of Chingleput, in Appeal Suit No. 475 of 1911, preferred against that of the Court of the District Munsif of Conjeevaram, in Original Suit No. 70 of 1910.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Appellant.

Mr. *C. Narasimhachariar*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant. He obtained permanent lease of a vacant site in the town of Conjeevaram belonging to a religious trust called "*durga*" (the burial place of a Muhammadan saint) and has built a house upon it. The lower Appellate Court found the perpetual lease invalid, as it was beyond the powers of the trustees to grant such a lease and it has decreed ejectment against the appellant

allowing him two months to remove the buildings erected on the site. The defendant's contentions in the second appeal are:—

(*a*) That the permanent lease should have been upheld as it was the custom of the *darga* for many a year to grant permanent leases of the *darga* sites;

(*b*) that it was to the advantage of the *darga* that such a permanent lease should be granted and

(*c*) that the plaintiff should have been directed to give compensation for the building instead of the defendant being merely allowed to remove the superstructure.

The *second* contention, namely, that it was to the benefit of the *darga* to grant a permanent lease is a question of fact, and we cannot interfere with the finding of the District Judge that there was no necessity to give a permanent lease and that such a lease was not for the benefit of the *darga*.

As regards the *first* contention, the general rule undoubtedly is that a permanent lease of a religious trust property is beyond the powers of the trustee. [See *Devasigamani Pandarasannadhi* v. *Palaniappa Chettiar* (1).] As regards the custom of the *darga*, the custom seems to have been begun only about 50 years ago and the custom by which trustees are to exceed their lawful powers cannot be considered a valid custom. Of course, no single trustee and no succession of trustees can create a lawful usage by acts in excess of their legal powers or constituting breaches of trust on their part.

As regards the *last* contention, Mr. T. R. Krishnaswami Aiyar for the appellant advanced his arguments in two ways. (1) He argued from the analogy of section 51 of the Transfer of Property Act that the defendant, having in good faith, built the house, is entitled to be given compensation before he is evicted. (2) He further argued that the plaintiff, having stood by when the house was erected, is estopped from claiming to evict him without paying such compensation. I think the analogy of section 51 of the Transfer of Property Act cannot be invoked. The Legislature has chosen to grant the right to claim compensation only to the man who makes improvements believing in good faith that he is "absolutely entitled" to the land on which he effects improvements, and not to a person who merely believes that he has got a permanent right of occupancy over a building site. As regards the second contention, the plaintiff is a religious trust, *darga*, represented by its trustees and is not bound by any act or omission of its trustees which constituted a breach of trust. There can, therefore, be no question of estoppel as against the *darga*. Further the conduct of a landlord who allows a tenant to erect a permanent structure might estop him in three ways in favour of the tenant: (*a*) it might estop the landlord from denying that the tenant has a right of permanent occupancy, (*b*) it might estop the landlord from evicting the tenant without paying him compensation, (*c*) it might estop him from denying the tenant's right to remove the superstructure, that is, from raising the contention that the superstructure having become permanently fixed to the site has become his (the landlord's) property and passes on eviction to the landlord. The first estoppel cannot arise in this case, as the lease itself which allowed a permanent right of occupancy has been found invalid as against the *darga*. If the trustee has got no legal right to grant a permanent lease to bind the *darga*, his conduct in allowing the building to be erected can still less constrain the *darga* to allow a permanent occupancy right to the tenant. The third question need not be considered as the lower Court has allowed the defendant to remove the superstructure and no appeal has been preferred on behalf of the *darga*.

In the result I would dismiss the second appeal with costs, granting, however, the appellant an extension of time till six months from this day to remove the superstructure.

NAPIER, J.—I concur.

Appeal dismissed.

(1) 9 Ind. Cas. 281; 9 M. L. T. 83; 34 M. 535; (1911) 2 M. W. N. 154; 20 M. L. J. 969.

KAMARA PEDA SUBBAYYA *v.* KAKERLA CHENNAPPA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 255 OF 1914.

December 15, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

KAMARA PEDA SUBBAYYA AND ANOTHER —DEFENDANTS—APPELLANTS

versus

KAKERLA CHENNAPPA AND OTHERS— PLAINTIFFS—RESPONDENTS.

Lease--Document not giving right to sell property for recovery of money advanced, whether usufructuary mortgage—Madras Hereditary Village Offices Act (III of 1895), s. 13--Alienations by way of lease—Adverse possession, whether can be acquired by lessee.

A document securing re-payment of a debt out of the rent of the service *inam* lands taken together with another document—a deed of lease—does not create an usufructuary mortgage where no authority is given to bring the properties to sale for recovery of the money advanced. The documents are only instruments creating a lease and creating an ordinary simple money debt. [p. 842, cols. 1 & 2.]

Madras Hereditary Villaga Offices Act III of 1895 does not prohibit alienations by way of leases. [p. 842, col. 2.]

Where, therefore, the suit lands formed the emoluments of the office of village blacksmith and defendants Nos. 1 and 2, the holders of the office, gave possession of the lands to the plaintiffs as lessees:

Held, that the plaintiffs' possession was only permissive and could not become adverse to the possession of the holder of the office. [p. 843, col. 2.]

Kshetrabaro Bissoyi v. *Sobhanapuram Hari Krishna Naidu*, 5 Ind. Cas. 125; 7 M. L. T. 94; 20 M. L. J. 417; 33 M. 340; *Rickard* v. *Graham*, (1910) 1 Ch. 722; 102 L. T. 482; 54 S. J. 426; 26 T. L. R 384; 79 L. J. Ch. 378; *Muthusamier* v. *Methanithi Swamiyar Avergal*, 19 Ind. Cas. 694; 13 M. L. T. 498; (1913) M. W. N. 581; 25 M. L. J. 393, followed.

Second appeal against the decree of the District Court of Kurnool, in Appeal Suit No. 98 of 1913, preferred against that of the District Munsif of Nandyal, in Original Suit No. 796 of 1912.

Mr. A. *Krishnaswami Aiyar*, for the Appellants.

Mr. S. *Duraiswami Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—I am not satisfied that the two documents *A* and *B* constituted an usufructuary mortgage as contended for by the appellants. Following the Full Bench decision in *Reference of the Board of Revenue under section 46 of the Indian Stamp Act*, 1879 (1), I hold that as a definite sum is stated as rent due periodically to the father of defendants Nos. 1 and 2 and as the plaintiffs could under no circumstances be entitled to bring the properties to sale for recovery of the money advanced, the documents are instruments creating a lease and creating an ordinary simple money debt.

But a new question of law was allowed to be taken and argued by the appellants and after hearing both sides, I think that that question should be decided in the appellants' favour. The plaint lands form the emoluments of the village blacksmith's office and cannot be detached from that office after Madras Act III of 1895 came into force in October 1895. They had not become so detached from the office by 12½ years' adverse possession in plaintiffs. The reasons are :—

(1) Only 11 and odd years had elapsed between the date of Exhibit A and the passing of Act III of 1895.

(2) The older Regulation VI of 1831 could not be construed as having prohibited alienation by leases, the terms of that regulation in respect of the prohibition of alienation not being materially different from the corresponding terms of Act III of 1895, which were construed in *Kshetrabaro Bissoyi* v. *Sobhanapuram Hari Krishna Naidu*(2) as not prohibiting alienation by way of leases. (If leases were allowed, plaintiffs' possession as lessees from the holder of the office could not be possession adverse to the holder of the office).

As the plaint lands could have been recovered by the defendants Nos. 1 and 2 on their father's death (which took place about six months before suit) by a regulation suit against the plaintiffs brought under section 13 of Act III of 1895 if the plaintiffs had continued in possession after the death of the father of defendants Nos. 1 and 2, the 1st and 2nd defendants' possession of the lands, which possession they were able to obtain without being put to the necessity of bringing such a suit, could not be wrongful or illegal possession. The lease by their father to the plaintiffs (unless perhaps it was a lease for the reasonable or customary term allowed in the usual course of agricultural husbandry) could not be valid beyond his life-time as his tenure of the office and his own right to enjoy the lands (which right

(1) 7 M. 203 (F. B.).

(2) 5 Ind. Cas. 125; 7 M. L. T. 94; 20 M. L. J. 417; 33 M. 340.

alone he could alienate by lease under section 8 of the Transfer of Property Act) came to an end at his death. [See also *Rickard* v. *Graham* (3) and *Muthusamier* v. *Methanithi Swamiar Avergal* (4)].

I would, therefore, set aside the District Judge's decree granting the plaintiffs' claim for possession of the lands and restore that of the District Munsif, which gave only a money decree against the defendants Nos. 1 and 2 to the extent of the assets left by their father. The plaintiffs will also get till recovery of the decreed amount interest on the same at 6 per cent. from the date of the Munsif's decree besides the interest allowed by the District Munsif till the date of the said decree. The parties will bear their respective costs throughout.

SPENCER, J.—Defendants Nos. 1 and 2 who are holders of the office of blacksmith are admittedly in possession of the suit lands, which are attached as *inam* to that office in the village of Chakarajuvenula. The plaintiffs are not entitled to recover possession from the defendants unless they can show title in themselves.

They rely on a lease, Exhibit A, which was executed simultaneously with the deed of agreement (Exhibit B) by which the father of defendants Nos. 1 and 2 agreed that the debt of Rs. 388-2-0, which he owed in 1884 to plaintiffs, should be discharged out of the rent of the service *inam* lands. It contains a clause: "If any impediment is caused in any year in the matter of your enjoying the said lands in that manner, I shall pay to you the interest for the total amount standing due up to that year at the rate of rupee one per cent. per mensem from the date of the execution of this deed and the principal on demand and take back my deed."

Upon these documents the District Munsif held that plaintiffs were entitled only to recover the balance of the debt due at the death of the father of defendants Nos. 1 and 2 with interest from the assets in the hands of defendants.

The Subordinate Judge reversed the District Munsif's decree and gave plaintiffs a decree for possession of the land.

(3) (1910) 1 Ch. 722; 102 L. T. 482; 54 S. J. 426; 26 T L. R. 384; 79 L. J. Ch. 378.

(4) 19 Ind. Cas. 694; 13 M. L. T. 498; (1913) M. W. N. 581; 25 M. L. J. 393.

I am of opinion that the documents do not give the plaintiffs any right to such relief as against the present office-holders who are now rightfully in possession of the land, but only gives a right to recover money under the above quoted clause.

Under section 13 of Act III of 1895 they might, if dispossessed, sue before the Collector for recovery of enjoyment of the emoluments of the office.

Respondents seek to support the lower Appellate Court's decree on the grounds that they have acquired a permanent right by 12 years' adverse possession. But it is clear that the possession they had under the last office-holders under this lease was permissive and will not enure against subsequent holders of the office, as a permanent alienation would.

I agree that this appeal must be allowed and the District Munsif's decree restored without costs with the addition of interest till date of realization.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1265 OF 1914.

March 12, 1915.

Present:—Mr. Justice Rafique.

DEO DUTT PANDE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KAULESHAR DUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Tree—Branches overhanging neighbour's house, right to remove.

A party has a right to the removal of the branches of a tree, which overhang his house. [p. 844, col. 2.]

Hari Krishna Joshi v. Shankar Vithal, 19 B. 420; *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee*, 31 C. 944; 8 C. W. N. 710, followed.

Second appeal from the decision of the Sessions and Subordinate Judge of Jaunpur, dated the 2nd June 1914.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Muhammad Ishaq Khan*, for the Respondents.

JUDGMENT.—The relevant facts of this appeal are as follows:—The plaintiffs-appellants are tenants and reside in the village of Karao in the district of Jaunpur. To the west of their house is an old *pipal* tree, some of the branches of which over-

hang their house. They instituted this suit in the Court of the Munsif of Jaunpur against the *zemindars* of the village for an injunction restraining the latter from preventing the plaintiffs from cutting down the *pipal* tree and appropriating its timber. The plaintiffs alleged that the tree belonged to them and they wanted to cut down the branches overhanging their house, but were prevented by defendants Nos. 1 and 2. It was further alleged in the plaint that in case the plaintiffs failed to prove their title to the tree, the defendants should be made to cut down the branches overhanging the house of the plaintiffs as the tree was old and likely to fall down any moment and cause damage to them. The claim was resisted principally by defendant No. 2, who claimed the tree as his and denied that it was in a dangerous condition. The learned Munsif dismissed the claim, holding that the tree belonged to the *zemindars*. On appeal the learned Subordinate Judge remanded the case under Order XLI, rule 25, Civil Procedure Code, for the trial of a fresh issue as to whether the *pipal* tree was dangerous to the plaintiffs and, if so, were they entitled to have it cut down. The first Court returned a finding against the plaintiffs to which objections were taken. The learned Subordinate Judge agreed with the first Court that the plaintiffs had failed to prove their title to the tree as also its dangerous condition, but as the tree was an old one and some of its branches overhung the house of the plaintiffs, the latter were entitled to have those branches cut down. The decree of the first Court was accordingly modified. As to costs the order was that the parties were to bear their own costs in both Courts. The plaintiffs have preferred a second appeal to this Court. They say that the lower Appellate Court ought to have decided the question with regard to the *nib* tree also which has grown inside the *pipal* tree. They further urge that under the circumstances of the case the decree should have been for the removal of the entire tree or at least for so much of it as overhangs the house of the plaintiffs. They dispute the order of the Court below as to costs and contend that costs should have been allowed to them. I do not think that the first contention of the plaintiffs-appellants is maintainable. It was not alleged by them that the *nib* tree overhangs or in any way affects their house. They cannot, therefore, ask for its removal. Nor have they made out any case for the removal of the entire *pipal* tree. It has been found as a fact by both the Courts below that the tree in question is not in a dangerous state. The lower Appellate Court, as a matter of precaution because of the old age of the tree, has allowed the lopping off of the western branches of the tree which overhang the house of the plaintiffs. The finding is not that it is in a dangerous state, but that at some future time the branches which overhang the plaintiffs' house might fall down and injure it or its inmates. The learned Subordinate Judge need not have based his judgment on that ground at all, as under the law the plaintiffs have a right to the removal of the branches of the tree which overhang their house, vide *Hari Krishna Joshi* v *Shankar Vithal* (1) and *Lakshmi Narain Banerjee* v. *Tara Prosanna Banerjee* (2). According to the finding of the lower Appellate Court the northern branches of the tree, by which are presumably meant the north-western branches, as the report of the *Amin* shows, also overhang the house of the plaintiffs. The latter have, therefore, a right to ask for the cutting down of those branches also. The appeal, therefore, must prevail as regards those branches. As to the last contention for the plaintiffs relating to costs, I do not think there is any force in it. Substantial allegations of the plaintiffs and principal reliefs sought by them have been disallowed. I think that the order of the lower Appellate Court with regard to costs was a correct order. I, therefore, modify the decree of the Court below by directing the defendant No. 2 to cut down the north-western and western branches of the tree in question which overhang the plaintiffs' house. The rest of the appeal fails and is dismissed. I also make no order as to costs.

Appeal partly allowed.

(1) 19 B. 420.
(2) 31 C. 944; 8 C. W. N. 710.

VEERAPPA CHETTY *v.* CHIDAMBARAM CHETTY.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 185 OF 1912.

December 10, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

VEERAPPA CHETTY AND ANOTHER—DEFENDANTS NOS. 5 AND 6—APPELLANTS

versus

CHIDAMBARAM CHETTY AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 4 AND 7 TO 9—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Agent, "duly authorised in that behalf," meaning of—Payment by partner in charge of branch of business, whether effective.

The mere fact of a partner being in charge of a branch of the partnership business does not authorise him to bind the firm by a payment or acknowledgment. He must be specially authorised to do so in order to bring the payment within section 20 of the Limitation Act. [p. 846, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 43 of 1911.

Mr. *K. V. Krishnasami Aiyar*, for the Appellants.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

This appeal coming on for hearing on the 5th September 1913, and having stood over for consideration till the 10th September 1913, the Court delivered the following

JUDGMENT.—One objection to the decree under appeal relates only to the case of the 6th defendant. He has been impleaded as the 5th defendant's son and contends that he cannot be held liable for a claim against his father, which originated in the transactions of the latter's firm, that firm not being alleged or proved to have carried on a family trade. But the relationship between these two defendants is sufficient to make the 6th defendant liable. The decision in his case must follow that in the 5th defendant's.

On behalf of the 5th defendant there is, *first*, an argument based on sections 132 and 133 of the Indian Contract Act and *Rouse* v. *Bradford Banking Company* (1). It is said that, when he left the firm on the 28th June 1909, he became a surety for the payment of the suit debt, the other partners remaining the principal debtors, and that he was discharged by the giving of time to them, when the loan was renewed on the 20th October 1909. This argument is not among the grounds of appeal; nor was it relied on in the lower Court. The plaintiffs deny that the giving of time was a term of the renewal; and it would be necessary to interpret the word *thavanai* in Exhibit A and the evidence in order to decide whether this was so. In the circumstances and at this stage we cannot allow the point to be taken.

Next, the 7th, 8th, and 9th grounds of appeal amount to a contention that the debt sued on was the result of a novation on the 20th October 1902, to which only the partners other than the 5th defendant were parties, and that he was released from liability. But this reference to a fresh loan in paragraphs 7 and 11 of the plaint is insufficient to support this. There is no legal presumption in its favour, and the evidence of the 5th defendant and the 7th defendant renders it improbable. We find against it.

Lastly, as to limitation. The suit was brought on the 25th January 1911 and is out of time, unless the plaintiffs show that a cause of action is available within three years before that date. No doubt they relied in their plaint and (so far as appears) at the trial only on a payment of interest by the 7th defendant in connection with the renewal of the 20th October 1909, that is, after the 5th defendant had left the firm; and the latter accordingly has argued that the former was not his agent duly authorized on this behalf with reference to section 20 of the Limitation Act. Here, however, the plaintiffs have pointed out that a payment of interest on the 28th May 1908 is allowed for in the schedule attached to the plaint. That date is before the 5th defendant retired, but within three years of the institution of proceedings. The 5th defendant took no exception to the plaint allegation of this payment in his written statement and, having accepted it there for one purpose, cannot be heard to deny it here for another. If section 20 is applicable to it, the suit must be held in time.

It is urged, however, that section 20 is inapplicable, because the payment was made

(1) (1894) A. C. 586; 63 L. J. Ch. 890; 6 R. 349; 71 L. T. 522; 43 W. R. 78.

by the 7th defendant and it is not shown that he was the agent duly authorized in this behalf of his partners, including the 5th defendant. Even if he was, as is alleged, in charge of a Burma branch of the partnership business and was himself a partner, that alone will not justify the presumption that he was authorized to bind the firm by a payment or acknowledgment: *Sheik Mohideen Sahib* v. *Official Assignee* (2). The question of limitation was raised clearly by the 5th defendant's written statement and the issues, and the plaintiffs were bound to adduce everything necessary for its decision. The learned Subordinate Judge, however, does not appear to have considered this aspect of it. We must call for a finding on the issue :—" Did the 7th defendant make the payment of the 28th May 1908 as the agent duly authorized on that behalf of the 5th defendant ?" Fresh evidence may be taken. The finding should be submitted within six weeks from this date. Ten days will be allowed for filing objections.

In pursuance of the order contained in the above judgment, the Subordinate Judge of Ramnad submitted the following

FINDING.—In this case I have been asked by the High Court to submit a finding on the following issue : —

" Did the 7th defendant make the payment of the 28th May 1908 as the agent duly authorised on that behalf of the 5th defendant?"

2. The Vakil for the 5th defendant contended that the payment said to have been made on 28th May 1908 had also to be proved, but as the issue did not warrant this, I ruled that this matter could not be gone into. He wanted me to receive the copy of the plaint served on his client, and I have done so.

3. The 7th defendant was a partner in the K. A. L. T. firm on 28th May 1908 and was also the agent of the firm on that date. No power-of-attorney was given to him by the other partners. Evidence was let in on the side of plaintiffs, to prove that such agents had power to borrow loans, to make payments to save limitation, and to acknowledge debts; and that these acts of theirs bound their principals. The 5th defendant in his evidence admits that during his agency the 7th defendant had dealings with 10 to 15 Chetti firms, and that he borrowed over and above the sum covered by the Adathi letters given to him. The 5th defendant separated from the K. A. L. T. firm in Soumya Ani and the other partners of the firm continued business under the agency of the 7th defendant. The 5th defendant admits that in this capacity the 7th defendant executed a pro-note for Rs. 7,500-0-0 to the N. P. A. K. firm; that he was present then and got the 8th defendant to execute the pro-note; that the 7th defendant alone signed the pro-note on behalf of the K. A. L. T. firm; and that the pro-note was binding on all the partners of the K. A. L. T. firm.

The 5th defendant before and after leaving the K. A. L. T. firm was a partner in the O. R. M. M. S. P. S. V. firm, and in discharge of a debt of Rs. 10,000-0-0 and odd due by the K. A. L. T. firm to the O. R. M. M. S. P. S. V. firm, he (5th defendant) got the 7th defendant as agent of the K. A. L. T. firm to assign two debts due to the K. A. L. T. firm. He says in his evidence that this assignment was binding on the other partners. Thus it is admitted that the 7th defendant continued as agent of the K. A. L. T. firm, after the 5th defendant left it; that no power-of-attorney was given to him; and that pro-notes and assignment-deeds executed by him on behalf of the K. A. L. T. firm were binding on the other partners. Before the date 5th defendant left the K. A. L. T. firm, the same 7th defendant was agent of the firm; and yet the 5th defendant says that he had then no authority to do acts binding on the other partners. The 7th defendant was the managing partner, and the other partners were not at the place at which business was being carried on. The witnesses called on plaintiffs' side prove that partner agents without power of-attorney can make payments to bind the other partners. What they say is corroborated by 5th defendant's own acts. I, therefore, find that the payment in question was made by

(2) 11 Ind. Cas. 332; 35 M. 142; (1911) 1 M. W. N. 347; 9 M. L. T. 473.

7th defendant as the agent, duly authorised in that behalf, of 5th defendant.

This appeal coming on this day for final hearing after the return of the finding upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.

We accept the finding and dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION NO. 42 OF 1913-14 OF GONDA DISTRICT.

December 16, 1914.

Present:—Mr. Campbell, J. M.

SAHEB DIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Raja MUHAMMAD ABUL HASAN KHAN—DEFENDANT—RESPONDENT.

Dasaundh — *Under-proprietary right — Ordinary tenant, land held as, by* dasaundh-*holder.*

A right to *dasaundh* is a *quasi*-under-proprietary right and does not carry with it any under-proprietary rights in the lands held by the *dasaundh*-holder as an ordinary tenant.

Parmeshar Dat v. *Raja Mohammad Abul Hasan Khan*, (3 Ind. Cas. 809; 14 O. C. 335, referred to.

Appeal from the decree of the Commissioner, Fyzabad, dated the 24th April 1914.

JUDGMENT.—I see no reason to interfere, and think that the Commissioner's order is perfectly correct. Respondent does not derive his title from the Raja of Bhinga; and consequently the decision in the case between the Raja of Bhinga and appellant does not make the present case *res judicata* for respondent. I think it is also clear that the only right now remaining to appellant under his *birt-patra* is the *quasi*-under-proprietary claim to *dasaundh*; and this does not carry with it any under-proprietary rights in the lands which he is now cultivating as an ordinary tenant.

If appellant, as he alleges, had retained possession of the village under his *birt-patra*, he would have put forward his *birtdari* claim, when he asked for recovery of possession of certain *sir* land in 1871, a request which was rejected.

The conditions of the *kabuliyats* under which he has been cultivating more recently, with a progressive rental, are entirely opposed to the idea that he was in cultivating possession as a *birtdar*. The case is on all fours with *Parmeshar Dat* v. *Raja Mohammad Abul Hasan Khan* (1). Appellant has certain rights of *dasaundh*, but they do not carry with them under-proprietary rights on the land from which his ejectment is now sought.

I uphold the Commissioner's order and dismiss this appeal with costs.

Appeal dismissed.

(1) 13 Ind. Cas. 809; 14 O. C. 335.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO 2020 OF 1913.

January 18, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

CONJEEVARAM HODGSONPET THANARAKSHANA NIDHI, REPRESENTED BY M. E. SRIRANGACHARIAR—PLAINTIFF—APPELLANT

versus

KANDASAWMY NAICKER AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract—Company—Contract with Company, whether can be altered by resolution of Company.

Once the rights of parties dealing with a registered Company, have become fixed by a contract, the Company cannot by a resolution subsequently passed by it alter those rights. [p. 849, col. 1.]

Allen v. *Gold Reefs of West Africa Ltd.*, (1900) 1 Ch. D. 656; 69 L. J. Ch. 266; 48 W. R. 452; 82 L. T. 210; 16 T. L. R. 213, followed.

Second appeal against the decrees of the District Court of Chingleput, in Appeal Suits Nos. 566 and 567 of 1911, preferred against that of the Court of the District Munsif of Conjeevaram, in Original Suit No. 533 of 1910.

Mr. *T. Rangachariar*, for the Appellant.

Messrs. *T. V. Muthukrishna Aiyar* and *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—The plaintiff is a limited liability Company registered under the Indian Companies Act and sues the defendants under the following circumstances.

CONJEEVARAM HODGSONPET v. KANDASAWMY.

The Company has for its object the collection of subscriptions at the rate of rupee one or its multiples per month from its subscribers. When a subscriber has regularly paid 80 such instalments of a rupee each, he becomes entitled to receive Rs. 100. In case of default of payment interest is charged on the unpaid instalments at $18\frac{3}{4}$ per cent. per annum. If any instalments are not paid at the end of the 80 months, then the subscriber gets back (under the present 13th Article of Association) only such sums as he has paid deducting therefrom interest on the unpaid instalments at the rate mentioned.

In addition to the above-stated conditions the subscribers are entitled to borrow from the Company on certain terms.

The 1st defendant subscribed for 25 "shares." He became liable, therefore, to pay Rs. 25 per month and would have become entitled to receive Rs. 2,500 if he had subscribed regularly for 80 months. But he availed himself of the power to borrow, and received Rs. 1,000 and Rs. 1,500 from the Company under Exhibits A and B. The questions in this appeal are concerned with the rights and liabilities of the parties under Exhibits A and B and the Articles of the Company in the events that have taken place, namely, that the 1st defendant has paid 49 out of the 80 instalments of Rs. 25 per mensem due from him and has made default in paying the remaining 31.

Exhibits A and B are most inartificial. We have had great difficulty in construing them. As the result of careful argument, however, we consider that by the last three sentences in Exhibit A (which alone need be referred to, as Exhibit B is not materially different) it is intended respectively to provide (1) that the defendants should pay interest at $6\frac{1}{4}$ per cent. per annum on the sum of Rs. 1,000 advanced to them under Exhibit A with and in addition to the instalments of Rs. 25 per mensem, (2) if the said interest and the subscription are not paid punctually, the defendants are also to pay compound interest at $18\frac{3}{4}$ per cent. per annum on the consolidated sum due, (3) that the properties mortgaged be charged with the entire balance due on the date of default after deducting the previous payments.

The difficulty lies in construing the last of the three sentences above referred to. The respondents argue that the entire balance due on default must mean merely the unpaid subscriptions together with interest on them and interest on the $6\frac{1}{4}$ per cent. interest. The appellant's contention is that the balance due means the amount due on the mortgage, *i. e.*, the Rs. 1,000, deducting therefrom the subscriptions already paid. Accepting the latter contention does not, however, help the appellant; for in that case the deduction would consist of the whole of the subscriptions paid by the defendants in regard to each mortgage, *viz.*, on Exhibit A the defendants would be entitled to claim for principal Rs. 1,000 less 31 times twenty-five rupees and similarly on Exhibit B, Rs. 1,500 less 31 times twenty-five rupees. The appellant can succeed in his contention only if in the one case 31 times ten rupees are deducted and in the other 31 times fifteen rupees.

It is clear, therefore, that no construction of Exhibits A and B can assist the appellant, and the learned Pleader, who appears for the appellant, was not prepared to put forward any contention to escape from this difficulty.

The appellant's contention then was that assuming that Exhibits A and B cannot assist him, he can rely upon the general law that he should get back the amounts he has advanced less such sums as may be found due to the 1st defendant on account of the subscriptions already paid by him. The amount that the 1st defendant is thus entitled to be credited with is (it is contended) shown by the 13th Article of Association.

It seems to us that Exhibits A and B and the Article must be read together. On doing so, the real transaction between the parties appears to be that the 1st defendant as a subscriber was allowed to anticipate the sum of Rs. 2,500 which would have become due to him as a subscriber of 25 shares, after the eightieth month. In order to secure for the due payment of instalments the Company obtained mortgages from the defendants and they agreed to pay $6\frac{1}{4}$ per cent. interest on the sum of Rs. 2,500 so anticipated. Exhibits A and B really provide only for the due payment of the further subscriptions by the defendants and for securing the interest on such subscriptions, should default be

made in payment of them. It is only in this view that the documents can be read in any reasonable manner.

Are the defendants' rights then altered by the Articles on which the appellant relies? The Article specifically relied upon is Article 60, which does not in terms deal with the liability of a subscriber placed as the defendant is placed. Article 60 merely requires the Directors to institute suits for a particular amount. The Article was added by a special resolution of the Company at a date subsequent to that when the defendants' 80 months expired; and even assuming that the 1st defendant then continued to be a member of the Company, it was added after the dates of Exhibits A and B. We think, therefore, that the defendants' rights and liabilities under Exhibits A and B cannot be affected by the Article: *Allen* v. *Gold Reefs of West Africa Ltd.* (1).

In our opinion, reading the Articles of Association and Exhibits A and B together, the most reasonable conclusion to be drawn is that the defendants should be held liable to pay only the unpaid instalments with interest. That is the conclusion at which both the lower Courts arrived, though for reasons different from those that we have mentioned.

It is conceded by both sides that the District Judge's remarks in paragraph 5 of his judgment are based on an erroneous view of the facts and that the District Munsif is right on this point. The District Munsif's decree will, therefore, be restored.

The parties will give and receive proportionate costs throughout. If there is any balance due from the defendants they should pay it within three months from this date. Interest on the consolidated amount due under the decree of the District Munsif, after the date fixed by him for payment, will be at 6 per cent. per annum.

Appeal partly allowed.

(1) (1900) 1 Ch. 656; 69 L. J. Ch. 266; 48 W. R. 452; 82 L. T. 210; 16 T. L. R. 213.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1163 OF 1913.

March 16, 1915.

Present:—Mr. Justice Chamier.

Musammat PHUL BIBI—PLAINTIFF—APPELLANT

versus

ZAHUR ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Ejectment—Occupancy tenant—Tenants, whether entitled to keep house appurtenant to his holding.

A tenant who has been ejected from his holding cannot keep possession of the house appertaining to the holding. [p. 850, col. 1.]

Second appeal from the decision of the Additional Judge of Gorakhpur, dated the 13th of August 1913.

Dr. *Suleman* (with him Mr. *Iswar Saran*), for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Phul Bibi, now represented by the appellant Bela Bibi, for possession of a house, *bhusauli*, cattle-trough, *et cetera*, on the allegation that one Kariman occupied them as appurtenances to his holding under the plaintiff and that Kariman died without issue; but *Musammat* Elaichi, a daughter of Kariman's wife, who had died, had set herself up as a daughter of Kariman. The defendants in the suit are the sons and husband of *Musammat* Elaichi. The plaintiff alleged that the defendants had entered into possession of the holding and of the house property in dispute though they were not entitled to do so as heirs of Kariman, and that they had been ejected from the holding by the Revenue Court. The defendants pleaded that on the death of Kariman, Elaichi, who was his daughter, entered into possession of the house property. They also pleaded that they were tenants along with Elaichi of other lands in the village and that they could not be ejected from the house while they still cultivated land in the village, though that land did not belong to the plaintiff. The lower Appellate Court found that the defendants were the sons of Elaichi who was the daughter of Kariman, that the defendants' mother had been ejected from the holding by the Revenue Court, but that they were entitled to retain possession of the house property. I remitted two issues to the lower Appellate Court by my order of July 2nd

PONNIATH AKATHOOT *v.* KRISHNA KAYIL.

last and on these issues the Additional Judge has found that the house, *bhusauli*, *et cetera*, were appurtenant to the holding of Kariman, that defendants had been ejected from their entire holding in the *khalsa* land, with which alone the plaintiff was concerned, and that the plaintiff had no interest whatever in any land that might still be in the cultivation of Elaichi. On these findings it seems to me that the plaintiff is entitled to succeed. The house was appurtenant to the holding; Elaichi failed to get possession of the holding and the defendants have been ejected from the holding. The defendants cannot in any view of the case retain possession of house property.

It appears that the original plaintiff, Phul Bibi, died after my order of July 2nd. The lower Appellate Court brought *Musammat* Bela Bibi in as representative of the original plaintiff. When this was brought to my notice, I required Bela Bibi to submit an application for substitution of names to this Court. Such an application was presented and under the orders of Mr. Justice Rafique the name of Bela Bibi was substituted for that of Phul Bibi. Now it is said that I cannot take any notice of the findings of the lower Appellate Court, because they were arrived at before the passing of the order of this Court substituting Bela Bibi for Phul Bibi. It is not suggested by the learned Vakil for the defendants that he has any further evidence to offer on the subject or that he was in any way prejudiced by the mistake of procedure that was committed. His opponent was and is Bela Bibi and in these circumstances, I see no reason why I should send the case back in order that the District Judge may rewrite his order. On the facts as found, I hold that the plaintiff is entitled to possession of the property in suit as against the defendants who appear to me to have never had any title whatever. I allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs here and in the lower Appellate Court.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2107 OF 1912.

December 7, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

PONNIATH AKATHOOT PARAMESWARAN MUMPU—PLAINTIFF—APPELLANT

versus

KRISHNA KAYIL *alias* POTHAN PURAYIL CHANDU NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Compensation for Tenants' Improvement Act (I of 1900), s. 9—Valuation of improvements not to be arbitrary—Governing principle.

Where it is not possible to calculate the exact cost of improvements effected by a tenant, the Court should, instead of arriving at an arbitrary estimate, follow the principle laid down in section 9 of Act I of 1900 and should base its calculation on the increase in the annual produce of the land. [p. 850, col. 2.]

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 199 of 1909, preferred against that of the Court of the District Munsif of Tellicherry, in Original Suit No. 290 of 1907.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *K. Govinda Marar*, for the Respondents.

This second appeal and the memorandum of objections coming on for hearing on the 27th of November 1913, the Court delivered the following

JUDGMENT.—We agree with the District Judge in holding that there is nothing in Exhibit Z which would prevent the 1st defendant from claiming compensation for improvements. The only other point argued relates to the amount to be awarded as compensation for improvements. The District Judge has found, as we understand him, that both the Commissioner's estimate and the oral evidence of the actual cost of improvements is unreliable, and has, in preference to trusting thereto, arrived at an "arbitrary estimate" (as he puts it) of Rs. 750. Section 9 of Act I of 1900 lays down the principles on which the calculation should be made and provides for an alternative method of calculation based on the increase in the annual produce of the land. Regarding this there appears to be some documentary evidence.

There is no reference to this Act in the judgment of the District Judge, and he

appears to have arrived at this figure without considering its provisions. We must, therefore, call for a finding on the evidence on record as to the proper amount to be decreed as compensation for improvements with reference to the provisions of section 9 of Act I of 1900. The Judge should assess separately the "value of the annuity" and "the cost of making the improvement." If he finds no reliable evidence on either point, the fact should be clearly stated.

The finding should be submitted within one month from this date, and seven days will be allowed for filing objections.

The other points raised in the memorandum of objections have not been taken before us.

In compliance with the above the District Judge of North Malabar submitted the following

FINDING.

* * * * * * * *

"There is no reliable evidence either as to the value of the annuity or the cost of making any improvement and, therefore, my finding is that no amount whatsoever can be decreed as compensation for improvements with reference to the provisions of section 9 of Act I of 1900."

This second appeal and memorandum of objections coming on this day for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We must accept the finding of the District Judge and allow the appeal with costs. The memorandum of objections is dismissed without costs.

Memorandum of objections dismissed;
Appeal allowed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 90 OF 1914.

January 28, 1915.

Present:—Mr. Justice Parlett.

ABDUL SHAKUR—APPELLANT

versus

SHWE YAUK KE AND ANOTHER—RESPONDENTS.

Possession, suit for—Decree barred by time—Regular suit, to eject judgment-debtors, whether maintainable.

When the execution of a decree for possession of a piece of land is barred by the Law of Limitation, a regular suit lies to eject the judgment-debtor on the basis of the decree. [p. 852, col. 1.]

Shama Charan Chatterji v. *Madhab Chandra Mookerji*, 11 C. 93, referred to.

Mr. *S. C. Guha*, for the Appellant.

JUDGMENT.—In Civil Regular Suit No. 132 of 1910 appellant obtained a decree against the respondents for possession of 28 odd acres of land, being holding No. 18 of 1909-10 in Mydthingji Kwin, bounded, north by Government waste land and Nga Yokke's land, south and east by Minzi Chaung and west by Government waste land. The land is further referred to as being marked A. Much confusion has been introduced by the Judge's method in that case of marking and referring to Exhibits, and improperly returning them to the parties tendering them. Both a map and a judgment are referred to in the proceedings as Exhibit A. The former only should have been so styled. It appears, however, that that map, being a map of 28·06 acres composing holding No. 18 of 1909-10, had a portion of that land, 9·10 acres, distinguished by the letter A in red, it being held on a *patta*, whereas the remaining 18·96 acres were held on another tenure. Hence the respondents have been able to raise the contention that the decree by referring to the land as marked A meant only the 9·10 acres of *patta* land, and not the whole 28·06 acres included in the map, Exhibit A. The addition of the area and boundaries, however, shows conclusively that this contention is false and groundless. This map was wrongly returned to the appellant on 12th October 1910.

On the 3rd May 1911 he attached it to an application for delivery of the land, in Civil Execution No. 56 of 1911. Delivery was effected on the 17th May. On 14th July the map was again returned to him. It appears that early in June respondents

re-entered upon the land and on 3rd August 1911 appellant applied in Civil Miscellaneous No. 15 of 1911 for an order under Order XXI, sections 97 and 98. The application was dismissed as time-barred. On the 7th May 1913 the present suit was brought to eject the respondents from the 28·06 acres of land. The case of *Sham Charana Chatterji* v. *Madhub Chandra Mookerji* (1) is authority that such a suit lies. The respondents set up the contention that the decree only referred to the 9·10 acres of *patta* land. The map filed as Exhibit A in Civil Regular No. 132 of 1910 and now attached to Civil Miscellaneous No. 15 of 1911 was put in in evidence, and the Township Court thereupon held the appellant entitled to evict respondents from the whole 28·06 acres shown therein.

The District Court reversed this finding, holding that the appellant failed to prove this case, and clearly entirely overlooking the map upon which he chiefly relied. That map is before me now and leaves no room for doubt that the construction placed by the Township Court upon the decree in Civil Regular No. 132 of 1910 is correct. The decree of the District Court is reversed and that of the Township Court restored with costs throughout, Advocate's fee in this case two gold *mohurs*. The respondents will be ejected from the whole 28·06 acres of land shown as holding No. 18 of 1909-10 and as bounded, north by Government waste land and Nga Shwe Yokke's land, south and east by Minzi Chaung and west by Government waste land and Kalon Nya's land.

Appeal allowed.

(1) 11 C. 93.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 367 OF 1914.

February 19, 1915.

Present:—Mr. Justice Ratique.

KEDAR RAI AND ANOTHER—RESPONDENTS—APPLICANTS

versus

SHEOPAL RAI AND ANOTHER—APPELLANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 4—Appeal against minor—Costs incurred by guardian ad litem—Appellant to pay costs of guardian—Practice

Where an appeal is filed against a minor under the guardianship of an officer of the Court, the appellant must pay to such guardian such sum of money as would enable him to oppose the appeal. [p. 852, col. 2.]

Application made during the pendency of this appeal by the Nazir of the District Court of Benares, who had been appointed guardian *ad litem* of the minor respondent, for an order compelling the appellant to pay him money to defend the appeal.

Mr. *Harnandan Prasad*, for the Applicants.

Mr. *Haribans Sahai*, for the Opposite Party.

JUDGMENT.—In Second Appeal No. 367 of 1914 one of the respondents is a minor and he has been served at the instance of the appellant under the guardianship of the Central Nazir of the Judge's Court, Benares. The Nazir has made an application under Order XXXII, rule 4, Civil Procedure Code, praying this Court to order payment to him of a sum of money sufficient to enable him to oppose the appeal in this Court. The learned Vakil for the appellant says that he does not wish to retain the name of the minor among the respondents any longer, as he finds that the minor is not a necessary party. He also objects to any order being made by this Court directing any sum of money to be paid to the Nazir which the latter may have incurred up to this time in connection with the appeal. The appellant is at liberty to release any of the respondents. But I do not think that he can evade payment of actual out-of-pocket costs which the Nazir has incurred in connection with the present appeal. Mr. Harnandan Prasad who appears for the Nazir says that Rs. 28 have been spent by the Nazir up to this time. The details of the expenditure are as follows: —

	Rs.
Vakalatnama	2
Application	2
Process fee	3
Another application	2
Process fee	3
Mr. Harnandan Prasad's fee ...	16

I think that as the Nazir has already spent a sum of Rs. 28 on account of the appellant having made the minor a respondent to the appeal, the appellant must pay that sum to the Nazir. I, therefore, direct

the appellant to pay the sum of Rs. 28 to the Nazir through his Vakil Mr. Harnandan Prasad before the hearing of the appeal. Order as to the release of the minor will be made at the hearing of the appeal to the effect that the appeal stands dismissed as against him. In case the appellant does not pay the said money, it will be recovered as costs in the case.

Application allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 302 OF 1912.

January 26, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

S. NATARAJA SARMA—PLAINTIFF—APPELLANT

versus

V. RAMABHADRA NAIDU GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence (Act I of 1872), s. 65—Document not produced but found inadmissible in a previous suit—Secondary evidence, admissibility of—Hindu Law—Gift to wife—Absolute interest or life-interest—Presumption.

Secondary evidence of a document which is not produced but which in a previous suit was found to be inadmissible as being not registered cannot be given. [p. 853, col. 1.]

In the absence of any evidence to the contrary a Hindu widow has only a life-estate in the property obtained by her from her husband. [p. 854, col. 1.]

Gomattam Ramanuja Aiyangar v. *Satgopachar*, 24 Ind. Cas. 20; 27 M. L. J. 329; *Bodi Muttayya* v. *Kavoori Kodandaramayya*, 23 Ind. Cas. 594; (1914) M. W. N. 387; *Sri Braja Kisora Devu Garu* v. *Sri Kundana Devi Patta Mahadevi Garu*, 22 M. 431; 26 I. A. 66 (P. C.); 9 M. L. J. 157; 3 C. W. N. 378, referred to.

Appeal against the decree of the District Court of Madura, in Original Suit No. 6 of 1911.

Mr. *C. V. Anathakrishna Aiyar*, for the Appellant.

Mr. *S. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.—The first question that is argued before us is that the District Judge was wrong in holding that Kamalsamy was not in possession of the properties after the death of Kamalammal, who held them under a grant made by her husband in the year 1877. The evidence in support of the appellant's contention is that of his first witness, and Exhibit G-3 is an order passed by the District Munsif in 1906 upholding the possession of Kamalasamy against the respondent. But that order was really passed upon the evidence of Kamalasamy himself who, now examined as the defendant's 9th witness, states that the evidence which he then gave was false and that it was made at the instance of the present appellant. The evidence seems, therefore, to be unreliable. As against the evidence of the plaintiff's first witness who is the plaintiff himself, there is the evidence of a number of witnesses on behalf of the respondent, some of them respectable and disinterested, who prove that Kamalasamy was not in possession after the death of the widow, Kamalammal. The Judge says that the only conclusion possible on the evidence is that Kamalasamy was not in possession. The probabilities are also in support of that conclusion. The defendant obtained possession through Court in August 1907. The appellant did not then claim possession of the property: he did not sue the tenants for the recovery of arrears of rent as they fell due and he filed the present suit only in the year 1910. We are not, therefore, prepared to interfere with the District Judge's finding on this point.

The next question is whether the plaintiff has got any title to the property. The grant obtained by Kamalammal from her husband is not produced and in a previous suit it was held to be inadmissible as it was not registered. The terms of the document, therefore, cannot be proved by secondary evidence. It is argued by Mr. Ananthakrishna Aiyar that there is no presumption that the grant was only for her life and that the presumption rather is that it was a gift to her and that she was solely entitled to the property. He also argues that, having been in possession for more than 12 years, she has acquired a title by prescription. And he relies upon two judgments reported as *Gomattam Ramanujaya Aiyangar* v. *Satgopachar* (1) and *Bodi Muttay* v. *Kavoori Kodandaramayya* (2). On the other side the opinion of their Lordships of the Privy Council in *Sri Braja Kisora Devu Garu*

(1) 24 Ind. Cas. 20; 27 M. L. J. 329.
(2) 23 Ind. Cas. 594; (1914) M. W. N. 387.

v. *Sri Kundana Devi Patta Mahadevi Garu* (3) is relied upon. In the present case, however, it is unnecessary to rely upon any presumption. In 1887 a creditor had attached the suit property as the absolute property of Kamalammal, the widow. The *zemindar* contended that he had only a life-estate and it was only that interest that could be sold in execution of the decree. His claim was disallowed. But in the suit which was brought by him to set aside that order, the Subordinate Judge decided that Kamalammal had only a life-interest in the properties and they were to be sold with that intimation, so that the purchaser would become liable to pay the *zemindar teervi* as long as the widow was alive. It negatived the absolute interest in the property which was set up by the widow. Subsequently the plaintiff's predecessor-in-title admitted that Kamalammal had only life-interest. The properties were dealt with on the footing that her interest was only a life-interest. In the absence, therefore, of any evidence as to the terms of the document, we are of opinion that this is sufficient to show that the widow had only a life-estate in the property. It is thus shown that the plaintiff has no title to the property, that neither he nor his predecessor-in-title was in possession of the same.

We are, therefore, of opinion that the Judge's decision is right and we dismiss the appeal with costs.

Appeal dismissed.

(3) 22 M. 431; 26 I. A. 66 (P. C.); 9 M. L. J. 157; 3 C. W. N. 378.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 263 OF 1913.

February 22, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

RAGHUNATH DAS—DEFENDANT—APPELLANT

versus

KISHEN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS

Hindu Law—Adoption—Sister's son—Invalid.

In the absence of a special custom, the adoption of a sister's son is invalid according to Hindu Law. [p. 855, col. 1.]

First appeal from the decision of the District Judge of Meerut, dated the 11th of June 1913.

Mr. *B. E. O'Conor*, (with him Dr. *S. C. Banerji*), for the Appellant.

Mr. *Hamilton*, The Hon'ble Mr. *Moti Lal Nehru*, Dr. *S. N. Sen* and Mr. *Avadh Bihari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought under section 92 of the Code of Civil Procedure. The allegations in the plaint were that Lala Shib Lal had by Will, dated the 18th of September 1911, and also by another deed executed during his life-time, created a trust of certain property, that Raghu Nath Das in collusion with Nathu Mal and two other trustees had taken possession of the trust property and misappropriated the same and converted it to their own use. The defence of Raghu Nath was that he was the adopted son of Shib Lal, that the family was a joint family, that the property was ancestral and that Shib Lal had no power to creat the trust (Raghu Nath himself brought the suit out of which the connected Appeal No. 265 of 1913 arises). Nathu Mal put in no written statement. The Court below has found that Raghu Nath and Shib Lal were separate at the time of Shib Lal's death. It also found that the trust was validly created and that a breach of trust was committed by some of the trustees and, amongst others, by Nathu Mal. Nathu Mal did not appeal against this decree by which he was ordered to render accounts. The suit brought by Raghu Nath was of course also dismissed, both suits being tried together. It has not been seriously contended that Shib Lal did not know and approve of the contents of his Will, or that the same was not duly executed by him. The evidence on the point is overwhelming and we entirely agree with the decision of the Court below. As to whether the property was ancestral, the Court below has found that Shib Lal was the sister's son of Bansidhar who was the original owner and from whom the property is said to have descended. Shib Lal was not the natural son of Bansidhar, and accordingly the property would not be ancestral in his hands unless he was the validly adopted son of Bansidhar. We see no reason whatever to differ from the view taken by the Court below on the evidence that Shib Lal was the sister's son

of Bansidhar. In the absence of a special custom (which would require to be proved), the adoption of a sister's son is invalid according to Hindu Law. The property was not, therefore, ancestral in the hands of Shib Lal. In addition to this, there is the clearest admission under the hand of Raghu Nath Das himself that he and Shib Lal had separated prior to the death of the latter. The result is that the decree of the Court below is correct. We accordinly dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 409 OF 1912.

November 18, 1914.

Present:—Mr. Lindsay, J. C.

BRIJRAJ SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GANGA BAKHSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Possession follows title—Trespasser, no presumption of possession in favour of—Possession, presumption of, while land under water.

Where possession in fact is undetermined, possession in law follows the right to possession: in other words, possession follows title. [p 856, col. 2.]

No presumption of possession can be raised in favour of a trespasser. [p. 856, col. 2.]

Where the plaintiffs' title to the land in suit was acknowledged and it was found that the land was under water for sometime during 12 years before suit:

Held, that the presumption as to possession must be in favour of the plaintiffs, even though the defendants were in actual possession immediately before and after the period during which the land was under water. [p. 856, col. 2.]

Appeal against the decree of the District Judge of Hardoi, dated the 18th July 1912, reversing that of the Subordinate Judge, Hardoi, dated the 11th November 1911.

Mr. *A. P. Sen*, for the Appellants.

Mr. *H. C. Dutt*, for the Respondents.

JUDGMENT.—The question for decision in this appeal is one of limitation. The appellants were the plaintiffs in the first Court and that suit was for recovery of possession of an area of some 29 *bighas*, the allegations for the plaintiffs being tha the land belonged to them and that they had been dispossessed from the same by reason of an order passed in April 1909, in proceedings between the parties under section 145 of the Code of Criminal Procedure. The principal defence was one of limitation, the defendants denying that the plaintiffs had been in possession within twelve years from the date of the suit. The suit as framed was one to which Article 142 of the Schedule to the Limitation Act applies and it certainly lay upon the plaintiffs to establish possession within limitation. The first Court found that the plaintiffs had proved this fact; the lower Appellate Court came to a contrary decision and the result has been the dismissal of the suit as barred by time.

The question of possession being the principal question for determination, it is necessary in the first place to consider the nature of the property in dispute. Proof of possession must necessarily vary with the nature of the property in respect of which possession is asserted.

It appears then from the findings of the Courts below that this area of 29 *bighas* odd is situated between the two villages Benhdar Khurd and Kharka. The plaintiffs are the owners of the former village and it is admitted that the land in dispute belongs to the plaintiffs' village. The land is tank land, that is to say, it is in ordinary circumstances submerged. But it has emerged from time to time during the last 20 years and has been cultivated on these occasions by tenants holding from the defendants.

The first Court held in this connection that the land is generally under water and the learned Judge of the Court below records in his judgment that it has been for considerable periods under water. These are findings of fact which are supported by the evidence on the record. This evidence relates in the main to certain occasions upon which disputes arose between the parties as regards possession—disputes which arose at considerable intervals of time. The first occasion was in the year 1882 when the parties applied for demarcation of boundaries. The case dragged on till 1885 when it was put an end to by reason of

the disputed land having become submerged by the water of the tank. We next hear of a dispute in 1893—another dispute about boundaries—and from the records of this litigation it is made to appear that the land had been under water since 1885.

The third occasion was in 1895 when the plaintiffs distrained the crop of a tenant growing on a portion of the disputed land which emerged from the tank. The tenant brought a suit to contest the right to distrain and this suit was decided adversely to the plaintiffs. The name of this tenant was Natha and he was examined in this suit as a witness for the defendants. He deposed that the land regarding which these proceedings in distraint were taken was cultivated by him for two years only and went under water afterwards.

The year 1896 produced a fresh litigation when the plaintiffs again applied for a demarcation of boundaries. The plaintiffs' application was rejected on the ground that they declined to accept demarcation on the basis of possession. With regard to this the lower Court observes that there could hardly be clearer proof than this that at this date the plaintiffs were not in possession. That may be if by possession is meant actual physical possession. Natha's case which was fought out in 1895 shows the same thing, but then we have Natha's statement that the land was submerged after he had cultivated for two years. So that the conclusion appears to be that for the years 1895 to say 1897 or thereabouts the land was out of the water and was for that period in the occupation of the defendants or their tenants. Thereafter it became covered with water.

The next dispute we hear of is in 1906 when a similar case of distraint arose between the plaintiffs and another tenant of the defendants. This case again was decided adversely to the plaintiffs. And the last litigation between the parties was in 1909 under section 145 of the Code of Criminal Procedure. In that case possession was awarded to the defendants and it is the order in this case which has given rise to the cause of action set up by the plaintiffs.

The result of the evidence is to show that between the years 1882 and 1906 the land in dispute has been submerged for long periods, but that during the intervals for which it was out of the water the defendants, who admittedly had no title and were mere trespassers, were successful in asserting their possession. The question is whether having proved so much the defendants are entitled to have it held in their favour that the plaintiffs have failed to prove possession within twelve years from the date of suit. The learned Judge has held that it may safely be affirmed that the plaintiffs have never had actual possession within limitation. In an earlier portion of the judgment the learned Judge had laid down that the plaintiffs must prove actual possession—meaning I presume actual physical possession of the land. I am unable to agree with this proposition. The plaintiffs had to prove possession—such possession as the land was capable of—and it cannot be argued that land which is lying at the bottom of a tank is, while it remains there, susceptible of physical occupation.

It is an axium of the law relating to possession that where possession in fact is undetermined, possession in law follows the right to possess: in other words, possession follows title. Applying this principle to the case before us it follows that while the land in suit was under water, possession in law was with the plaintiffs whose title or right to possess is acknowledged. And if it is shown, as I think it has been, that the land was under water during twelve years before suit, the presumption as to possession must be in favour of the plaintiffs. It was for the defendants to rebut that presumptin and in any opinion they failed to do so. It was not sufficient for them to show that on isolated occasions when the land emerged they successfully asserted their physical possession. Being trespassers their possession would be recognised only for so long as they could successfully assert it. It cannot be presumed in their favour that their possession continued after submergence. No presumption of possession can be raised in favour of a trespasser. So once their actual possession ceased by reason of the land's going under water, possession in law must have necessarily reverted to the rightful owner—that is, the person who has the right to possess. I cannot agree with the learned Judge in holding that possession in

law can remain in abeyance in a case of this nature. If possession is not with the trespasser it must be with the person who has the right to possess. The learned Judge remarks in the latter portion of his judgment that the real truth appears to be that the land was not in the actual possession of either party during these intervals, meaning, I take it, the intervals of submergence. That no doubt is true, but possession, that is, possession in law must during those periods be presumed to have been with the plaintiffs.

I hold, therefore, that the decision of the lower Appellate Court is erroneous and that for the purpose of Article 142 of the Schedule to the Limitation Act, the plaintiffs did furnish adequate proof of possession within limitation. I allow this appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The appellants here will have their costs both in this Court and in the Court below.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 157 OF 1914.

March 10, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

Musammat AFZAL BEGAM—DEFENDANT—APPLICANT

versus

Musammat AKHARI KHANAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (2)—Withdrawal of suit—Appellate Court, power of, to grant permission to withdraw suit with liberty to bring fresh action—Jurisdiction.

An Appellate Court can under Order XXIII of the Civil Procedure Code give a plaintiff permission to withdraw his suit with liberty to bring a fresh one. [p. 858, col. 2.]

Ganga Ram v. *Data Ram*, 8 A. 82; A. W. N. (1886) 6, followed.

Choragudi China Kotayya v. *Sri Raja Varadaraja Appa Row Bahadur*, 25 Ind. Cas. 388; 27 M. L. J. 244; 1 L. W. 613; 16 M. L. T. 186; *Eknath* v. *Ranoji*, 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R. 237, not followed.

Civil revision against an order of the District Judge of Bareilly, dated the 7th of August 1914.

FACTS of the case appear clearly from the judgment.

Dr. *S. M. Suleman*, for the Applicant:—Order XXIII, rule 1, Civil Procedure Code, does not apply to Appellate Courts. I rely on *Choragudi Chinna Kotayya* v. *Sri Raja Varadaraja Appa Row Bahadur* (1), *Eknath* v. *Ranoji* (2), *Ghazanfar Husain* v. *Ram Ratan Lal* (3), *Satyabhamabai* v. *Ganesh Balkrishna* (4). *Prima facie* Order XXIII, rule 1, applies to original suits. Order XXIII, rule 1, clause (1), cannot obviously apply after a suit has terminated. It gives absolute right to withdraw the suit.

Sub-clause (2) makes mention of the permission to bring a fresh suit. It cannot apply where clause (1) does not apply.

Sub-clause (3) provides for discretion to award costs. Presumably no costs can be awarded after decree. So it governs cases under sub-clauses (1) and (2).

Section 107, Civil Precedure Code, cannot be of much help in this connection. The words used are "as nearly as may be." The original Court has no power to allow a claim to be withdrawn after decree, and so an appeal cannot be withdrawn.

The old section 373 has been materially altered and the new provisions of Order XXIII, rule 1, have to be applied. The ruling in *Ganga Ram* v. *Data Ram* (5) was passed under the old Civil Procedure Code. It has been dissented from in *Jagdesh Chaudhri* v. *Tulshi Chaudhri* (6).

The High Court can interfere in revision with such an order. I rely on *Ram Krishna* v. *Ram Kripa* (7), *Radha Rawan* v. *Tula Ram* (8), *Manbhari* v. *Sumer Chand* (9).

Mr. *Agha Haidar*, for the Opposite Party, was not called upon.

JUDGMENT.—This is an application for revision of an order passed by the District Judge of Bareilly under Order XXIII, rule 1 (2), allowing the plaintiff to withdraw from the suit and giving her liberty to institute a fresh suit in respect

(1) 25 Ind. Cas. 388; 27 M. L. J. 244; 1 L. W. 613; 16 M. L. T. 186.
(2) 10 Ind. Cas. 813; 35 B. 261; 13 Bom. L. R. 237
(3) 20 Ind. Cas. 17.
(4) 29 B. 13; 6 Bom. L. R. 533.
(5) 8 A. 82; A. W. N. (1886) 6.
(6) 16 A. 19; A. W. N. (1893) 189.
(7) 14 Ind. Cas. 97; 9 A. L. J. 358.
(8) 17 Ind. Cas. 647; 10 A. L. J. 393.
(9) 25 Ind. Cas. 175; 12 A. L. J. 441

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of the same subject-matter. It is contended that the learned Judge had no power to act under this rule because it is only the Court of first instance that can allow the plaintiff to withdraw the suit and give him or her permission to institute a fresh suit. The applicant relies upon the decision of the Madras High Court in *Choragudi Chinna Kotayyaa* v. *Sri Raja Varadaraja Appa Row Bahadur* (1) and the decision of the Bombay High Court in *Eknath* v. *Ranoji* (2). These two decisions certainly support the contention advanced on behalf of the applicant; but as long ago as 1885 this Court in *Ganga Ram* v. *Data Ram* (5) decided that an Appellate Court could, under section 373 of the Code of Civil Procedure, 1882, give a plaintiff, whose suit had been dismissed by the Court of first instance, permission to withdraw his suit and give him leave to institute a fresh one. The decision in that case was based on some earlier decisions of the Calcutta High Court under the corresponding provision in the Code of Civil Procedure, 1859. So far as we are aware the correctness of the decision of this Court has never been challenged in this Court and we believe that when the new Code of Civil Procedure was passed, there was no reported decision to the effect that the Appellate Court could not give such permission. All the reported cases were in favour of the view that the appellate Court could give such permission. Indeed Courts had gone further and held that a Court executing a decree could give such permission. Order XXIII, rule 4, distinctly lays down that nothing in the order shall apply to any proceedings in execution of a decree or order, thereby superseding the decision that a Court executing a decree could give such permission. The language of Order XXIII, rule 1, is not exactly the same as that of section 373 of the Code of Civil Procedure of 1882. The provisions of the enactment have been re-arranged; but we do not think that the re-arrangement indicates any intention to lay down that an Appellate Court is not to give such permission. We do not think that sufficient ground has been shown for departing from the long continued practice of this Province founded upon the decision of this Court in *Ganga Ram* v. *Data Ram* (5). A good deal may, no doubt, be said against the view taken by this Court; but the ruling has stood unchallenged for many years and we shall only introduce confusion if we depart from it now. There are several reported cases in which the lower Appellate Court has given the plaintiff permission to withdraw from the suit and file a fresh suit and such orders have been attacked on various grounds, but so far as we know it has never been contended here since 1885 that an Appellate Court has not power to grant such permission; we propose to adhere to the decision of this Court. Then it is contended that even if the District Judge had jurisdiction to act under Order XXIII, rule 1, he has exercised his jurisdiction in an unreasonable way, that he has not found that the suit would fail on account of a formal defect and that the ground given by the District Judge is really no ground for allowing the plaintiff to withdraw from the suit. The suit was one for partition of property which originally belonged to one Moti Begam. One of the children of Moti Begam was Kamini Begam who was married to a man named Khadim Ali. Several members of the family were impleaded as defendants to the suit, but the heirs of Khadim Ali, who was dead, were not impleaded. In her written statement the first defendant to the suit distinctly pleaded that as Khadim Ali's heirs were not parties to the suit, the suit could not proceed. This plea appears to have escaped the attention of the Subordinate Judge when he was fixing issues, with the result that no specific issue was fixed regarding it. But at the time of argument the Subordinate Judge was asked to decide behind the back of Khadim Ali's heirs that they had no right to the estate. He declined to do this, but set apart what he conceived to be Khadim Ali's share and gave the plaintiff a decree for partition of her share in the remainder of the property. The plaintiff appealed contending that her entire claim should have been decreed. The first defendant filed cross-objections, one of which was that all the necessary parties had not been impleaded and that the suit should have been dismissed. Thereupon the plaintiff presented a petition to the District

Judge saying that it was by mistake that she had failed to implead the heirs of Khadim Ali, that the first defendant had pleaded that the suit could not proceed in their absence and had reiterated this objection in her memorandum of objections in the Appellate Court and that she was afraid that her suit and appeal would be dismissed on this ground; she, therefore, prayed for permission to withdraw from the suit and bring another suit. The District Judge rightly or wrongly held that as the suit was one for partition, non-joinder of necessary parties might result in its being dismissed and he pointed out that a complete partition of the property could not be effected in the absence of Khadim Ali's heirs and he came to the conclusion that a fair ground has been made out for allowing the plaintiff to withdraw from the suit. It may be that we should not have taken the same view as the District Judge took of the non-joinder of Khadim Ali's heirs. It might have been possible to hold that the suit could proceed in their absence so far as the rest of the property was concerned; but this is not an appeal and it seems to us impossible to say that the District Judge in arriving at his decision that permission to withdraw the suit should be given to the plaintiff has acted illegally or with material irregularity. We are, therefore, unable to interfere with the decision of the District Judge. We dismiss this application with costs including fees on the higher scale.

Application dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 89 OF 1913.

June 23, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

KALAP NATH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MATA DIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 108, cl. (10)—Rival tenants, contest to cultivate same land between.

Section 108, clause (10), of the Oudh Rent Act, has no application where the contest is one between rival tenants claiming to cultivate the same land. [p. 860, col. 1.]

Appeal against the decree of the District Judge of Gonda, dated the 30th January 1913, reversing that of the Munsif of Gonda, dated 9th December 1912.

Babu *Aditya Prasad*, for the Appellants.

Babu *Surendro Nath Roy*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants sued in this case for possession of plots Nos. 1889/1 and 1889/2 *khasra* and for damages, on the allegation that they were tenants of the said plots and that the defendants wrongfully ejected them on the 27th January 19 0. The suit was filed on the 15th August 1912. The defence was that the said plots originally belonged to two brothers, Hanoman and Ramanand; that Ramanand was the ancestor of the plaintiffs and Hanoman was the ancestor of the defendants; that a partition took place between Ramanand and Hanoman about 40 years ago whereby the plots in dispute were allotted to Hanoman and that from that time Hanoman and his descendants had been in posseseion of the said plots in their own right.

The Court of first instance found that Ramanand was a tenant of the entire plot No. 1889 *khasra* and that the plaintiffs, who were his kinsmen, had established their possession over the same till 1317 *Fasli*. It decreed the claim of the plaintiffs accordingly for possession of the disputed area and Rs. 9 as damages. The defendants appealed. The lower Appellate Court threw out the claim of the plaintiffs on the preliminary ground that it was barred by section 108, clause (10), of the Oudh Rent Act. That section, however, applies to cases where a tenant or an under-proprietor sues for the recovery of the occupancy of any land from which he has been illegally ejected by the landlord. Such a suit has to be brought against the landlord under section 129 of the Oudh Rent Act within a period of one year from the date of the accrual of the cause of action. The landlord is not, however, a party to this suit. There was no objection raised that he was a necessary party. On the other hand, it was pleaded by the defendants that they cultivat,

ed the land in their own right as heirs of Hanoman, to whom the said plot, they stated, had been allotted by partition. On the 25th December 1911, that is, sometime before the institution of the suit the defendants took a lease of the said plots from a *thekedar*, who derived his title from the landlord agreeing to hold the land on an enhanced rent. But their occupation did not begin from the date of the execution of that lease, and the decision in *Ram Lal* v. *Chunni Lal* (1) relied on by the lower Appellate Court does not, therefore, apply. That was a case in which an occupancy-tenant had died leaving two daughters, whose names were recorded as occupancy-tenants in succession to their father but who had not been able to obtain actual possession of their father's holding. On the contrary the *zemindar* had put his own tenants in possession of the land and had thereby ejected the daughters from the holding. The title of the daughters to the recovery of the occupation of the land, from which they were ejected, had lapsed as against the *zemindar* by reason of limitation and the suit filed by the lessees of one of the daughters for possession of the holding as against the person who was put in possession of the land by the *zemindar* was, therefore, held to be not maintainable. In the present case the possession of the defendants is said to have existed from before the date of the lease granted by the defendants and the cause of action set up in the plaint, and, as the contest is one between rival tenants claiming to cultivate the same land, section 108, clause (10), of the Oudh Rent Act has no application. Even in cases where a person had not obtained possession over a holding which he claimed to have inherited from his ancestor, it was held by this Court in *Raghubar Dayal* v. *Chandan* (2) that the first question for decision was whether the plaintiffs were entitled to succeed to the right of occupancy as heirs of the deceased tenant and that until such question was determined, no relationship of landlord and tenant could be established to enable the plaintiffs to claim relief in the Revenue Court.

The present suit was, therefore, rightly instituted in the Civil Court and the questions at issue ought to have been gone into. No question of jurisdiction was raised in the written statement.

The appeal is, therefore, allowed and the case remanded to the lower Appellate Court with a direction to re-admit the appeal under its original number and to dispose of it in accordance with law. The costs will abide the result.

Appeal allowed; Case remanded.

(1) 27 A. 372; 2 A. L. J. 69; A. W. N. (1904) 281.
(2) 10 O. C. 23.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL 71 OF 1914.

December 14, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

GHANTASALA SEETHARAMIAH—DEFENDANT—APPELLANT

versus

TADEPALLI PITCHAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage-deed—Provision for compound interest on default, whether penal.

A provision for compound interest on default is not penal by itself, but a provision for compound interest at an appreciably higher rate than the rate mentioned as payable till default may be penal. [p. 860, col. 1.]

Sundar Koer v. *Rai Sham Krishen*, 34 C. 150; (P. C.); 34 I. A. 9; 11 C. W. N. 249; 5 C. L. J. 106; 4 A. L. J. 109; 9 Bom. L. R. 304; 17 M. L. J. 43; 2 M. L. T. 75, followed.

Second appeal against the decree of the District Court of Kistna at Masulipatam, in Appeal Suit No. 533 of 1912, preferred against that of the Court of the Principal District Munsif of Masulipatam, in Original Suit No. 571 of 1910.

Mr. *N.S. Narasimhachari*, for Mr. *V. Ramadoss*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—Following *Sundar Koer* v. *Rai Sham Krishen* (1), we hold that a provision for compound interest on default is not by itself penal but a provision for compound interest at an appreciably higher rate than the rate mentioned as payable till default may be penal. We hold that the raising of the rate for compound interest from twelve and quarter annas to one rupee per cent. per mensem (from 9-3/16 per cent. to 12 per cent. per annum) is penal and

(1) 34 C. 150 (P. C.); 34 I. A. 9; 11 C. W. N. 249; 5 C. L. J. 106; 4 A. L. J. 109; 9 Bom. L. R. 304; 17 M. L. J. 43; 2 M. L. T. 75.

we allow compound interest at nine and three-sixteenths per cent. with proportionate costs to the plaintiffs throughout in modification of the decree of the lower Appellate Court. Time for redemption is extended till three months from this day.

Decree modified.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 190 OF 1913.

March 8, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Musammat MUNNA KUNWAR—PLAINTIFF—APPELLANT

versus

VENAIK RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Guardian and ward—Guardian purchasing property in consideration of money due to minor—Trustee—Limitation.

Where a decree, passed in favour of a minor under the guardianship of a certain person, is discharged by the guardian in consideration of the transfer made to him of certain property, he holds that property as the trustee for the minor. [p. 862, col. 1.]

First appeal from the decision of the Subordinate Judge of Benares, dated the 24th November 1913.

FACTS.—Daya Ram and Mangal Ram were cousins. After Daya Ram's death on July 18th, 1888, his cousin, Mangal Ram obtained a certificate of guardianship of the two minor daughters of Daya Ram on 13th March 1890. There were some *hundis* left by Daya Ram, in which his share was ⅓rd, Mangal Ram and Uadho Ram held ⅓rd share and Adit Ram ⅓rd. A suit was brought by Adit Ram, Mangal Ram, Madho Ram and the plaintiff and *Musammat* Hari Kunwar, her sister, under the guardianship of Mangal Ram. The latter's daughter died and only the plaintiff represented her in the suit.

A decree was obtained and in satisfaction of the decree the judgment-debtors conveyed the property in dispute under two sale-deeds of 20th December 1898 and 17th September 1897. The sale-deeds were in the name of Adit Ram, Madho Ram and Mangal Ram.

The plaintiff attained majority on 27th September 1901 and brought this suit for possession, on the allegation that Mangal Ram held the property as her trustee and as her guardian, and that he died in 1902 and his sons also held the same position, but refused to pay her profits now. The defendants denied their possession as that of trustees and pleaded that the suit was time-barred. The Subordinate Judge dismissed the suit. Plaintiff appealed.

Dr. *S. C. Banerjee*, for the Appellant:—The property was purchased in the name of three of the decree-holders, but the consideration for it was the decretal amount due from the judgment-debtors who sold the property.

Moreover, one of the decree-holders who purchased the property was the certificated guardian of the plaintiff who was then a minor. In such a case, the property would be held in trust by the purchasers for the other decree-holder, the plaintiff in this case. Under section 10 of the Indian Limitation Act of 1908, the present suit cannot be barred by time.

The plaintiff attained majority in 1901. The present suit was instituted in 1911. The position of the certificated guardian cannot be adverse to the ward and hence the present suit cannot be barred by time.

Section 63, clause (2), of the Trust Act provides that the beneficiary has the same rights as the trustee.

The Hon'ble Dr. *Sunder Lal* (with him Pandit *Rama Kant Maliiya*), for the Respondents:—Two rules have always been held to apply in cases under section 10 of the Limitation Act. (1) There should be an express trust. (2) That the suit should be one for following the trust property for the purposes of the trust. The words used in section 10 are "Trust for a specific purpose" and this clearly shows that the trust must be an express one.

[RICHARDS, C. J.—*A* is given Rs. 10,000 in trust for *B*. *A* invests Rs. 10,000 in purchase of property. What time should *B* sue in?]

The Hon'ble Dr. *Sunder Lal*:—Section 10 would apply.

In the present case he is not holding as a trustee for an express trust.

[RICHARDS, C. J.—The Law of Limitation does not apply between *cestui que trust* and a trustee at Common Law].

The Hon'ble Dr. *Sunder Lal*—He and other persons were personally entitled and they purchased the property for themselves. They were only liable to pay the money due to the plaintiff. They did not purport to purchase the property for the plaintiff.

He referred to *Balwant Rao* v. *Puran Mal* (1), *Amina Bibi* v. *Najm-un-nissa Bibi* (2), *Kherodemoney Dossee* v. *Loorgamoney Dossee* (3).

JUDGMEMT.—This appeal arises out of a suit in which the plaintiff claims to be put into proprietary possession of one-third of certain property together with an account of what was due to her whilst she was wrongfully kept out of possession, and to be awarded the amount so found due. The main facts relevant to the present appeal are admitted. A decree was made on the 29th of February 1892 in favour of one Adit Ram, son of Fateh Ram, Mangal Ram and Madho Ram, sons of Gulab Ram, and *Musammat* Munna Kunwar (daughter of Daya Ram) under the guardianship of the aforesaid Mangal Ram. In part discharge of this decree certain properties were purchased but in the names only of Mangal Ram, Adit Ram and Madho Ram. The plaintiff says that she was entitled to one-third of the decree and that therefore the decree having been discharged in part by the transfer of the property, she is entitled to the property to the extent of her interest in the decree and that Mangal Ram, who was her guardian, must be deemed to have held the property to the extent of one-third as trustee for her. Numerous defences were pleaded, including a plea that the claim of *Musammat* Munna Kunwar under the decree had been discharged and that she had been paid off, and a further plea of limitation. The Court below without deciding any of the other issues has dismissed the suit as being barred by time.

We are clearly of opinion that if Mangal Ram, who was the guardian of Munna Kunwar in this very decree, gave a discharge for the decree in whole or in part in consideration of the transfer to him of certain property, he would hold that property as the trustee for Munna Kunwar to the extent of her interest. It is doubtful whether time would run at all in favour of Mangal Ram, or his representatives, but certainly time would not commence to run until after *Musammat* Munna Kunwar attained majority. Mangal Ram undoubtedly was in a fiduciary capacity towards Munna Kunwar. We, therefore, think that the Court below was wrong in holding that the suit was barred by limitation. Munna Kunwar did not attain her majority until the 27th of September 1901 and the suit was instituted on the 23rd of September 1911. We wish it to be understood that we are not expressing any opinion on the other issues.

We allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit the case under its original number in the file and to proceed to hear and determine the same according to law. The appellant must have the costs of this appeal, which will include in this Court-fees on the higher scale. Other costs will be costs in the cause.

Appeal allowed; Case remanded.

(1) 6 A. 1; 10 I. A. 90; 13 C. L. R. 39; 4 Saraswati's P. C. J. 435.

(2) 27 Ind. Cas. 712; 13 A. L. J. 255.

(3) 4 C. 455; 3 C. L. R. 3.5; 2 Shome L. R. 135.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 31 OF 1914.

November 16, 1914.

Present:—Mr. Lindsay, J. C.

NIRANJAN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAGAN NATH AND ANOTHER—PLAINTIFFS AND ANOTHER—DEFENDANT—RESPONDENTS.

Mortgage—Extension of time—Civil Procedure Code (Act V of 1908), s. 148, O. XXXIV, r. 8—Suit for redemption—Preliminary and final decree, passing of.

A suit for possession of mortgaged property brought by a puisne mortgagee against the prior mortgagees was compromised. It was agreed that the claim for possession should be allowed on condition of the puisne mortgagee paying a certain amount by a fixed date. In default of payment on the date mentioned, the prior mortgagees were to be allowed to take possession. On the date fixed for payment the puisne mortgagee applied for extension of time which was granted by the lower Court:

NIRANJAN SINGH *v.* JAGAN NATH.

Held, that no extension of time could be granted either under section 148, Civil Procedure Code, or Order XXXIV, rule 8, Civil Procedure Code. [p. 863, col. 2.]

The power to enlarge time by the proviso to rule 8 of Order XXXIV, Civil Procedure Code, can be exercised only in cases to which the rule strictly applies, namely, to cases in which a suit has been brought for redemption and in which both a preliminary and a final decree for redemption have been passed. [p. 863, col. 2.]

Appeal against the order of the Subordinate Judge, Hardoi, dated the 4th July 1914.

Babu *Bisheshwar Nath*, for the Appellants.

Babu *Rudra Dut Sinha*, for the Respondent No. 2.

JUDGMENT.—The facts of this case are as follows. One Jodha Singh mortgaged certain property in the first instance to two persons, named Niranjan and Rameshar. He afterwards mortgaged the same property to Jagan Nath and Sheodarshan. These second mortgagees brought a suit for possession of the mortgaged property in which the prior mortgagees were impleaded as defendants. The suit was contested but the parties finally compromised. It was agreed that the claim of Jagan Nath and Sheodarshan to possession as mortgagees should be allowed on condition of their paying Rs. 4,297 to the prior mortgagees on or before the *Jeth puranmashi*, 1971 *Sambat* (9th June, 1914). In default of payment of this sum on the date mentioned the prior mortgagees were to be allowed to take possession by application in execution. On the 9th of June 1914, the date fixed for payment under the decree based upon the compromise, these second mortgagees applied to the Court below for extension of the time fixed for payment till the 30th of June. Notice was served on the opposite party who contested the application. The learned Judge, treating the decree based upon the compromise as a redemption decree, allowed an extension of time till the 30th of June. This order is now attacked here in appeal on the ground that it was not an order justified by law. In the Court below the application for the extension of time was based upon two provisions of the Code of Civil Procedure, one section 148 of the Code and the other rule 8 of Order XXXIV. The appellants here objected that no extension could be allowed under section 148 and in support of this contention they referred to the case reported as *Narendra Bahadur Singh* v. *Ajudhya Prasad* (1). The learned Judge of the Court below affected to distinguish that case from the present case, but in my opinion he has made a distinction without a difference. The principle laid down in that judgment was as much applicable to the facts of the case here as it was to the facts of the case reported. What was held by the Judges of this Court was that the general provisions of section 148 of the Code of Civil Procedure relate only to proceedings antecedent to the passing of a final decree and that when once such a decree has been passed, the power of the Court is limited by the general principle that once a judgment has been pronounced and the decree signed, such final decree cannot be altered except under the provisions of section 152 or Order XX, rule 3, or those relating to review of judgment, except in cases in which power to grant further extension of time has been expressly reserved to the Court. It follows from this exposition of the law that section 148 could not be made available in order to justify the extension of time which was allowed in the present case. I have said, however, that the learned Judge considered that he was entitled to allow the extension of time by virtue of the provisions of rule 8, Order XXXIV. With this view I am unable to agree. Rule 8 of Order XXXIV relates to decrees which are passed in suits brought for redemption. The suit, in which the compromise was arrived at and in which the decree, with which the lower Court was dealing, was passed, was not a suit for redemption at all, but a suit of an entirely different character. It was merely a suit by a mortgagee asking for possession of the mortgaged property in accordance with the terms of the mortgage-deed. I do not think that the provisions of rule 8, Order XXXIV, can be extended to apply to a suit of that nature. In my opinion the power to enlarge the time which is conferred upon the Court by the proviso to rule 8 can be exercised only in cases to which the rule strictly applies, namely, to cases in which a suit has been brought for redemption and in which both a preliminary and a final decree for redemption have been passed. This being so, I am of opinion that the learned

(1) 5 Ind. Cas. 443; 13 O. C. 28.

Judge had no power to grant this extension. I, therefore, accept the appeal and set aside the order of the Court below. As the subsequent mortgagees failed to deposit the money by the date fixed in the decree based upon the compromise, they are not now entitled to have possesoion of the property, which must be made over to the prior mortgagees in accordance with the decree and the compromise. The appellants' costs of this appeal will be paid by the respondents Nos. 1 and 2.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 54 OF 1913.

December 21, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

S. S. SUBRAMANIA PILLAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

A. K. SANKARALINGAM CHETTIAR AND OTHERS—DEFENDANTS Nos. 2 TO 4—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Award directing parties to share assets and liabilities equally, acceptance of, whether amounts to acknowledgment.

An acceptance of an award directing the parties to share equally the outstandings and "amounts payable" found in the accounts of the partnership is not an acknowledgment of liability for the purposes of section 19 of the Limitation Act. [p. 864, col. 2.]

Appeal against the decree of the Court of the Subordinata Judge of Ramnad, in Original Suit No. 327 of 1911.

Mr. *T. Arumainathan*, for the Appellants.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

This appeal coming on for hearing on the 23rd December 1913, the Court (Miller and Tyabji, JJ.) delivered the following

JUDGMENT.—The *first* question raised in the appeal presents no great difficulty. The contention of the appellants is that the award, Exhibit A, read with the endorsement signed thereon by the 1st defendant and 2nd defendant accepting the award, amounts to an acknowledgment of liability which will give a new starting point of limitation under section 19 of the Limitation Act. In the award the arbitrators direct the 1st and 2nd defendants to share equally the outstandings and "amounts payable", *i. e.*, we may take it the liabilities found in the joint accounts, *i. e.*, in the accounts of the partnership; and in the endorsement the defendants accept the award. But the direction in the award is not an assertion that the book liabilities found in the accounts represent actual existing obligations, any more than it is a declaration that the book outstandings are recoverable assets. It is only a direction that the partners are to share equally whatever of the book assets they can recover and whatever of the book liabilities they may have to pay; and the acceptance of this direction is not an acknowledgment of liability. The entries in the books when made may have been acknowledgments, but they were not made within the period of limitation.

The *second* point taken is that it has not been proved that the partnership between 1st and 2nd defendants was dissolved before the settlement signed by the 1st defendant in 1911. That, however, will make no difference seeing that the transactions between the partnership and the plaintiffs ceased, as the plaintiffs' books show, in 1906. The 1st defendant's acknowledgment was then not within the period of limitation and is of no avail for the purposes of section 19 of the Limitation Act. The settlement of 1911 was only incidentally a settlement between the two firms (the defendants had an interest in the plaintiffs' firm). In fixing the liability of 1st defendant to the plaintiffs the amount which had been due since 1906 by defendants' firm was set off against the amount due to the 1st defendant as a partner in the plaintiffs' firm. It is, therefore, unnecessary to decide when the defendants' firm was dissolved. So far then as the plaintiffs' case depends on acknowledgment, it fails.

Then it is said that the defendants' account which the Subordinate Judge refused to receive shows that limitation did not begin to run in 1906. We have had the account looked at, but have not been shown how it can be held to be a mutual, open and current account, and the alleged adjustment of interest in 1909 is not signed so as to make it an account stated signed by

the defendant under Article 64 of Schedule I of the Limitation Act. It is unnecessary, therefore, to consider whether the Subordinate Judge ought to have admitted the document. It does not help the plaintiffs.

The remaining question is whether 2nd defendant is not bound as a surety: on this question the Subordinate Judge has not heard evidence or arrived at any conclusion. Paragraph 7 of the plaint alleges, as we understand it, that the 2nd defendant undertook to make good to the plaintiffs' firm all losses sustained by the firm in consequence of any failure of 1st defendant to pay what was due by him to his partners: *i. e.*, if at dissolution the 1st defendant owed money to the firm of the plaintiffs, the 2nd defendant guaranteed payment. If this is so, it may be that 2nd defendant must be held liable for the amount found due by 1st defendant in 1911, or it may be that there are circumstances which relieve him of any liability: the question has not been decided and we have not considered it. We leave it for the decision of the Subordinate Judge.

We must ask the Subordmate Judge to return a finding on this question which was substantially raised in the 5th issue:—

Whether the 2nd defendant was a surety for 1st defendant as alleged in paragraph 7 of the plaint and, if so, are 2 to 4 defendants liable to satisfy the plaintiffs' claim ?

Evidence may be taken. The finding should be submitted within two months and seven days will be allowed for filing of objections.

In compliance with the bove order, the Subordinate Judge of Ramnad answered the issue in the negative and against plaintiffs.

This appeal coming on this day for final hearing after receipt of the finding from the lower Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding that the 2nd defendant was not a surety for the 1st defendant. The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 400 OF 1911.

July 27, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

THE GARDEN REACH SPINNING AND MANUFACTURING COMPANY, LTD.,—CLAIMANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27, O. XLVII, r. 1—Appeal—Application, preliminary, to file fresh evidence, legality of—Application, whether sustainable—Appellate Court, power of—Additional evidence, admission of.

A preliminary application to admit fresh evidence before appeal is heard is not warranted by the terms of Order XLI, rule 27. [p. 866, col. 1.]

An application to admit fresh evidence discovered out of Court by the parties comes under Order XLVII, rule 1, not under Order XLI, rule 27. [p. 866, col. 2.]

Order XLI, rule 27, does not authorize an Appellate Court to admit fresh evidence, documentary or oral, and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred, unless the Appellate Court, after examining the evidence on the record, comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a *lacuna* or defect on the evidence on the record. [p. 866, col. 2.]

Appeal against the decree of the Special Land Acquisition Judge of 24-Perganas, dated the 23rd of June 1911.

Messrs. *Pugh* and *Cubitt*, Counsel, and Babus *Satyendra Nath Roy*, *Surendra Nath Roy* and *Narendra Nath Sett*, for the Appellants.

The Hon'ble Sir *S. P. Sinha* and *Caspersz*, Counsel, and Babus *Ram Charan Mitra*, *Ambica Pada Choudhury*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an application by the appellants for the admission of certain additional evidence in an appeal we are about to hear.

The appeal itself is with reference to the amount to be paid by the Government as compensation for the property of the appellants which has been compulsorily acquired under the provisions of the Land Acquisition Act. The fresh evidence that the appellants wish to adduce consists of certain documents leading up to and resulting in a compromise of another case with reference to the acquisition of the premises of the British India Steam Navigation

Co., which adjoin the premises of the appellants.

The compromise with the British India Steam Navigation Co. had not been arrived at when the lower Court gave judgment, nor when the appeal was filed in this Court. The present application is opposed by the Secretary of State for India in Council, the respondent to the present appeal.

Now the powers of an Appellate Court in India to admit further evidence are governed by the provisions of Order XLI, rule 27, which so far as material is in the following terms: "(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if (*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined." The wording of the rule shows clearly that the power of an Appellate Court to admit further evidence is a very restricted one.

In the first place, the rule prohibits the parties to the appeal from producing further evidence.

Next, the power of the Court to admit further evidence is only in case the Appellate Court "requires" the additional evidence "to enable it to pronounce judgment or for any other substantial cause."

As has been pointed out, the word "requires" plainly means "needs or finds needful." When, therefore, can the Appellate Court "require" the additional evidence "to enable it to pronounce judgment or for any other substantial cause?" Manifestly not until the Appellate Court has examined the evidence on the record and comes to the conclusion that the evidence as it stands is inherently defective. Until the Court has, therefore, examined the record, it is not in a position to say, whether the evidence is inherently defective and that it will require the further evidence to enable it to pronounce judgment or for any other substantial cause. A preliminary application such as the present is not warranted by the terms of Order XLI, rule 27.

An application to admit fresh evidence discovered out of Court by the parties comes under Order XLVII, rule 1, not under Order XLI, rule 27.

It is said that the evidence was not in existence at the date of the trial and the case of *Kotaghiri* v. *Vellanki* (1) was cited to show that such evidence is not admissible by way of review. The point does not arise in the present case and it is not necessary for us to decide whether such view is correct or not.

Order XLI, rule 27, does not, I think, authorise an Appellate Court to admit fresh evidence, documentary or oral and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred, unless the Appellate Court, after examining the evidence on the record, comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a *lacuna* or defect in the evidence in the record.

This appears to me to be the effect of the decision of the Privy Council in the case of *Kessowji Issur* v. *Great Indian Peninsular Railway Company*(2). I can find nothing in the judgment of their Lordships to suggest that new evidence, discovered out of Court by the parties but which only came into existence after the filing of the appeal, can be admitted on a preliminary application by the parties to the Appellate Court. Such a suggestion is negatived by the express words in Order XLI, rule 27, that "the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court."

I think, therefore, that we have no jurisdiction to assent to the present application. But even if we had such jurisdiction, I should, on the materials before us, refuse this application. The evidence the appellant Company wish to put forward is to the following effect.

The British India Steam Navigation Company were the owners of the premises adjoining those of the appellant Company.

(1) 4 C. W. N. 725; 24 M. 1 (P. C.); 27 I. A. 197.

(2) 11 C. W. N. 721; 31 B. 381; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 465; 9 Bom. L. R. 671; 17 M. L. J. 347 (P. C.); 34 I. A. 115.

Both the British India Company and appellant Company are represented in Calcutta by Messrs. Mackinnon Mackenzie and Company as also in London, although apparently the two Companies have different Boards of Directors in London.

On the premises adjoining those of the appellant Company, the British India Company had a considerable coal business chiefly for the purpose of coaling their extensive fleet. This property of the British India Company is known as Bracebridge Hall.

The same declaration under the provisions of the Land Acquisition Act was made in respect of the property of the appellant Company, Bracebridge Hall and various other properties.

The British India Company, after the declaration, preferred a claim for a very large amount amounting in the first instance to over one crore and 22 lakhs of rupees.

An award of 14 lakhs odd of rupees was made by the Land Acquisition Collector. The British India Company then required the matter to be taken before the Special Land Acquisition Judge. Negotiations were then opened between Sir Frederic Dumayne on behalf of the Calcutta Port Commissioners on the one hand and in the first instance with Mr. Alexander McLaurin Monteath and subsequently Lord Inchcape on behalf of the British India Company, on the other hand. After long and protracted negotiations the case of the British India Company was subsequently settled by a cash payment of 28 lakhs of rupees to the British India Company, and the grant of certain facilities by the Port Commissioners with reference to the coaling of the fleet of the British India Co. It is now alleged that the facilities granted to the British India Co. are more valuable than those enjoyed by them at Bracebridge Hall, and, therefore, the whole of the 28 lakhs was awarded in respect of the other items of their claim. On this footing, it is said that the Port Commissioners have paid the British India Co. in respect of the site of Bracebridge Hall an amount three or four times larger than the amount paid to the appellant Company, when in fact the land of the appellant Company and Bracebridge Hall must be of substantially the same value. The appellant Company, therefore, desire to give in evidence certain documents relating to the compromise of the claims of the British India Co. Two affidavits have been filed on the present application, one by Mr. Alexander McLaurin Monteath in support of the application and the other by Sir Frederic Dumayne in opposition thereto. Sir Frederic Dumayne is the Vice-Chairman and Chief Executive Officer of the Port Commissioners. There is a conflict between the statements contained in the affidavit of Mr. Monteath and those in the affidavit of Sir Frederic Dumayne. Now it appears from the evidence that the negotiations, which led to the settlement with the British India Co., were opened early in January 1911. The negotiations no doubt were stated by Sir Frederic Dumayne to be "without prejudice to either side" and "confidential." Mr. Sinha on behalf of the Government has argued that this would render all correspondence which passed between the parties thereto incapable in any event of being used in evidence even when a settlement was arrived at. I think Mr. Sinha placed his case too high. The affidavits do establish, however, that in addition to the correspondence interviews took place in the first instance between Mr. Monteath and Sir Frederic Dumayne with a view to a settlement of the case of the British India Co.

The negotiations in India closed in May 1911.

In June 1911 Sir Frederic Dumayne proceeded to England. It appears from his affidavit that the Port Commissioners had directed him to see Lord Inchcape with reference to compromising the British India Company's case. He was also authorised to go as far as to make an offer of 25 lakhs of rupees for that purpose. Lord Inchcape and Sir Frederic Dumayne arrived finally at a settlement, *viz.*, that the Port Commissioners should pay to the British India Co. 28 lakhs of rupees and give to the British India Co. certain facilities. Sir Frederic Dumayne has sworn in his affidavit that in the settlement he never contemplated paying 28 lakhs of rupees for the land, structures and machinery of the British India Co., but that he agreed to this sum as a settlement of the whole case.

Lord Inchcape has not made an affidavit as to what took place between himself and Sir Frederic Dumayne. The Port Commissioners sanctioned with reluctance the settlement arrived at between Lord Inchcape and Sir Frederic Dumayne and recommended it to the Government for sanction and approval. The settlement was subsequently approved of by the Government. This, however, was after the present case had been decided by the Special Judge and the present appeal filed.

Much stress has been laid by the appellants on the proceedings of the Special Land Acquisition Committee of the Port Commissioners of the 20th October 1911. No doubt the record of the proceedings is not very happily worded, but I cannot imagine that a public body like the Port Commissioners intended to pay the British India Co. for their land a sum so vastly in excess of what they were paying to other parties and which would in the end result in their having to pay excessive sums for other lands acquired by them. For if this 28 lakhs was in fact paid only for the land, structures and machinery, this fact would be used in subsequent cases against the Port Commissioners as to the value of the lands acquired by them.

Sir Frederic Dumayne has sworn that he was fully cognisant of the prices paid by the Port Commissioners on other acquisitions and that what he wanted to settle was the whole case against the Commissioners.

The total claim preferred by the British India Co. amounted to Rs. 1,22,40,786-11-10. A large number of the items in the claim would appear to be altogether untenable. One of the items in the claim was a sum of Rs. 37,01,940 "for loss of time." This item was claimed for the difference between the time it would take to bring the vessels of the British India Co. alongside at Bracebridge Hall and that required to take them into the Docks of the Commissioners.

It is difficult to imagine on what principle such a claim could be supported. The Port Commissioners were, however, in this difficulty that the Collector had allowed the sum of Rs. 1,27,140- 0-0 in respect of this item and so had admitted the claim in principle. The Court, under the provisions of the Land Acquisition Act, has no jurisdiction to reduce the amount awarded by the Collector and it may perhaps be doubted whether the Court has jurisdiction to re-allot over the different items of claim the aggregate amount allowed by the Cellector. All the probabilities, therefore, suggested that the story told by Sir Frederic Dumayne in his affidavit that what he settled with Lord Inchcape was the whole case between the British India Co. and the Port Commissioners and that the sum of 28 lakhs of rupees was not paid to British India Co. in respect of the land, machinery and structures only, is correct. The only person who could have contradicted Sir Frederic Dumayne as to the terms arrived at in London between Lord Inchcape and himself would be Lord Inchcape. If, therefore, we were to decide to permit the appellant Company to adduce further evidence, it would have to be the evidence of Lord Inchcape as to what were the terms of settlement between himself and Sir Frederic Dumayne. In that event such evidence would have to be tested in the ordinary manner by cross-examination.

The letters that passed between Lord Inchcape and Sir Frederic Dumayne, dated the 26th of January and the 13th of February 1912, suggest that Lord Inchcape did not consider that the sum of Rs. 28 lakhs had been paid to the British India Co. in respect of Bracebridge Hall and the structures and machinery thereon.

The statements in Sir Frederic Dumayne's affidavit appear to me to agree with all the probabilities of the case and are uncontradicted as to what was intended to be settled between him and Lord Inchcape. Even, therefore, if we have jurisdiction to admit this further evidence on the materials before us, I should refuse the appellant Company leave to do so.

The present application is, therefore, dismissed with costs, which we assess at 10 gold *mohurs*.

RICHARDSON, J.—I entirely agree with Mr. Justice Fletcher, whose judgment I have had the advantage of reading, that the application before us is not one which we have jurisdiction to entertain under Order XLI, rule 27. And I will only add this that even if we had a power, co-extensive with the power of the Trial Court under Order XLVII, to admit fresh evidence by way of review, I am not of opinion that the evidence tendered is evidence which ought to be

admitted in the exercise of any such power. It is not evidence the hearing of which on the issue which has to be determined is practically beyond the sphere of controversy or in any sense conclusive. On the contrary it is only necessary to read the affidavit on the one side and the counter-affidavit on the other to show that matter is raised of a controversial and argumentative character. The question at issue is the market value of certain land at certain date. The argument which it is sought to put in (together with letters and other documents leading up to it) was arrived at in another case between parties, one of whom is not a party to the present case, and it was arrived atafter the trial of the present case was concluded. By itself the agreement is of no use to the appellant Company. It only shows that a lump sum was paid to the British India Co. in respect of the compulsory acquisition of their land and that in the same respect certain facilities were also promised to them by the Port Commissioners in connection with their coal tract. The land, it is true, adjoins the land of the appellant Company. But the compensation which the British India Co. had claimed from the Collector was arranged under different heads, many of which had nothing to do with the value of the land. Two or three items were withdrawn while the case was before the Collector, but the total claim which was subsequently carried before the Special Land Acquisition Judge was still very large. That claim was satisfied by the lump sum and the coaling facilities. Then comes the point: how much of the money payment is to be allocated to the land? That depends on the further question, what was the value assigned to the facilities? Both these questions are in serious dispute, each side endeavouring to fasten upon the other its own interpretation of the agreement. As might have been expected, when such questions are debated between practical businessmen, there is a good deal to be said—at any rate a good deal was said —on both sides. The difficulty of arriving at a decision as to what was paid for the land is not diminished by the reflection that it is not the actual value of the land and the actual value of the facilities that has to be considered, but what was in the minds of the parties to the agreement. What the appellant Company is really trying to do is to fix upon the Port Commissioners an admission as to the value of the land acquired from the British India Co., and I merely add that for that purpose the value which the Port Commissioners attributed to the land (as to which Sir Frederic Dumayne's affidavit is entitled to the greatest weight) is more important than the value which the British India Co. may have attributed to the land. But to my mind the doubts and difficulties which surround the evidence tendered are not only no recommendation, but are a complete bar, to its reception at this stage, even, as I have said, if we had a power to receive fresh evidence such as that conferred on the Trial Court by Order XLVII.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 240 OF 1914.

November 26, 1914.

Present:—Mr. Stanyon, A. J. C.

BATTOO—DEFENDANT—APPELLANT

versus

NARAIN PRASAD—PLAINTIFF—RESPONDENT.

Tank, village, let for cultivation of water-nuts—Tank, whether land—Cultivator, whether tenant.

A village tank which is let for the cultivation of water-nuts is not "land let or occupied for agricultural purposes or for purposes subservient to agriculture" within the meaning of these terms in the Central Provinces Tenancy Act, and, therefore, no cultivator of such nuts is a tenant as defined in that enactment. [p. 871, col. 2.]

Appeal against the decree of the Additional District Judge, Damoh, dated the 19th January 1914, confirming that of the Munsif, Hatta, dated the 15th November 1913.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *A. C. Ray*, for the Respondent.

JUDGMENT.—This appeal is made against a decree obtained by the landlords of a village in the Damoh District for ejectment of the defendant from a tank of which the defendant has been a lessee for many years for the growing of water-nuts. The only point which I am required to decide is, whether the appellant is an ordinary tenant of the tank, and that depends upon the question whether the tank is 'land' within

the meaning of that term in the Central Provinces Tenancy Act.

It has been contended on behalf of the appellant that the water-nut is actually a produce of land, the plants being planted annually in the bed of the tank when the water is low, and that subsequently, during monsoon, they rise with the water and bear the nut, which is gathered for food like rice or any other agricultural product. It was also said that as the water recedes after the monsoon, the bed of the tank left dry is used for cultivation. This latter argument is of no value, because it is most clearly proved that the defendant paid Rs. 7 a year for the use of the tank to grow water-nuts only, and if he grew any bye-crops of *dhania* or *jawa* on parts of the dry bed he did so as a mere licensee or trespasser outside the terms of his lease, and could not treat such user as a basis for claiming a tenant-right.

As regards the main question, the argument on behalf of the appellant is plausible but, in my opinion, unsound. Various cases have been quoted, but none of them are in point. The matter is not one to be decided by analogy, or by a too literal and artficial interpretation of definitions of such words as 'agriculture', 'land' and 'tenant.' It is one to be treated with reference to established usage. Nevertheless, I will examine the case law.

In *Kunhayen Haji* v. *Mayan* (1), it was held that a lease of a coffee garden is not an agricultural lease within the meaning of section 117 of the Transfer of Property Act, 1882. In *Murugesa Chetty* v. *Chinnathambi Goundan* (2), the above ruling was considered incorrect, and a lease of a betel garden was held to be an agricultural lease under the said enactment. In *King-Emperor* v. *Alexander Allan* (3), lands on which potatoes, grain, vegetables, etc., are grown were held to be lands used "solely for agricultural purposes." These cases all have reference to the Transfer of Property Act, under which the term 'agricultural' is given a much wider significance than is permissible under the Central Provinces Tenancy Act. Land used for fruit or vegetable gardens only would not be used for agricultural purposes under the latter enactment.

In *Siboo Jelya* v. *Gopal Chunder* (4), it was held that an occupancy right could not be acquired under the Bengal Tenancy Act (X of 1859) in a tank used for the preservation and rearing of fish. Couch, C. J., and Glover, J., observed:

"No doubt, it may be said that a tank comes under the word land, as land covered with water. But it is to be land cultivated or held; and we think, in considering whether this tank comes within the provisions of Act X of 1859, we must do what was done in *Ranee Doorga Soonduree* v. *Bibee Oomdutoonissa* (5), * * we must look at all the provisions of the Act."

The learned Judges then showed what anomalies would result from holding that the tank was land. This view was affirmed in *Nidhi Krishna Bose* v. *Ram Doss Sein* (6). The same learned Judges said:—

"Where land is let for cultivation, and there is a tank upon it, the tank would go with the land; and if there was a right of occupancy in the land, there would be a right of occupancy in the tank as appurtenant to the land. But here the tank is the principal subject of the lease, and only so much land passed with the tank as is necessary for it, namely, for the banks. his, in reality, is the tank, and according to the decisions, there cannot be a right of occupancy acquired in it."

The latest published decision of the Calcutta High Court on the point seems to be that in *Mahananda* v. *Mongala* (7), where it was laid down that "a suit for recovery of arrears of rent of a tank, which is not a part of an agricultural holding but is used for rearing and preserving fish, is not maintainable in a Revenue Court, the provisions of Act X of 1859 not being applicable to such a suit." It was further ruled that the term 'land' in section 6 of that enactment means cultivated land, and does not include a tank regarded as land covered with water. This case is very much in point, as the definition of 'land' in the Bengal Tenancy

(1) 17 M. 98; 4 M. L. J. 21.
(2) 24 M. 421.
(3) 12 M. L. J. 393; 25 M. 627; 1 Weir 727.
(4) 19 W. R. 200; 13 B. L. R. 423 *n*.
(5) 18 W. R. 234; 9 B. L. R. 101.
(6) 20 W. R. 341.
(7) 31 C. 937; S C. W. N. 804.

Act is very similar to the definition of 'land' in the Central Provinces Tenancy Act.

There is no reported decision of this Court directly in point, but in *Ramprasad* v. *Nathe Khan* (Miscellaneous Appeal No. 26 of 1914) decided on the 20th November 1914, I held that a person who took a part of the village common from the *malguzar* for planting a mango grove did not *ipso facto* become an ordinary tenant, the planting of such a grove not being an agricultural purpose, or a purpose subservient to agriculture. But though the *status* of a *singhara* cultivator has not been decided by this Court hitherto, it is not *res integra*. It has been duly considered by the Settlement Department. In the Land Revenue Settlement of the Nagpur District, effected during the years 1890 to 1895, the Settlement Officer, Mr. (now Sir Reginald) Craddock at page 68 (paragraph 125) of his interesting and exhaustive report wrote thus:—

"It was a doubtful point whether the *dhimar* who had a lease of the right to cultivate *singhara* in a tank could not be said to hold land for an agricultural purpose, and did not, therefore, become a tenant of the land included in the bed of a tank. But no such claim has ever been put forward by the *dhimars* themselves, and such a grant would be contrary to immemorial custom and prejudicial to the interests of the proprietor and the community in general whose rights of user might be infringed. The *dhimar* has, therefore, been held to be a licensee entitled merely to the use of the tank for a specific purpose."

These remarks are entirely in accordance with my own experience of the subject in these Provinces for over thirty years. The income from *singhara* leases has always been treated as *siwai* income. No *dhimar* who cultivates *singharas* would call himself a *kasktkar* or *kisan*, the terms applied to one who cultivates the land for cereals and other agricutural produce. The *singhara* rights are part of the *jalkar* or rights over water, and *singharas* are usually planted and produced in tanks which are in the common use of the village people in the same way as the village common. The cultivation of the nut is confined to the fishermen caste, almost invariably *dhimars*. The license is really an annual permission; though it is entirely in accordance with the habits of the people that it should first become a monopoly on the part of particular families of *dhimars*, and then descend from father to son under a system which strongly favours heredity in all special duties and privileges. Where we have the duties of the village priest, the village barber, the village watchman, the village scavenger and the village beggar descending from father to son, and the same rule observed even in the employement of menial servants, it is but natural that the village fisherman, or family of fishermen, should continue to get the same license to grow *singharas* in the same tank year after year until the license begins to have the appearance of a permanent right. That is what has happened in the present case. The plaintiffs are probably acting harshly and unwisely in turning out an old licensee who has paid his dues regularly for many years, but there can be no doubt of their legal right to do so. I hold that a village tank which is let for the cultivation of water-nuts is not "land let or occupied for agricultural purposes or for purposes subservient to agriculture" within the meaning of these terms in the Central Provinces Tenancy Act, and, therefore, no cultivator of such nuts is a tenant as defined in that enactment. The present case has, therefore, been correctly decided and this appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2058 OF 1913.

March 1, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

AVULA CHARAMUDI—DEFENDANT NO. 1—APPELLANT

versus

MARRIBOYINA RAGHAVULU AND ANOTHER—PLAINTIFFS NOS. 2 AND 3—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 14—Perpetuities, rule against, when applicable—Interest in land—Agreement to sell, if within the rule.

The rule against perpetuities is applicable only in reference to an attempt to create an interest in land. [p. 876, col. 1.]

AVULA CHARAMUDI v. MARRIBOYINA RAGHAVULU.

No interest in land is created by an agreement to sell the land, still less by reason of there being a possible claim to have an agreement for sale specifically enforced as against a transferee with notice of the agreement and, therefore, such an agreement is not within the rule against perpetuities. [p 876, col. 1.]

Second appeal from the decree of the District Court of Nellore in Appeal Suit No. 68 of 1910, dated the 2nd of January 1913, preferred against that of the Court of the District Munsif of Kavali in Original Suit No. 489 of 1908.

Messrs. *A. Krishnasami Iyer* and *M. Subbaraya Iyer*, for the Appellants.

Mr *T. V. Muthukrishna Iyer*, for the Respondents.

JUDGMENT.—It has been argued before us that the agreement, Exhibit G, on which the plaintiff sues for a reconveyance of the land to him, is void as being opposed to the rule against perpetuities, inasmuch as no period is fixed during which the plaintiff may claim to have the land reconveyed: the argument is that under Exhibit G the land would be tied up for an indefinite period as the plaintiff would be entitled to assert his right at any time, however remote. The short answer to this argument is that the land is not tied up by Exhibit G; and that there is a mere personal contract between the contracting parties which does not create any interest in the land, though it may have some reference to the land. This answer is met by the contention that if the agreement to reconvey contained in Exhibit G is a valid contract, then specific performance of it could be had under the Specific Relief Act, section 27 (*b*), from any subsequent purchaser of the land who had notice of it; that, therefore, the agreement to reconvey must be taken to be a covenant running with the land and as such amounting to an interest in land; and that if so, the attempt to create such an interest for an indefinite period of time must fail under the Transfer of Property Act, section 14, which must be applied as the rule of Hindu Law is not less stringent than that contained in the section: *Ramasami Pattar* v. *Chinna Asari* (1).

Our attention was drawn to *London and South Western Railway Co.* v. *Gomm* (2), which has been referred to or followed in India in *Kolathu Aiyer* v. *Rangavadhyar* (3), *Haris Paik* v. *Jahuruddi Gazi* (4), *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (5), *Kalimuddin Bhuya* v. *Reazuddin Ahmed* (6).

The decisions of English Courts cannot be followed without caution inasmuch as the rules of law and equity relating to covenants running with the land as laid down in *Tulk* v. *Moxhay* (7), with the limitation placed upon those rules by such decisions as *Haywood* v. *The Brunswick Permanent Benefit Building Society* (8) and *London and South Western Railway Co.* v. *Gomm* (2), may have a different effect from the law which has to be enforced in British India by reason of section 27 (*b*) of the Specific Relief Act and section 40 of the Transfer of Property Act. It may be that covenants which would not run with the land in England would in British India be enforceable as against persons having notice of them. We refer, however, to English decisions not so much for taking from them the law as if it were directly and in terms applicable to India, but for the elucidation of some of those general principles with which the statutary law of India deals.

The first point to be borne in mind in connection with the questions that arise in this appeal is expressed with very great clearness by Farwell, L. J., in *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers* (9):

"It is settled beyond argument that an agreement merely personal not creating any interest in land is not within the rule against perpetuities. It is sufficient to refer to *Witham* v. *Vane* (10) in the House of Lords. There, there was 'a covenant by a purchaser of lands in fee simple contained in the conveyance made to him by the

(1) 24 M. 449; 11 M. L. J. 132.

(2) (1882) 20 Ch. D. 562; 51 L. J. Ch. 720; 46 L. T. 449; 30 W. R. 620.

(3) 18 Ind. Cas. 203; 24 M. L. J. 84; 13 M. L. T. 179; (1913) M. W. N. 163; 38 M. 114.

(4) 2 C. W. N. 575.

(5) 5 C. W. N. 343.

(6) 4 Ind. Cas. 743; 10 C. L. J. 626; 14 C. W. N 295.

(7) (1848) 2 Ph. 774; 1 Hall & Tw. 105; 18 L. J. Ch. 83; 13 Jur. 89; 41 E. R. 1143; 78 R. R. 289.

(8) (1882) 8 Q. B. D. 403; 51 L. J. Q. B. 73; 45 L. T. 609; 30 W. R. 299.

(9) (1910) 1 Ch. 12 at p. 33; 79 L. J. Ch. 150; 101 L. T. 865; 74 J. P. 21; 54 S. J. 80; 26 T. L. R. 61

(10) (1883) Challis on Real Property, 2nd Ed., App. V, p. 401 (3rd Ed., App. V, p. 440.—*Ed.*)

vendor, that the purchaser, his heirs, appointees, and assigns will from time to time and at all times pay, or cause to be paid, to the vendor, his heirs, executors, administrators, or assigns, the sum of six pence for every chaldron of coals wrought and gotten out of the lands conveyed, and which shall be shipped for sale.' That was entered into by the Earl of Darlington (afterwards Duke of Cleveland) in 1824. He died in 1842; the benefit of the covenant was assigned to certain other persons, and they sued the executors of the Duke in the year 1883, and this question of perpetuity was swept aside as having no relevancy whatever to a mere personal covenant, although such covenant was connected in some way, at any rate, with the land. But the fact that there is some connection with reference to land does not make a personal contract by *A*, less a personal contract binding on him with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.

"The real answer", continues Farwell, L. J., "to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still that land, then in an action on the covenant the plaintiff may claim specific performance, and it is for the Court to see whether in such circumstances it is inequitable to grant specific performance, or whether the covenantor ought to pay damages in lieu of it. There is no defence to such an action in the present case. So far as I see I should have no hesitation whatever in decreeing specific performance. There certainly is no honesty in the Company's case; there is a clear covenant by them to do a certain thing when called on by a particular person. They are so called on by that person. They have had the benefit of the covenant in the reduction of the amount of money which they have had to pay, and now they refuse to perform their own personal covenant on the ground of perpetuity."

The distinction between an agreement merely personal and an agreement creating an interest in land was not lost sight of in *London and South Western Railway Co.* v. *Gomm* (2), on which the appellant greatly relied. There a Railway Company had held in 1865 with an agreement by their vendee on behalf of himself "his heirs or assigns, owner and owners for the time being of the land and all other persons who should or might be interested therein;" the agreement so entered into contained an option to the Railway Company to repurchase at any time. Sir George Jessel, M. R., says, pages 580, 581, "whether the rule as to remoteness applies or not depends upon this, as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract but is only a purchaser from Powel who did. If it is mere personal contract it cannot be enforced against the assignee. Therefore the Company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for coveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for re-purchase is not different in its nature."

Sir George Jessel's remarks read in the light of what Farwell, L. J., said in *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers* (9) had reference only to that aspect of the agreement which purported to create an interest in the land; that aspect alone had any relevance to the question that the Master of the Rolls was considering. But as Farwell, L. J., pointed out, parties may by the same agreement purport to do two things; (1) create an interest in land in perpetuity; (2) to enter into a personal covenant unrestricted in point of time, the rule against perpetuities cannot be obnoxious to the latter though it invalidates the former.

Lord Justice Lindley in *London & South Western Railway Co.* v. *Gomm* (2) at page 587 said: "This is an action for specific

performance of a contract entered into not by the defendant but by somebody else. The first thing, therefore, the plaintiffs must shew is, upon what legal principles the defendant is bound by a contract into which he did not enter. It is not contended that he is bound by it on the ground that the covenant entered into by Powel runs with the land and binds him at law, but it is said that though it does not bind him at law it binds him in equity."

"Then upon what principle is it that he is bound in equity? It is said that he is bound in equity because he brought the land knowing of the covenant into which his predecessor-in-title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants."

The learned Lord Justice then considers which classes of covenants run with the land, in other words, which classes of agreements are enforced in England not only against the person who entered into them but against a purchaser of the land with notice of the agreement entered into by his predecessor-in-title. That portion of his judgment is not directly applicable as we have the law laid down in the Specific Relief Act, section 27 (c), and the Transfer of Property Act, section 40. He concludes by saying that the agreement then before the Court could be enforced (if at all) as against the defendants only as a covenant running with the land; that the agreement for re-purchase went beyond the doctrine of covenants running with the land laid down in *Tulk* v. *Moxhay* (7), and could not, therefore, be said to be a covenant running with the land, and could not consequently be enforced against a person who did not enter into it. He then agrees with the observations of the other members of the Court that the covenant purports to create an interest in land but that that interest is void for remoteness.

Thus it is clear that the Court was not deciding in *London & South Western Railway Co.* v. *Gomm* (2) upon the personal aspect of the agreement at all. What was then decided was (1) that the agreement could not prevail as between the parties before the Court in any aspect other than that by which it purported to create an interest in land and that in as far as it purported to create an interest in land, it was void for remoteness; (2) that the defendant could not be bound by an agreement to which he was not a party on the ground that it was a covenant running with the land, for the agreement was not of that class which could run with the land not being within the principle laid down in *Tulk* v. *Moxhay* (7). In other words the decision may shortly be thus stated: the agreement either created an interest in the land, or it did not; if it created an interest in land, then it was void for remoteness; if it was merely a personal covenant it did not bind the defendant, who was not a party to it, and was not bound by it under *Tulk* v. *Moxhay* (7).

It seems clear on a consideration of the cases to which we have referred, that very different sets of rules apply according as the juristic act in question creates.

1. An interest in land, or
2. A mere personal contractual liability.

With reference to the former (1) the policy of the law is expressed in the rule against perpetuities, and a transaction (whether it is a contract of a declaration of trust or a bequest) in so far as it purports to create an interest in land is void to the extent that it contravenes the rule against prepetuities: what is void is the interest which is sought to be created so as to come into operation at a remote time, not the contract. If, however, the sole object of a contract is to create such an interest, it is of course wholly void.

With reference to the latter (2) however as Farwel, L. J, pointed out, the rule against perpetuities has no application. A contract which is binding only personally would, in strictness and according to literal import, be enforceable only so long as both the contracting parties are alive; for if one of them is dead, then there is either no person to enforce it, or no person against whom it can be enforced. It would have been meaningless for the law to apply the rule against the perpetuities to such a transaction; for the transaction can (in its strictness) prevail for only a fragment of the period mentioned in

the rule against perpetuities. Far from limiting the period during which such a transaction is to operate, the law has enlarged the scope of its operation from its strict limits (*viz.* during the life-time of both contractnig parties) so as to bind the representative of the promisors (Indian Contract Act, section 37).

It is also clear that a contract does not create an interest in land merely because it has reference to land. This is well recognised in England. In India there cannot be a more emphatic enunciation of this principle than that contained in the Transfer of Property Act, section 54, last paragraph, which is explained and contrasted with section 55 (6) (*b*) in *Kurri Veerareddi* v. *Kurri Bapireddi* (11). The law in England seems to be different from that contained in section 54: *London and South Western Railway Company* v. *Gomm* (2). Moreover the scheme of the Indian Law differs widely from that of English Law. The Indian Legislature has given a great extension to the personal liability of parties having notice of a contract made by one under whom they claim; though such liability is tempered by the discretion of the Court that is asked to enforce specific performance. On the other hand, the Indian Legislature has been stringent in allowing interests to be created in land either for remote periods, or without registered documents. In any case having an interest in land or any other property implies having existing rights in them: and that is very different from having personal rights against some one who may at the discretion of the Court be required by law to do some specific act or in lieu of it to give compensation.

It is argued that because under section 27 (*b*) of the Specific Relief Act the contract may be enforced against transferees with notice, therefore, it creates an interest in the land. But in the *first* place if, as between the parties themselves a contract for sale does not create an interest in land, it is inconceivable that an interest should be created when the liabilities under the contract are transferred to a third party. *Secondly*, section 27 (*b*) read with section 22 of the same Act only gives a discretionary power to the Court to enforce a contract specifically; it is difficult to see how an interest in land can be considered to be created when it is in the discretion of the Court whether to recognise it or not. If an interest already exists there can be no power in the Court to take away the existing rights of the parties.

Moreover assuming that under section 27 (*b*) some interest might be created in the land itself which can avail to a limited extent as against transferees, it does not follow that the personal liability of the contracting parties is lessened because certain rights *in rem* are attempted to be created and the attempt is unsuccessful by offending the rule against perpetuities. The argument as put by the appellant is self-destructive. For if any interest in land may be created by operation of section 27 (*b*), then that may be a ground for upholding that interest as against transferees, and it may be that the transaction by virtue of which the interest arises, *viz.*, the contract, may thus have an extended operation: the section cannot, on the assumption that it creates an interest in land affect the operation of the contract in its personal aspect. If the object of the section is assumed to be to give an enhanced efficacy to a contract by the creation of interest in the property itself, in addition to mere personal rights and liabilities, the section cannot be utilised for taking away the binding force of the contract as between the parties themselves.

There are observations in *Kolathu Aiyer* v. *Rangavadhyar* (3) to the effect that one who has obtained a promise for the conveyance of land has by virtue of the Specific Relief Act, section 27 (*b*), and the Trusts Act, section 91, "a substantial interest in it:" such an interest is apparently meant as is implied in section 14 of the Transfer of Property Act. These observations were perhaps not necesary for the decision, as in the earlier portion of the jugdment it is intimated that the intention of the parties as appearing from the contract was that the heirs of the covenantor should not be bound by it and the suit was against the heirs, *Stocker* v. *Dean* (12), Indian Contract Act, section 37, paragraph 2. In any case we are unable to reconcile these observations with section 54 of the Transfer of Property Act and *Kurri Veerareddi* v. *Kurri Bapiredai* (11).

(11) 29 M. 336 at p. 349; 16 M. L. J. 395; 1 M. L. T. 153.

(12) (1852) 51 E. R. 739; 16 Beav. 161; 96 B. R. 75.

BAIJ NATH GOENKA *v.* NAND KUMAR SINGH.

The two cases decided in Calcutta, *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (5) and *Kalimuddin Bhuya* v. *Reazuddin Ahmed* (6), are not easily reconcilable on principle. The attempt in the latter to distinguish the former on the ground that the application of the rule against perpetuities may depend upon whether the person sued is the original covenantor or one on whom the interest had devolved, cannot be accepted in the face of the authorities. Thus in *Witham* v. *Vane* (10), decided by the House of Lords, the covenant was enforced as between the executors of one party to the contract and the assignees of the other, the ground of decision being that the covenant sought to be enforced was a personal contract and there was no reason why specific performance could be refused. On the other hand if the right that is sought to be enforced depends upon the existence of an interest in the land, and that interest itself is void in law, it does not matter whether the persons that are before the Court are those who have themselves been parties to the transaction attempting to create an interest, or that they are strangers or transferees.

Our decision must, therefore, be that the rule against perpeturties is applicable only in reference to an attempt to create an interest in land, that no interest in land is created by an agreement to sell the land, still less by reason of there being a possible claim to have an agreement for sale specifically enforced as against a transferee with notice of the agreement. The lower Courts were, therefore, right in holding that the agreement for re-sale now in question was enforceable and the appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 245, 254, 332 AND 333 OF 1914.

August 19, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

Rai BAIJ NATH GOENKA *Bahadur*—JUDGMENT-DEBTOR—APPELLANT

versus

IN NO. 245 OF 1914

NAND KUMAR SINGH—DECREE-HOLDER—RESPONDENT.

IN NO. 254 OF 1914

RAGHURAJ SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

IN NO. 332 OF 1914

SHEOADHIN SINGH—DECREE-HOLDER—RESPONDENT.

IN NO. 333 OF 1914

BAIJNATH SINGH—DECREE-HOLDER—RESPONDENT.

Bengal Land Revenue Sales Act (XI of 1859), ss. 33, 34—Sale amended Final decree of a Civil Court, meaning of—Execution—Limitation.

An estate belonging to the respondents was sold for arrears of revenue under Act XI of 1859 by the Collector on January 2nd, 1900. The proprietors preferred appeals to the Commissioner of Revenue, and he passed orders on March 21st, 1900, setting aside the sale. On the application of the auction-purchasers the Commissioner reviewed his order of March 21st and on June 21st, 1900, cancelled his order setting aside the sale, and instead, affirmed the sale. One June 20th, 1901, the respondents sued the appellant-auction-purchaser for a declaration that the Commissioner's order reviewing his first order was *ultra vires*. The suit went up to the Privy Council where it was held that the order of the 21st of March 1900 was final and conclusive and that the Commissioner had no power to review. The respondent applied for execution:

Held, that the judgment of the Privy Council was not the final decree of a Civil Court annulling a sale made under Act XI of 1859, as it only held that the Commissioner had set aside the sale and that order must stand good. [p. 878, col. 1.]

Section 34 refers to cases brought before the Civil Courts under section 33 of the Act. The two sections must be taken as closely related to each other and the rule of limitation as applying only to suits brought under section 33. [p. 878, col. 1.]

Appeals against the orders of the Additional Subordinate Judge of Monghyr, dated the 23rd and 27th May 1914.

Mr. *B. C. Mitter*, (Standing Counsel) and Babu *Karunamoy Bose*, for the Appellant.

Babus *Joges Chandra Roy*, *Naris Chandra Sinha* and *Panchanan Ghosh*, for the Respondents.

BAIJ NATH GOENKA *v.* NAND KUMAR SINGH.

JUDGMENT.

WALMSLEY, J.—These appealf arise under the following circumstances. An estate belonging to the respondents was sold for arrears of revenue under Act XI (B. C.) of 1859 by the Collector of Monghyr, on January 2nd, 1900. The proprietors preferred appeals to the Commissioner of Revenue, and he passed orders on March 21st, 1900, setting aside the sale. On the application of the auction-purchasers, now the appellants, the Commissioner reviewed his order of March 21st and on June 21st, 1900, cancelled his order setting aside the sale, and instead, affirmed the sale.

On June 20th 1901, the first respondent instituted a suit against the auction-purchasers (making his co-proprietors parties), praying for a declaration that the Commissioner's order reviewing his first order was *ultra vires*, for recovery of possession of his share of the estate, and for mesne profits, he also asked for the sale to be set aside if it was held that the Commissioner's second order was not *ultra vires*, and did have the effect of affirming the sale. The Court of first instance held that the suit was barred by limitation, but on appeal to this Court, it was held that the suit was within time, and the case was remanded for trial upon other issues. On remand, the suit was decided in favour of the plaintiffs, now respondents, the co-sharers having become co-plaintiffs. There was again an appeal to this Court; the main question was whether the Commissioner had power to review his order setting aside the sale; it was held that he had no power to do so, and on that ground the appeal was dismissed. The first appellant then preferred an appeal to the Privy Council and judgment was delivered on February 11th, 1913. It was very brief, so I quote it in full: "Their Lordships are clearly of opinion that the order of the 21st of March 1900 was final and conclusive, and that so far as the Commissioner was concerned, he had no power to review that order in the way in which he has reviewed it. That is the only point in the case. They will humbly advise His Majesty that the appeal ought to be dismissed." On the 27th of September 1913, the respondent No. 1 applied for execution of the decree which it had taken so long to obtain. Three other applications were made by his co-sharers and they were dealt with together. Various objections were taken by the appellants, but the principal one was that the applications for execution were barred by limitation. The learned Subordinate Judge overruled this objection, and allowed execution to proceed. An appeal has been preferred by the auction-purchasers in each of the four execution cases.

The only point which has been pressed before us is that the applications are time-barred. It is contended that as the judgment of the Privy Council was delivered on February 11th, 1913, and the first respondent's application for execution was not made until September 27th, 1913, that is after an interval of more than six months, the applications for execution are barred by section 34 of Act XI (B. C.) of 1859. That section runs as follows:—"If a sale made under this Act be annulled by a final decree of a Civil Court, application for the execution of such decree shall be made within six months after the date thereof; otherwise the party, in whose favour such decree was passed, shall lose all benefit therefrom."

It is contended for the appellant auction-purchasers that the sale was a sale made under the Act, and that it has been annulled by a final decree of Civil Court. Reference is made to the case of *Sreemuni Lal Ghose* v. *Shama Soonduree Dassee* (1), but fail to see what assistance it gives to the appellants. In that case a sale was held to be null and void, because it had been made when no arrears of revenue were due; when the Court was asked to make a special declaration that the sale was annulled, their Lordships said, "That appears to us to be unnecessary. For the purposes of section 34 of Act XI of 1859, we consider that the sale is already annulled by the decree for possession." They cannot have been thinking of the period of limitation prescribed by section 34 but only of the opening words of that section, and what they meant was that a sale which is null and void requires no formal annulment and that a decree directing the original proprietor to be put in possession

(1) 12 W. R. 276.

is all that is necessary for destroying the effects of the void sale.

It appears to me that the appellants' contention fails for two reasons. The *first* is, that the judgment of the Privy Council was not the final decree of a Civil Court annulling a sale made under the Act. The decree of this Court was to this effect: (1) the order of the Commissioner dated June 21st, 1900, was declared *ultra vires* and ineffectual; (2) the order of March 21st, 1900, setting aside the sale was upheld and confirmed; (3) possession and mesne profits were awarded to the old proprietors. Their Lordships of the Privy Council said that the order passed by the Commissioner on March 21st 1900 was final and they dismissed the appeal. Neither Court, therefore, set aside the sale: what they said was that the Commissioner had set aside the sale, and that order must stand good. As the Privy Council's judgment is not a final order annulling the sale, it does not fall within section 34.

The *second* reason is that section 34 refers to cases brought before the Civils Courts under section 33 of the Act. The earliar section sets out the grounds on which a Civil Court may annul a sale held under the Act, with certain conditions as to limitation and other matters. Then section 34 says, "if a sale made under this Act be annulled by a final decree of Civil Court, application for execution of such decree shall be made within six months." The two sections must be taken as closely related to one another, and the rule of limitation as applying only to suits brought under section 33. It appears to me, however, that the respondent's suit was not a suit under section 33; the plaint, no doubt, did contain allegations such as are appropriate in a suit for the annulment of a sale; but the chief contention throughout all the litigation was that the sale had been set aside by the Commissioner, and that there was no subsisting sale to be annulled. On this ground, I hold that the suit was not one under section 33 of the Act, and was, therefore, not subject to the special rule of limitation provided by section 34.

It is not asserted that the applications for execution are barred by the general rules of limitation.

I would, therefore, dismiss the appeals.

CHATTERJEE, J.—I agree. Costs one gold *mohur* in each case.

Appeals dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 326 OF 1915.

March 19, 1915.

Present:—Justice Sir P. C. Banerji, KT.

SUNDER LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

DHARAM PAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partition of land—Trees go with land.

Trees growing upon land, the subject of a partition by the Revenue Authorities, go with the land and if not excluded must be deemed to have been allotted to him to whom the land was allotted. [p. 878, col. 2.]

Muhammad Sadiq v. *Laute Ram*, 23 A. 291, A. W. N. (1901) 86, followed.

Second appeal from the decision of the Additional Subordinate Judge of Aligarh, dated the 17th of December 1914.

Mr. *Bhagwati Shanker*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit for possession of a plot of land No. 425 together with trees standing thereon and for damages for the value of a tree cut down by the defendants. The Court of first instance found that the land belonged jointly to the parties but that under a partition which took place in 1906, it had been allotted to the share of the plaintiffs. It was, therefore, of opinion that the plaintiffs were entitled to possession of the land. It, however, held that the trees had been planted by the defendants' ancestors and that the plaintiffs were not entitled to them. That Court whilst decreeing the claim for possession dismissed it in respect to the trees. The defendants submitted to the decree of the Court below, but the plaintiffs appealed. The lower Appellate Court has held and, I think rightly, that as under the partition of 1906 the land was allotted to the plaintiffs and the trees were not excluded from the plaintiffs' share, they must be deemed to have been allotted to the plaintiffs along with the land. This was the view held by a Full Bench of this

Court in *Muhammad Sadiq* v. *Laute Ram* (1). In that case it was held that trees growing upon land, the subject of a partition by the Revenue Authorities, go with the land and may properly be partitioned along with it by the Revenue Authorities. Therefore, even if the trees had belonged to the parties jointly or to the defendants exclusively before the partition, after partition they become the property of the plaintiffs. Furthermore, the lower Appellate Court was of opinion that it had not been established that the defendants' ancestors planted the trees and were the exclusive owners thereof before the partition. This may be an erroneous finding, but being one of fact must be accepted in second appeal. There is, therefore, no force in the appeal. I accordingly dismiss it.

Appeal dismissed.

(1) 23 A. 291; A. W. N. (1901) 86.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 206 OF 1910.

July 6, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Rani HEMANTA KUMARI DEBI—DEFENDANT—APPELLANT

versus

MIDNAPUR ZEMINDARI COMPANY, LTD.—PLAINTIFFS—RESPONDENTS.

Specific performance of contract to grant a permanent lease—Civil Procedure Code (Act XIV of 1882), s. 375—Registration Act (III of 1877), ss. 3, 17, 47—Lease, meaning of—Compulsory registration—Unregistered deed, admissibility in evidence of—Petition of compromise, how far admissible in evidence—Conveyance, effect of—Lands not assessed by Government, effect of—Consideration—Court's duty.

Per *Mookerjee, J.*—Under section 375 of the Code of Civil Procedure the Court has jurisdiction to pass a decree in accordance with a compromise only in so far as it relates to the subject-matter of the suit; and its decree is final only to that extent. [p. 880, col. 2.]

Under section 3 of the Registration Act, 1877, the term 'lease' includes an agreement to lease, and under section 17 clause (*d*), an agreement to grant a lease of immoveable property for any term exceeding one year is compulsorily registrable. [p. 881, col. 1.]

Neither clause (*h*) nor clause (*i*) affects cases under clause (*d*) as they apply only to cases under clauses (*b*) and (*c*) of section 17 of the Registration Act. [p. 881, col. 1.]

Panchanan Basu v. *Chandi Charan Misra*, 6 Ind. Cas. 443; 14 C. W. N. 874; 37 C. 808 and *Safdar Reza* v. *Amzad Ali*, 7 C. 703; 10 C. L. R. 121 (F. B.); 4 Shome L. R. 240, referred to.

In a suit for specific performance of a contract to grant a lease, an unregistered deed containing the alleged agreement is admissible in evidence to prove the contract for the breach of which the suit is brought. [p. 881, col. 2.]

Konduri Srinivasa Charlu v. *Gottumukkala Venkataraju*, 17 M. L. J. 218, followed.

Satyendra Nath Bose v. *Anil Chandra Ghosh*, 5 Ind. Cas. 38; 14 C. W. N. 65; *Sarat Chandra Ghose* v. *Sham Chand Singh, Roy*, 14 Ind. Cas. 701; 16 C. L. J. 71; 39 C. 663, referred to.

Hurjivan v. *Jamsetjee*, 9 B. 63 and *Purmanand Das* v. *Dharmsey*, 10 B. 101, dissented from.

A petition of compromise which embodies the terms of the agreement to lease or the decree which recites the terms of the compromise can be received in evidence in proof of the agreement to lease. [p. 882, col. 1.]

The mere fact that the Government has not assessed any revenue on the lands (which were found to be re-formation and not accretion) does not entitle the defendant to claim rent at a higher rate than usual. [p. 883, col. 2.]

Per *Beachcroft, J.*—Where the petition of compromise embodying the terms of the agreement to lease, is not considered by the Court to be an agreement to lease:

Held, that section 49 of the Registration Act can have no application. [p. 883, col. 2.]

Where the promise to give a lease of the land which was the subject-matter of a previous suit was part of the consideration to the Company for consenting to a decree in a later suit:

Held, that the decree was equally admissible in evidence and the Court was bound to record the whole of the terms of the compromise. [p. 884, col. 1.]

Pranal Anni v. *Lakshmi Anni*, 22 M. 508; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 47 (P. C.), referred to.

The documents referred to in clauses (*e*) to (*u*) of section 17 of the Indian Registration Act are excepted only from the provisions of clauses (*b*) and (*c*), and not from the provisions of clauses (*a*) and (*d*). [p. 884, col. 2.]

Appeal against the decree of the Subordinate Judge of Nadia, dated the 29th March 1910.

Mr. *S.P. Sinha*, Counsel, Babus *Kishori Lall Sarkar*, *Bepin Behari Ghose*, *Debendra Nath Bagchi*, *Marindra Nath Bhatacharyya* and *Bidhu Bhusan Ganguli*, for the Appellant.

Dr. *Rash Behari Ghose* and Babus *Jogesh Chandra Roy* and *Rajendra Chandra Guha*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the defendant in a suit for specific performance of a contract to grant a permanent lease.

The agreement was made on the 20th September 1897 and was in respect of lands which at that time formed the subject-matter of a litigation between the defendant and the Secretary of State for India in Counsil. The contract was for the grant of a lease by the defendant to the plaintiffs, if the former should obtain a decree in her suit against the Secretary of State. That suit was decided in favour of the defendant by the Judicial Committee on the 21st March 1906; and the plaintiffs commenced this action against the defendant on the 26th February 1909. The defendant denied that she had entered into the alleged agreement with the plaintiffs and also contended that if the agreement was established, it was of such a character that a Court of Equity would not grant specific performance thereof. The Subordinate Judge has overruled the contentions of the defendant and has decreed the suit. The defendant has now appealed to this Court. The fundamental point for consideration is whether the agreement alleged by the plaintiffs has been proved, and this involves the determination of the question, whether a petition of compromise which embodies the agreement to grant the lease, and a decree which recites the terms of the compromise, are admissible in evidence to prove the terms of the agreement. For the appreciation of the question raised, it is necessary to give a brief outline of the facts antecedent to this litigation.

The lands in respect of which a permanent lease is claimed by the plaintiffs are included in Estate No. 1 of the Rajshahi Collectorate, in which the defendant had 2 annas 15 *gundas* share with a separate account. In 1863, when the dry lands emerged from the floods, Watson and Company, the predecessor-in-interest of the plaintiffs, entered into possession. The predecessor-in-title of the defendant, Maharani Sarat Sundari, instituted a suit for ejectment of the company. The Subordinate Judge dismissed the suit; but on appeal to this Court, that decree was reversed on the 12th February 1868 and a decree was made in favour of the then plaintiff for such of the lands as were proved to be accretions to *Mouza* Jatashai. An appeal to the Judicial Committee was preferred, but was dismissed for want of prosecution in 1875. The lands decreed in favour of the plaintiff shortly afterwards disappeared in the river. When they re-appeared, Government took possession of part of the lands and leased them to the Company, while the Company took possession of the remainder. There were negotiations between the defendant and the Government for a settlement of the dispute, but they were infructuous as the Government consented to withdraw from possession, only if the rights of the Company were recognised. In these circumstances, the defendant instituted two suits in 1895 for recovery of possession, one (No. 72) against the Secretary of State in respect of accretions to *Mouza* Jatashai, the other (No 73) against the Company in respect of re-formations on the original site of Jatashai. On the 20th September 1897, the suit against the Company was decreed on the basis of a petition of compromise. It is this petition of compromise, which embodies the agreement to lease now sought to be specifically enforced, the petition refers to the lands of both the suits; as regards the lands of the suit against the Company, the petition provides for the creation of tenancy rights in the Company on certain specified conditions; while as regards the lands of the suit against the Government, the petition recites that the then plaintiff had agreed to grant a permanent lease to the Company on certain specified terms, in the event of a successful termination of her claim against the Government. The Court recorded the compromise in full, as it was bound to do under section 375 of the Code of 1882, and made a decree in these terms: "The suit be decreed in terms of the compromise filed by both the parties." It may be a matter for controversy whether the Court intended to incorporate in its decree all the terms of the compromise or to give effect only to such of the terms as related to the lands in suit; at any rate, under section 375, the Court had jurisdiction to pass a decree in accordance with the compromise only in so far as it related to the subject-matter of the suit, and its decree would be final only to such extent. I may take it, consequently, that the decree while it recited all the terms of the compromise, gave effect to such alone of the terms as related to the subject-matter of that suit. It is on this basis that the Company seek in the present suit the specific performance of so much of the agreement as related to subject-matter of the suit against the Secretary of State. The question

necessarily arises, whether the petition of compromise, which embodies the terms of the agreement to lease, or the decree, which recites the terms of the compromise, is admissible in evidence, notwithstanding the provisions of section 49 of the Indian Registration Act. On behalf of the defendant, it has been argued that as under section 3 of the Registration Act, 1877, the term lease includes an agreement to lease, under section 17, clause (*d*), an agreement to grant a lease of immovable property for any term exceeding one year is compulsorily registrable. It has been pointed out that neither clause (*h*), which exempts from registration documents merely creating a right to obtain other documents, nor clause (*i*), which exempts from registration decrees and orders of Courts, is of any assistance to the plaintiffs, as these clauses apply only to cases under clauses (*b*) and (*c*) of section 17 and do not affect cases under clause (*d*). There is considerable force in this contention and it is worthy of note that in the case of *Panchanan Basu* v. *Chandi Charan Misra* (1), the attention of the Court was not drawn to the extended significance of the term lease as defined in section 3, nor to the fact that clause (*h*) of section 17 refers only to cases under clauses (*b*) and (*c*). It cannot be disputed that as laid down by the Full Bench in the case of *Sufdar Raza* v. *Amzal Ali* (2) an agreement for a lease, when in writing, is compulsorily registrable under clause (*d*) of section 17. But the question remains what is the precise effect of non-registration. Section 49—I quote so much of the section as is applicable to the present case—is in these terms: "No document required by section 17 to be registered shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property, unless it has been registered in accordance with the provisions of this Act." The petition of compromise, consequently, does not affect the immoveable property now in dispute; but can it be received as evidence of a transaction affecting such property? The answer will be in the affirmative or negative, according as it is held that the argreement to lease did not or did affect the property, it is plain from the terms of the agreement that it did not operate as a present demise. The distinction between a lease and an agreement for lease may be briefly stated. An instrument by which the conditions of a contract of letting are finally ascertained and which is intended to vest the right of exclusive possession in the lessee either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently, is a lease; it is said to operate by way of actual demise, and when the lessee has entered under it, the relation of landlord and tenant is fully created. On the other hand an instrument which only binds the parties, the one to create and the other to accept, a lease hereafter, is an agreement for a lease, and although the intending lessee enters, the legal relation of landlord and tenant is not created, unless he also pays rent, in which case he becomes tenant from year to year, upon the terms of the agreement so far as applicable to a yearly tenancy: *Richardson* v. *Gifford* (3). This is subject to the rule in *Walsh* v. *Lonsdale* (4), that on equitable grounds the Court may under certain circumstances treat the parties to be in the same position as if a lease had actually been granted, on the principle that equity considers that to have been done which should have been done. Consequently where, as here, there is no present demise the agreement to lease does not operate as a lease and does not affect the land. It will affect the land only when specifically enforced in a suit properly framed for the purpose of or when followed by the grant of a lease. On this principle, it was ruled in *Konduri Srinivasa Charlu* v. *Gottumukkala Venkataraju* (5), that in a suit for specific performance of a contract to grant a lease, an unregistered deed containing the alleged agreement is admissible in evidence to prove the contract for the breach of which the suit is brought. This principle was approved in *Satyendra Nath Bose* v. *Anil Chandra Ghose* (6), and is the foundation of the decision in *Sarat Chaandr Ghosh* v. *Sham Chand Singh Roy* (7). I am not prepared to adopt the contrary view taken in *Hurjivan* v.

(1) 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874.
(2) 7 C. 703; 10 C. L. R. 121.

(3) (1834) 3 N. & M. 325; 1 A. & E. 52; 3 L. J. K. B. 122.
(4) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.
(5) 17 M. L. J. 218.
(6) 5 Ind. Cas. 38; 14 C. W. N. 65.
(7) 14 Ind. Cas. 701; 39 C. 663; 16 C. L. J. 71.

Jamsetji (8), and *Purmanand Das* v. *Dharsey* (9). I hold accordingly that the petition of compromise has been rightly received in evidence in proof of the agreement to lease.

The question next arises, whether the petition was executed by the defendant. She says in her evidence that she signed the *solehnamah*, and put in the word *iti* on every page and that her seal was impressed above her signature on every page. The *solehnamah*, as actually filed in Court, bears her signature on the first page only with the impression of her seal above it, the other pages do not bear her signature but bear the impression of her seal in the back. She denies that the word *iti* on the sheets other than the first is in her handwriting. The obvious suggestion is that the original sheets other than the first have been replaced after the document had been executed by her. No such allegation was made expressly in her written statement, and I am in full agreement with the Subordinate Judge that the evidence is insufficient not only to prove such a case, but even to raise a reasonable suspicion that there had been a substitution of sheets after execution. No foundation is laid in the evidence as to the identity of the person possibly guilty of such a crime; in the absence of any evidence on the point, I am not prepared to countenance the theory that the Company or their officers had bribed her officers to enter into a conspiracy to betray their mistress. On the other hand, upon a careful comparison of the word *iti* which finds a place on every sheet, I am satisfied that the word, wherever it occurs, was written by the same person; and as the word on the first sheet was admittedly written by her, the word on each of the other sheets is in her handwriting; this conclusively establishes the genuineness of all the sheets including the one containing paragraph 8, which embodies the agreement to lease and is suggested to have been interpolated fraudulently. I am not prepared to attach any weight to her assertion that every sheet must have been sealed as well as signed by her in the usual course. I cannot overlook the fact that the document was executed on the 20th September 1897, and she gave her deposition on the 11th July 1909. It would be an extraordinary feat of memory to be able to remember accurately, after the lapse of twelve years, whether one had signed one or more pages of a document and how many times the seal had been put thereon; it is not suggested that she had any occasion to make a special note of this matter at the time of execution or to recall it to memory at any subsequent period. On the other hand, her deposition shows that she is not able at this distance of time to recollect accurately the details of the negotiation and the terms of compromise ultimately settled. I am satisfied that the petition of compromise, as it stands, is genuine in its entirety, and as the defendant admits that the petition signed by her was executed after she had become fully aware of its contents, there is no room for controversy that she is bound by all the terms of the petition inclusive of the agreement to lease embodied in paragraph 8. This really concludes the case; as the defendant signed the petition with full knowledge of its contents, there can be no question that the agreement to lease was made as alleged by the plaintiffs; in this view, it is needless to consider whether the Pleader who filed the petition in Court on the strength of a new *vakalatnama* was duly authorised; nor is it necessary to examine the oral evidence as to the negotiations between the officers on both sides which preceded the actual execution of the petition by the plaintiffs and the defendant and their respective Pleaders. But I may add that on a scrutiny of the evidence I am satisfied that the Subordinate Judge has correctly held that the terms as finally embodied in the petition of compromise are identical with those actually agreed upon between the parties. The failure of the defendant to examine important witnesses on her side, namely, her survey Amin Ashutosh, her Jamanabis Srisnarayan, her manager Ambica Charan and her sister's husband Gobinda Chandra, as also her omission to produce important documentary evidence, namely, the draft of the *solehnamah*, are matters for legitimate adverse comment and tend to throw suspicion on her case. Much stress has been laid on the fact that even after the compromise with the defendant, the Company helped the Government officers in the suit brought by her against the Secretary of State. But the

(8) 9 B. 63.
(9) 10 B. 101.

explanation is obvious: the Company had not undertaken to remain neutral, much less to assist the defendant; the Company were free to help the Government officers with information and they did so because they would not lose even if the defendant was defeated. The Company would be able to take a lease from Government, and that on easier terms than from the defendant, to whom they would have to pay a profit in addition to any revenue that might be assessed by Government. I hold accordingly that the agreement to lease of which the plaintiffs seek specific performance has been fully established.

Two subordinate questions have been argued on behalf of the defendant, namely, *first*, that the plaintiffs have not succeeded to the right of Watson and Company to enforce specific performance of the agreement to lease, and *secondly*, that the terms of the agreement are so vague and indefinite that the Court should not grant specific performance thereof. There is no substance in either of these contentions. As regards the first point, it is plain, on the conveyance taken by the plaintiffs, that they have succeeded to the contractual right vested in their vendors. As regards the second point, the Subordinate Judge has correctly interpreted the terms of the agreement to lease. It would be an obviously unreasonable construction to hold that the defendant agreed to grant a permanent lease of the disputed lands to the Company, only on receipt of the Government revenue; there is no concievable reason why she should thus make a free gift of the lands to the Company after she had successfully litigated against the Secretary of State. The only reasonable construction is that the Company undertook to pay her Government revenue in addition to rent at the rate fixed for the lands of Suit No. 73, that is 4 annas 6 pies per *bigha*, and, this is the view adopted by the Subordinate Judge. The suggestion has been faintly made that even this rate is too low, but I do not feel pressed by this contention; it must be remembered that the rate of 4 annas 6 pies per *bigha* is the rate fixed for the lease of the lands of suit No. 73, and that from the year 1319, the defendant would be entitled to get rent at such rates as may be in force in the vicinity. I may add that the mere fact that the Government has not assessed any revenue on the lands (which were found to be re-formation and not accretion) does not entitle the defendant to claim rent at a higher rate than 4 annas 6 pies per *bigha* up to the year 1318; I express no opinion upon the question, what would be fair rent for revenue-free lands with effect from 1319. As the plaintiffs have not taken any cross-objection, the Court cannot also consider whether the decree is too favourable to the defendant.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT, J.—I agree that this appeal should be dismissed with costs, though my reasons for considering the compromise petition and the decree in Suit No. 73 of 1895 admissible in evidence differ somewhat from those given by my learned brother. The view, which I take, is that the petition was not an agreement to lease and, therefore, section 49 of the Registration Act can have no application. It was a petition presented on behalf of the then plaintiff, defendant in the present suit. It is headed "the petition of the plaintiff Rani Hemanta Kumari," and runs as follows :—" Being apprehensive as to the future result of the said Suit No. 73 of 1895, which I have instituted in this Court against Messrs. Robert Waston & Co., Ltd., for the lands mentioned in the schedule and which is still pending, now with the consent of both of us this suit is compromised according to the manner mentioned below. . . . . ." Then follow the terms set out in 8 paragraphs. The effect of these terms is that the plaintiff's title as proprietor to the lands in suit is recognised, the Company will be given a lease of those lands on certain terms, and also be given a lease of the lands the subject-matter of Suit No. 72 in case of a successful termination of that suit against Government. Then follows the prayer, "hence by filing this *solehnama* with the consent of the defendant Sahibs, it is prayed that after going through the above statements the present suit may be decided in terms of the aforesaid terms." Then follow the schedule of the boundaries and the signatures of the Managing Agents and

the Pleader of Messrs. Waston & Co. as consenting to the petition.

To my mind this simply amounts to a statement to the Court by the plaintiff that the parties have come to certain tems, the accuracy of which statement is accepted by the Managing Agents and Pleader of the Company, accompanied by a prayer that the suit may be disposed of accordingly. The document itself is not an agreement to lease but a statement of fact, accompanied by a prayer in a petition to the Court.

If the terms had been stated orally to the Court, the Court would have been bound to make a record of the whole of them, under section 375 of Act XIV of 1882, though the decree of the Court would have been final only as far as it related to the subject-matter of the particular suit. For the convenience of the Court or for the purpose of ensuring accuracy, the terms were put on paper, but that fact does not alter the real nature of the petition, or convert what is really a prayer to the Court into an agreement to lease.

The decree was equally admissible in evidence. As already remarked, the Court was bound to record the whole of the terms of the compromise. The promise to give a lease of the land, which was the subject-matter of Suit No. 72, was part of the consideration to the Company for consenting to a decree in Suit No. 73. If any authority is required for the proposition that the decree would be evidence, it may be found in the case of *Pranal Anni* v. *Lakshmi Anni* (10). The Privy Council remarked: "If the parties, after agreeing to settle the Suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute." That language applies to the circumstances of the present case. Section 17 of the Indian Registration Act does not, to my mind, create any real difficulty. It is true that the documents referred to in clauses (*e*) to (*n*) of that section are excepted only from the provisions of clauses (*b*) and (*c*) and not from the provisions of clauses (*a*) and (*d*), but that is because the documents enumerated in clauses (*e*) to (*n*) come within the description of documents in clauses (*b*) and (*c*) only and not within the description of documents in clauses (*a*) and (*d*).

As regards the facts I consider it clearly established that the whole of the petition of compromise is genuine and that that part of it which contains paragraph 8 was not a fraudulent interpolation. And I come to this conclusion not merely on the undoubted similarity of writing of the word "*iti*" in the various places in which it occurs, for the similarity of writing of a single word taken by itself would be a misleading test. But the learned Subordinate Judge has put the matter very clearly and forcibly, in dealing with the 6th and 7th issues, on page 155 of the paper-book. He points out that the defendants admittedly signed a *solehnama*, which was fair copied from a draft prepared by the principal officers on both sides and that she was aware of its contents, that there was evidence that this *solehnama* was the identical one which was filed in Court and that evidence to the contrary, if plaintiffs' story were untrue, was available to the defendant, but was withheld.

The question of the authority to compromise of the Pleader, who filed the petition of compromise, becomes immaterial in the view that the defendant signed the compromise petition in the form in which it now is. The argument is that he had authority to compromise, but his authority did not extend to the inclusion of matters contained in paragraph 8 of the petition. His authority was contained in a *vakalatnama* filed on the 20th September 1897, the same day on which the compromise petition was filed. The *vakalatnama* contains a *precis* of the contents of the petition of compromise, but there is no reference to the subject-matter of paragraph 8 of that petition. Though the question of his autho-

(10) 22 M. 508; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147 (P. C.).

rity to compromise is immaterial, this *vakalatnama* deserves notice as a piece of evidence supporting defendant's case that the petition which she signed was added to before its presentation in Court.

A possible explanation of the omission of the subject-matter of paragraph 8 from the *precis* contained in the *vakalatnama* is that it went beyond the subject-matter of the suit which was to be compromised.

But there are other matters in connection with this *vakalatnama* which deserve notice. The Pleader in question, Babu Narahari Mookerjee, was examined as a witness for the plaintiff. He states that he got the petition of compromise from Sirish Narain Prochanda, the *am-mukhtar* of the defendant, to be filed. Srish Narain, it may be mentioned, is one of the witnesses who ought to have been called for the defendant. The explanation, given for not calling him, based on the allegation of his dismissal from defendant's service, does not carry conviction. To satisfy himself the Pleader asked for a *vakalatnama* specifying the terms of the compromise, signed by the defendant. Yet having got the *vakalatnama* he says he did not read the petition of compromise as he had no time, it was brought to him just before the rising of the Court, and he took Sirish Narain's word that its contents corresponded with what was written in the *vakalatnama*. In cross-examination this statement was modified, the witness admitting that the petition was brought to him the day before it was filed. It is clear that the petition was not brought just before the rising of the Court and filed at once, for the order sheet of the record shows that on the filing of the petition the Judge ordered the case to be called up that day for orders, and later on the same day decreed the suit in terms of the compromise. Further having asked for a *vakalatnama* to satisfy himself as to the terms of the petition of compromise the Pleader did not trouble to compare the two, and finally when the decree was drawn up in accordance with the compromise petition it was he who signed it on behalf of the defendant.

Various theories for his conduct are possible: either he was satisfied that the petition of compromise was covered by the terms of the *vakalatnama*, and the contention advanced for the plaintiffs was that the word '*ityadi*' was wide enough to cover the terms of paragraph 8, or he knew that the petition of compromise went beyond the terms of the *vakalatnama*, and filed it honestly because he believed it to have been signed by defendant, or he filed it dishonestly in the interest of Robert Watson & Co. It is also a possible theory that the difference in the two documents was due to design as a means of subsequently attacking the compromise.

Now, had he intended to act dishonestly in the interest of Robert Watson & Co., there was no necessity for him to get a fresh *vakalatnama* specifying the terms of the compromise, for under his original *vakalatnama* of the 1st April 1895 (Exhibit 20) he had authority to file petitions of compromise. The reasonable view is that he made himself acquainted with the terms of the petition of compromise and filed it because he believed it to be in order; but he is now doing what he can to support the position taken up by the defendant. That the defendant did not cease to trust him is shown by the fact that he drafted her written statement in the present suit and acted for her in the suit till cited as a witness by the plaintiffs.

It is further clear that the compromise was part of a policy of reconcilation between the parties. In 1896, Bhuban Babu, a Pleader, had been trying to have disputes amicably settled, and in the following year, the year of the compromise in question, disputes in regard to a large number of villages were settled. A few appeals in cases between the parties were prosecuted, but generally speaking there was a settlement of disputes between them. Crawford says he was particularly insistent on having the land in Suit No. 72 included in the compromise or he would not have compromised Suit No. 73. These facts are sufficient answer to the argument that it was unlikely that the defendant would have given up the land for which she had been and still was fighting Government.

There is no force in the argument that that part of the contract referred to in paragraph 8 of the petition cannot be enforced as it was for a lease of accretions

to defendant's land, whereas in fact the land was found by the Privy Council to be a reformation *in situ*. It is clear the the parties contracted for a lease of the land which was the subject-matter of Suit No. 72. A misdescription of it will not affect the contract, especially when it appears that the present defendant was claiming the land in Suit No. 72 on the alternative plea that it was either a reformation *in situ* or an accretion to her estate.

My learned brother has dealt with the questions of the terms on which the lease was to be given and of the plaintiffs' title. On these points I have nothing to add.

Appeal dismissed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 57 OF 1914.
February 22, 1915.
Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.
NATHU MAL—DEFENDANT—APPELLANT
versus
KISHORI LAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Power of Court to direct account to be taken from trustee.

The provisions of section 92 of the Code of Civil Procedure are quite wide enough to entitle the Court to direct an account against a trustee and to make an order upon him to pay the amount found to be due upon the taking of those accounts.

First appeal from the decision of the District Judge of Meerut, dated the 3rd January 1914.

Mr. *Alston* (with him the Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Harendra Krishna Mukerji*), for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of the same suit as *Raghunath Das* v. *Kishen Lal* (1). In that suit a decree was made against the appellant here (Lala Nathu Mal) ordering him to file accounts. The Court below has found a considerable sum as being due by him. It is contended on his behalf in the first instance that it was not competent to the Court, having regard to the fact that the suit was brought under the provisions of section 92 of the Code of Civil Procedure, to make a decree against him for an account. He contends that he is not and was not a trustee, and that, therefore, an independent suit was necessary against him to establish his liability. We find, however, on looking at the plaint in Suit No. 4 of 1913 that in paragraph 7 the clearest allegations are made against Nathu Mal that he was a trustee and that he entered into possession of the property as such and misappropriated it. Nathu Mal put in no written statement and he never appealed against the decree ordering him to account. Under section 92 the Court may direct accounts to be taken and to grant such further and other relief as the nature of the case may require. In our opinion these provisions are quite wide enough to entitle the Court to direct an account against a trustee and to make an order upon him to pay the amount found to be due upon the taking of those accounts.

It is next contended on behalf of the appellant that the learned Judge found the account against him on insufficient evidence. We find on looking at the record that Nathu Mal neglected to appear before the Judge. The Judge, therefore, had to take the accounts as best as he could in his absence. We, therefore, see no reason to interfere with the decree of the Court below and dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

(1) 28 Ind. Cas. 854.

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL DECREE No. 270 OF 1911.
July 6, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
Srimati MANORAMA CHOWDHURANI—PETITIONER—APPELLANT
versus
SOSHI MOHAN DAS MAJUMDAR AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Will, Probate of, revocation of—Knowledge, acquiescence and lapse of time, whether bar to Probate proceeding—Application to be made bona fide.

In a proceeding to set aside a Probate, where knowledge, acquiescence and lapse of time are shown, the petitioner must give some reasonable and true

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explanation of the delay, or in other words the application must be made *bona fide*, before it can succeed. [p. 887, col. 2.]

Hoffman v. *White*, 2 Phillim 223 and *Merryweather* v. *Turner*, (1844) 3 Curt. 802 at p. 813, referred to.

Kunja Lal Chowdhury v. *Kailash Chandra Chowdhury*, 7 Ind. Cas. 740; 14 C. W. N. 1068, referred to.

Appeal against the decree of the District Judge, Tipperah, dated the 15th of May 1911.

Babus *Dwarka Nath Chakravarti* and *Ramesh Chandra Sen*, for the Appellant.

Messrs. *Casperz* and *Anis Yusuff* and Babu *Upendra Kumar Roy*, for the Respondents.

JUDGMENT.—This was a suit for revocation of Probate of the Will of one Gobind Chandra Das Majumdar calling upon the executor to prove the Will in the presence of the petitioner.

The testator died on the 27th or 28th December 1883 of cholera in a boat and the Will was said to have been executed on the 27th December 1883. He left a widow and five minor daughters unmarried as well as two brother's sons, the objectors in this case who were then also minors. By the Will the widow got a life-estate with remainder to the brother's sons, and the daughters were given allowance for maintenance of Rs. 12 a year each. The petitioner Manorama Choudharani is the only one of the daughters who has borne sons, and she claims to come in, because, admittedly although general citations were issued and her mother obtained Probate of the Will, no separate guardian *ad litem* was appointed to represent the minor daughters or the minor brother's sons in the Probate proceeding. The eldest daughter Kusum Kumari, now a childless widow, was born about 1869; the elder brother's son Sari Mohan Das Mozumdar was born in 1872; the second daughter Kumudini was born in 1871; the petitioner was born in 1876; the fourth daughter Kadambini was born in 1880, and the younger brother's son Kamini Mohan Majumdar was born in 1883. The fifth daughter is dead.

It is fully established by evidence that Siba Sundari, the widow of the testator, took out the Probate on the 20th March 1884, and in a rent suit in 1886 the Will was filed by her confidential servant Kali Kanta Biswas and returned to her. In 1887 the petitioner, then 11 years of age, was married, and there is evidence that the Will was read out to her husband, a Pleader's clerk who has since become a Vernacular copyist in the Munsif's Court at Lakhipur, and herself at the time of the marriage. In accordance with the terms of the Will Kusum Kumari, one of the daughters, gave receipts for her allowance to her mother in 1887 and to her mother and Khuri the mother of the objectors, jointly for the years 1888 and 1891. Two subsequent receipts of hers, the first given to her mother and Sari Mohan jointly and the second to her mother alone, have also been produced. Receipts of a similar nature granted by Kumudini for 1890 and 1901 are produced and from Kadambini for 1903. But the most important document is the receipt given by the petitioner herself in 1901 for Rs. 200, being the arrears of her maintenance for 16 years from 1885 to 1900 and three-quarters of her allowance of 1901. All these receipts clearly recite that her father, Gobinda, before his death executed a Will on the 18th *Pous* 1290 and in the said Will he made directions for payment of Rs. 12 annually to the recipient as allowance out of the profits of the estate. In 1909 the objectors, Sashi Mohan and Kamini Mohan, had occasion to bring a suit for accounts against Kali Kanta Biswas who was managing for Siba Sundari and for their own mother and they made Siba Sundari a defendant also. This appears to have annoyed Siba Sundari who separated from her sister-in-law and the objector and went over to the side of the petitioner and her husband and in 1910 this petition was brought making Siba Sundari alone a party. Upon this the objectors came in and said that the petition was fraudulent and collusive and got up by Siba Sundari. At the trial Siba Sundari and all the surviving daughters denied the Will altogether and denied they had received any allowance and supported the petitioner in her allegation that she had no knowledge of the Will of her father or of the Probate case until *Kartic* 1316, when she went to visit her father's house.

As regards the facts we may at once say that we have carefully perused the documents and can have no doubt that the receipt, Exhibit A, is in the handwriting of the petitioner herself, and the other receipts are genuine. Numerous specimens of the handwriting of the ladies have been produced in the shape of affectionate letters and post cards written by them to the objectors and

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to their own mother, the authenticity of which cannot for one moment be doubted, though the witnesses of the petitioner have had the audacity to deny all knowledge of them. It is clear from the correspondence that up till 1909 the sisters were on the most affectionate terms with their cousins, the objectors. One of the letters speaks of the objectors as the only hope of carrying on their father's name.

We, therefore, find two main facts against the petitioner: *first* that her petition is not *bona fide* but collusive and fraudulent, made solely as an answer to the suit for accounts against their mother and her agent, and *secondly* that no reasonable account is given of the circumstances which entitled the petitioner to re-open the Probate after so many years. The account she does give is entirely false, and as Siva Sundari herself undoubtedly obtained the Probate and they knew of it and acquiesced in it for many years, they must on the authorities give some good and true reasons why they had not proceeded earlier. This doctrine is cleary laid down in *Hoffman* v. *White* (1), which was cited with approval in *Merryweather* v. *Turner* (2), where it was stated that the ground or principle upon which the Court proceeded in *Hoffman* v. *White* (1) was that the petitioner was not barred by lapse of time, if he can show good reason why he did not proceed at an earlier period; but if he does not show good cause, the Probate Court will not allow him to call in the Will after such a lapse of time. The same view has been taken by this Court in *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury* (3).

It is argued that in all these cases there had been collateral litigation in other Courts to which the petitioner had been a party and was thereby saddled with knowledge and acquisence. But it does not seem to us to matter by what facts such knowledge and acquiescence are established, for neither knowledge nor acquiescence nor lapse of time are of themselves operative as a bar to the proceeding which every person interested in the estate of the testator has a right to bring if they were not made parties in the Probate proceeding. What is held is that where knowledge, acquiescence and lapse of time are shown the petitioner must give some reasonable and true explanation of the delay, or in other words, the application must be made *bona fide*.

We are of opinion, apart from all authority, that our finding that this petition is a dishonest and vindictive proceeding supported by false evidence and not putting the true facts at all before the Court, is certainly a bar to the re-opening of the Probate obtained 30 years ago under circumstances which created no suspicion of a Will, the provisions of which have been accepted by all the parties as reasonable and proper and such as the testator would be likely to make.

The appeal is, therefore, dismissed with costs. We assess the hearing fee at three gold *mohurs*.

Appeal dismissed.

(1) 2 Phillim 223.
(2) (1844) 3 Curt. 802 at p. 813.
(3) 7 Ind. Cas. 740; 14 C. W. N. 1068.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 21 OF 1913.
June 14, 1914.
Present:—Mr. Hallifax, A. J. C.

KESRA—DEFENDANT—APPELLANT
versus
HIRAJI—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (XI of 1898), ss. 69 (1), 83—Settlement Officer, record by—Sir land—Conclusive—Civil Court, decree of.

An order or entry of a Settlement Officer recording, or omitting or refusing to record, any land as *sir* land under section 69 (1) is final, unless and until it is reversed or modified by the decree of a Civil Court in a suit instituted under section 83 within one year after the Settlement comes into effect. (p. 859, col. 1.)

Miscellaneous appeal against the order of the District Judge, Nimar, dated the 16th June 1913, remanding the case decided by the Additional Judge to the Court of the Subordinate Judge, Khandwa, dated the 30th January 1913.

Dr. *H. S. Gour*, for the Appellant.
Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—The plot of land in dispute, which is situated in the Nimar District, has been cultivated by the defendant-appellant and his father since the year 1885

at the latest. It was recorded as the *sir* land of the plaintiff-respondent at the two Settlements made in 1868 and 1898. The next Settlement of the district was still in progress when this suit was filed in December 1911 and the Settlement Officer had not then made any entries in the Record-of-Rights in respect of this plot. The plaintiff sued to eject the defendant on the ground that the land was his *sir*, and the defendant resisted the claim on the ground that it had ceased to be *sir* and he had acquired occupancy rights in it by long continued tenancy. In the first Court it was held that the land had ceased to be *sir* though it was so recorded in the papers of the Settlement then current, but no intelligible reason is stated for this view. In appeal the learned District Judge held that as the land was recorded as *sir* by the Settlement Officer under section 69 of the Land Revenue Act, and the entry had not been corrected by means of a suit filed under section 83 of the Act, that entry was final and the land is *sir* land, in which occupancy rights cannot accrue under the first proviso attached to the definition of an occupancy tenant given in section 44 of the Tenancy Act. The learned Judge, therefore, set aside the decree of the first Court by which the suit had been dismissed and remanded the suit to that Court for disposal on the merits after deciding the third issue, which has reference to the improvements alleged to have been made by the defendant and his father, and the defendant's right to be paid the cost of those improvements before ejectment.

In second appeal the defendant contends that he is entitled to show otherwise than in a suit filed for that purpose under section 83 of the Land Revenue Act that the entry of the land as *sir* land in the papers of the current Settlement is wrong. He also complains that the plaintiff never definitely pleaded that this plot was a separate holding, that is to say, formed by itself a holding consisting entirely of *sir* land, and he urges, therefore, that if the remand of the suit is maintainad, he ought to be allowed to plead and prove that there is other land in the same holding which is not *sir*. As for this second plea, it is true that there is no express statement in the plaint that the plot forms a separate holding by itsef, but this is very clearly implied in the claim to eject the defendant on the sole ground that the land is *sir*. Further, the Pleader for the defendant put eight questions to the other side by way of clearing the pleadings and issues. The sixth of these was: "Does the plaintiff base his claim under clause (*c*) of section 69 of the Tenancy Act?" The written reply to this given by the Pleader for the plaintiff was: "The plaintiff bases his claim on section 69 (*c*) of the Tenancy Act." Nothing could be clearer than this, and the defendant never pleaded that this plot formed part of a larger holding comprising land other than *sir*. Indeed even in this Court it was alleged that all his other land in the village was an occupancy holding, and he was recorded as an ordinary tenant of the land in dispute at least up till 1907. The defendant cannot, therefore, be allowed to take now the plea that the holding does not consist entirely of *sir* land.

In support of the contention that the remedy provided by section 83 of the Land Revenue Act is cumulative and not exhaustive, and that an entry made in the Record-of-Rights in reference to a matter mentioned in section 78 can be proved to be wrong otherwise than in a suit filed for that purpose within one year under section 83, reference is made to the ruling of the Calcutta High Court in *Dibakar Bisi* v. *Chatto Bag* (1), a case from the Sambalpur District, and that of this Court in *Lachman Ram* v. *Bhim Sen Hari Ramogore Lall* (2), which was quoted with approval in the Calcutta case. In both cases the entry in question was in reference to rights other than *sir* rights, and in the Calcutta case a sharp distinction was drawn between entries in respect of *sir* and other entries. Indeed the whole basis of the decision that entries regarding all other rights can be questioned otherwise than in a suit filed under section 83, is that entries regarding *sir* rights cannot, under the provisions of section 69 (4), which would not have been specially restricted to entries regarding *sir* rights but would have been applied to all entries, if the Legislature had had any intention that they should be so applicable. In any case, the words of section 69 (4) of the Land Revenue

(1) 6 Ind. Cas. 672; 14 C. W. N. 686.
(2) 10 C. P. L. R. 33.

Act are perfectly clear, and they put it beyond doubt that an order or entry of a Settlement Officer recording, or omitting or refusing to record, any land as *sir* land under section 69 (1) is final, unless and until it is reversed or modified by the decree of a Civil Court in a suit instituted under section 83 within one year after the Settlement comes into effect. In respect of other entries section 83 gives the aggrieved party a remedy in addition to those he has under the ordinary law. In respect of entries regarding *sir* land, section 69 (4) takes away those other remedies and restricts the party to the remedy provided by section 83.

The appeal, therefore, fails and is dismissed. All the costs incurred in this Court will be paid by the appellant. Twenty rupees will be allowed as Pleader's fee. Other costs will follow the event, as already orderd by the lower Appellante Court.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 114 OF 1913.

APPEAL AGAINST APPELLATE ORDER NO. 24 OF 1914.

December 8, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

IN NO. 114 OF 1913

NATHERSA ROWTHER—DEFENDANT No. 1—APPELLANT

IN NO. 24 OF 1913

NATHERSA ROWTHER AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

Sheik MAHOMAD ROWTHAN AND OTHERS—DEFENDANT NO. 4—PLAINTIFF—RESPONDENTS.

Court Fees Act (VII of 1870), s. 11—Proceedings for ascertainment of profits—Order directing payment of additional Court-fee within fixed time—Effect of non-payment—Appellate Court, whether can extend time—Civil Procedure Code (Act V of 1908), ss. 148, 149.

No special procedure for dismissal for default in payment of Court-fee under section 11 of the Court Fees Act is necessary so long as it is clear that the parties have had fair notice of the nature of the proceedings. [p. 891, col. 2.]

Where, therefore, in proceedings for the ascertainment and recovery of profits in a partition suit an order was made ascertaining profits and directing the decree-holder to pay additional Court-fee on or before a fixed date:

Held, (1) that as the order was merely inserted incidentally in a decision on an application made by the decree-holder for a different purpose, there was no adjudication or valid dismissal of the suit; [p. 891, col. 2.]

(2) that an Appellate Court can neither extend the time fixed by the first Court for payment of the Court-fee nor reduce the amount awarded and that sections 148 and 149 of the Civil Procedure Code do not give it this power either separately or jointly. [p. 893, col. 1.]

Appeals against the decrees of the Court of the Subordinate Judge of Kumbakonam in Appeal Suits Nos. 15 of 1912 and 432 of 1912, preferred against those of the Court of the District Munsif of Mannargudi in Execution Petition No. 666 of 1911, in Execution Appeal No. 618 of 1911 and in Execution Petition No. 228 of 1910, in Original Suit No. 63 of 1901 respectively.

Messrs. *T. Rangachariar* and *K.S. Jayarama Aiyar*, for the Appellants.

Messrs. *G. S. Venkatarama Aiyar*, and *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—These appeals relate to proceedings for the ascertainment and recovery of profits in a partition suit. The decree in Original Suit No. 63 of 1901 on the file of the District Munsif of Mannargudi was passed under the former Code and directed ascertainment of past and future profits in execution. The decree-holder, 1st respondent, applied for acertainment in Execution Petition No. 228 of 1910, and an order was passed on 22nd March 1911 ascertaining profits and directing him to pay Additional Court-fee, Rs. 227-8, on or before 6th April 1911. This payment was not made, 1st respondent merely applying in the ensuing September for leave to execute on condition that the amount should be credited from anything realised from appellants, the judgment debtors, and in October for leave to execute to recover the past profits on payment of the Court-fee calculated on them. In November he applied in Execution Appeal No. 618 for an extension of time for the payment and to have the delay excused, and in Execution Petition No. 666 for execution. It is contended by appellants that the orders on the last-mentioned applications amounted to a dismissal of the suit for profits under section 11, Court Fees

Act; and it will be necessary to decide whether this is so. Meanwhile appellants had appealed against the order on Execution Petition No. 228; and in the order, which is the subject of Appeal against Order No. 24 of 1913, the lower Appellate Court reduced the amount awarded by the District Munsif and allowed one month for payment of the Court-fee on this reduced amount. Consistently with this decision it, in Appeal Suit No. 15 of 1912, set aside the District Munsif's dismissal of Execution Petition No. 666 and remanded it for disposal; and that order is the subject of Appeal against Order No. 114 of 1913.

The arguments first calling for consideration are these: in Appeal against Order No. 114, that (1) 1st respondent's obligation to pay the Court-fee fixed by the District Munsif's order on Execution Petition No. 228 was not in any way suspended or affected by the fact that an appeal against that order was filed by appellants, even though in it the amount payable was eventually reduced and the time for payment extended; (2) the failure to fulfil that obligation entailed the dismissal of the suit, so far as it related to profits, under section 11, Court Fees Act; (3) after that dismissal the lower Appellate Court could not deal with the decree for profits in appeal, since it had ceased to exist; (4) the lower Appellate Court was not authorised by section 11 or any other provision of law to fix time for payment of Court-fee in respect of profits, when they had been ascertained and time had been fixed by the District Munsif and no additional fee was payable under its order.

Much careful argument has been addressed to us in support of these contentions. But of the first three only one calls for examination, that the suit for profits was dismissed. For, if there was no legal dismissal of it, it cannot matter for the present purpose whether or no 1st respondent's conduct would have entitled appellants to claim one or whether they will be entitled to claim one in other proceedings before the District Munsif. In order to decide whether there was a legal dismissal it is necessary to refer to the orders on Execution Appeal No. 618 and Execution Petition No. 666, on which appellants rely. In the former the District Munsif refused to extend the time to enable 1st respondent to pay Court-fee or to excuse his delay in doing so. In the latter, passed on the same day, he said, "As Execution Appeal No. 618 is dismissed, suit in respect of mesne profits is dismissed. So this petition (for recovery of the profits in execution) is dismissed." The latter alone contains any statement as to the disposal of the suit. Yet it is on the former that appellants rely as in effect dismissing it, though it does not do so in terms; and the reason for this preference is evidently that the latter was the subject of appeal to the lower Appellate Court and of appeal against Order No. 114 here, whilst the former has not been appealed against. But, whichever order is relied on, the result must be the same. The order in Execution Appeal No. 618 did not purport to dismiss the suit, for profits and cannot be treated as having done so. The order on Execution Petition No. 666, which purported to do so, cannot be accepted as effecting a valid dismissal, because it was not passed after any claim to that relief had been made by appellants or after 1st respondent had had any notice that such a claim must be resisted. No doubt no special procedure for dismissal for default in payment of Court-fee is prescribed in section 11, Court Fees Act, or elsewhere, and no special procedure need be insisted on so long as it is clear that the parties have had fair notice of the nature of the proceedings. But that is not clear in the present case, since 1st respondent had no notice that an order of dismissal would be passed against him, and what is alleged to be such an order was merely inserted incidentally in the decision on an application made by him for a different purpose. In these circumstances, it is not possible to hold that there was any adjudication or any valid dismissal of the suit. The lower Appellate Court may have been mistaken in its order in the appeal above referred to, when it assumed that only "the propriety of the order in Execution Appeal No. 618 dismissing the suit as to past and future profits", and not also its formal validity, was open to discussion. But the conclusion reached here, that it was invalid, is sufficient for the present purpose, since it entails that the majority of appellants' contentions must fail.

There remains their fourth contention,

that the lower Appellale Court had no power to extend time already fixed for payment of Court fee by the District Munsif or to fix a fresh time, when its order did not direct the payment of any additional amount. If it is accepted, appellants will be entitled to move the District Munsif in a proper way to dismiss the suit for profits under section 11 on account of 1st respondent's original default.

The powers of the lower Appellate Court must under section 107, Civil Procedure Code, be taken to have been identical with those of the Court of first instance, since it has not been shown that distinct powers of the kind now in question are conferred on Appellate Courts by any special provision. It is accordingly contended that the lower Appellate Court possesses such powers, because the Court of first instance must be held to have possessed them under either section 11, Court Fees Act, or sections 148 and 149, Civil Procedure Code, taken independently or together. The argument as to section 11 is based on the judgment in *Golab Chand* v. *Bahuria Ram Murat Koer* (1). But the existence of a power to extend time is based herein on (1) the reasonableness of such an interpretation of section 11, (2) a supposed analogy with the interpretation of section 549, Civil Procedure Code, in certain Privy Council decisions; and with great respect it may be doubted whether a construction, which supplements a provision of law in itself workable and intelligible, is reasonable or legitimate whilst the analogy proposed is unsustainable in view of the restriction, introduced since the date of those Privy Council decisions, of the exercise of the power to enlarge time to acts prescribed or allowed by the Code, the payment of Court-fees under section 11 not being an act of that description. And on the other hand, if the Appellate Court has the same power to fix time for payment of fees under section 11 as the Court of first instance, that power must be exercised subject to the same restriction; that is, only in respect of fees calculated on profits, the amount of which it has itself ascertained. But here the lower Appellate Court ascertained no amount, since it merely confirmed in part the ascertainment of the District Munsif; and it, therefore, had no power to fix a time. It is possible that it might have had power to stay disposal of the suit for profits pending the appeal against the original award. But there was no stay or application for one in the present case. And in this Presidency it is settled that a merely affirming decree (or, it is to be supposed, when there has, as here, been a total default, a partially affirming one) does not give the plaintiff time for performing a condition. *Ramaswami Kone* v. *Sundara Kone* (2). In these circumstances the argument based on section 11 cannot be sustained.

That based on sections 148 and 149, Civil Procedure Code, can be dealt with shortly. So far as it is based on the former alone, section 148, by which the powers of the lower Appellate Court when it passed its order must be taken to have been regulated, permits the enlargement of a period fixed by the Court for the doing only of an act prescribed or allowed by the Code; and the payment, now in question, was primarily at least, prescribed or allowed only by the Court Fees Act. It is said, however, that it was allowed by section 149. The history and wording of that section, however, negative the contention. It represents in a more general form section 582 (A) of the former Code which authorised as regards appeals and applications for review, the use of the Court's discretion to permit payment, at any stage, of duty which had not been paid at the time of presentation through mistake, *Durga Charan Naskar* v. *Dookhiram* (3) and *Valambal Ammal* v. *Vythilinga Mudaliar* (4). That it contemplates cases in which the payment of duty is insufficient *ab initio*, not those, such as the present, under the second paragraph of section 11, Court Frees Act, is apparent from (1) the restriction of the indulgence to cases of deficiency in the fee prescribed by law on any document, which is inappropriate if the fee to be ascertained as the result of inquiry is meant, (2) the reference to an immediate use of the Court's discretion which is inconsistent with the terms of section 11; (3) the provision in its last sentence regarding the date from which the document shall take effect, which would be meaningless in

(1) 10 Ind. Cas. 268; 23 C. L. J. 432.

(2) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.

(3) 26 C. 925.

(4) 24 M. 331; 11 M. L. J. 119.

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the case of ascertainment of profits. Sections 148 and 149 being inapplicable separately, it is difficult to understand the attempt to rely on them in combination. It is based on the suggestion that section 149 makes payment of deficient duty an act permitted or allowed by the Code and, therefore, one covered by section 148, and on the authority of *Golab Chand* v. *Bahuria Ram Murat Koer* (1). But this is unsustainable in view of the conclusion just reached as to the scope of section 149 and the decision cited, which proceeds mainly on the application of section 11, Court Fees Act, above referred to, merely mentions the combination of the two sections as a possible ground of decision and appears irreconcilable on this point with the judgment of the same learned Judge in *Budhan Shah* v. *Sita Nath Shah* (5). All attempts to support the power of the Court acting under section 11 to extend time failing, whether they are made directly with reference to it or indirectly with reference to other provisions, the absence of reference to such a power from the section must be decisive against its possession by the Court of first instance and, therefore, against its possession by the Appellate Court. The former can, no doubt, after the proper procedure has been followed, review its order fixing a time for payment and fix an enlarged time for appropriate reasons. But that is not material in the present connection. The conclusion must be against 1st respondent, that the portion of the lower Appellate Court's order extending time for payment was beyond its powers and must be set aside. Appeal against Order No. 114 is allowed to this extent, but is dismissed in other respect.

Appeal against Order No. 24 is argued against the decisions of the lower Appellate Court and District Munsif in Appeal Suit No. 432 of 1912 and Execution Petition No. 228 of 1910, allowing 1st respondent to recover 14 lots of *punja* land as covered by the decree under execution. It is urged that they are not covered by it and that the order for delivery is in effect an addition to it. The facts are that the decree, which incorporated the plaint schedules, awarded to 1st respondent a share in 1st defendant's share of the *samudayams* proportinate to other specified land. No doubt there should, in accordance with the civil revision petition then in force, have been a preliminary and afterwards a final decree, the latter including a definite scheme for division dealing with each item of property. But there was in fact, in accordance with a very common practice only, one decree and the actual division was left to be made in execution. These lots, it is not disputed, are what 1st defendant obtained in a division of *samudayams* made among the villagers independently of this litigation, and there is no foundation for the contention that they either are not liable to division or are not included in the property, held in the decree to be liable to it. There is, therefore, no reason for interference on this point.

The memorandum of objections in this appeal is argued, *first*, on the ground that the lower Appellate Court failed to consider certain evidence, Exhibits B and C, in estimating the profits. It is not to be assumed that it did not consider it, because it did not refer to it explicitly; and it had good reason for not so referring to it, since as the District Munsif held it was open to objection.

Next, it is contended that the lower Appellate Court should have accepted the rate at which the District Munsif allowed profits and not limited the rate to that claimed in the plaint, because the claim was not made in the plaint approximately, but at an actual figure which should have been awarded with reference to *Baboojan Jha* v. *Byjnath Dutt Jha* (6) The answer is, *firstly*, that, though the language of the plaint is not clear and it included no offer to pay Court-fee on any amount eventually to be ascertained, the references in it to profits, which are evidently estimated at a round figure, are not clearly anything but approximate. And, *secondly*, the authority relied on has been superseded by *Gauri Prosad Koondoo* v. *Reily* (7), under which the specification of an amount in the plaint can be used only as evidence against the plaintiff, and not as limiting the amount which can be awarded. *Soorial Row* v. *Cotaghary Boochiah* (8) has also been cited by 1st appellant and

(5) 7 Ind. Cas. 578; 13 C. L. J. 78.

(6) 6 C. 472; 7 C. L. R. 539; 5 Ind. Jur. 413; 4 Shome L. R. 94.

(7) 9 C. 112; 12 C. L. R. 41.

(8) 2 M. I. A. 113; 5 W. R. (P. C.) 127; 1 Suth. P. C. J. 91; 1 Sar. P. C. J. 159; 18 E.R. 244.

is no doubt a decision of the Privy Council. But the portion thereof relied on was not necessary to the disposal of any ground of appeal and their Lordships did not commit themselves to any approval of the course taken by the lower Court. Instances are, moreover, referred to in the last Calcutta judgment cited, in which the contrary course was followed. In these circumstances the lower Appellate Court's conclusion on this point cannot be sustained.

Appeal against Order No. 24 is accordingly dismissed with costs, and the memorandum is allowed to the extent that past profits will be awarded at the rate fixed by the lower Appellate Court for future profits. The lower Appellate Court's order for proportionate costs before it will stand. There will be proportionate costs in this Court. The additional Court-fee on the amount of profits now ascertained must be paid within one month from this date.

TYABJI, J.—I have read the judgment prepared by my learned brother. I agree that there was no dismissal of the plaintiff's suit as to mesne profits.

With reference to the question whether the lower Appellate Court had power to extend the time for payment of the Court-fee on the mesne profits as ascertained by itself, I see no way out of the reasoning of my learned brother showing that the lower Appellate Court can have no power to extend the time or to fix it on the basis of its own decree. The result is no doubt anomalous; but it is brought about in part by the anomalous nature and history of the proceedings and as my learned brother points out, the Court of first instance can, after the proper procedure has been followed, review its order fixing a time for payment and fix an enlarged time.

I have nothing to add to the other points mentioned in my learned brother's judgment. I entirely agree with the orders he proposes and his reasons.

Appeal partly allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2908 OF 1913.

January 26, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

KSHIROD CHANDRA GHOSE—DEFENDANT—APPELLANT

versus

SRISH CHANDRA GHOSE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Grant—Right of way—Enjoyment for over 70 years—Presumption—Limitation Act (IX of 1908), s. 26, application of—Grant or legal origin.

The enjoyment of the right of way for a period of over 70 years is evidence which would lead a Court to refer such enjoyment to a grant or other legal origin. [p. 895, col. 1.]

Where the plaintiffs did not state in the plaint that they claimed the way under any kind of grant, nor did they state that they claimed it under section 26 of the Limitation Act, the defendant is not prejudiced, regard being had to the facts proved raising a presumption of grant or other legal origin. [p. 895, col. 1.]

Appeal against the decree of the Sub-Judge, second Court of Chittagong, dated the 7th of July 1913, affirming that of the Munsif, Additional Court, at Hathazari, dated the 4th of April 1912.

Babus *Mohini Mohan Chakravarti* and *Khitish Chandra Sen*, for the Appellant.

Babu *D. L. Kastgir*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for establishment of a right of way and for other reliefs.

The plaintiffs alleged that they and their predecessors before them had enjoyed the right of way peaceably, openly, as of right and without interruption for about a hundred years, and prayed for establishment of their ancestral right of way, "a right by possession for a period over the period of limitation, or a right of easement by user and necessity."

The defendants pleaded *inter alia* that the plaintiffs had no right of way. The Court of first instance held that the pathway beyond 3 cubits in width had been obstructed for seven years before the suit and apparently treating the suit as one under section 26 of the Limitation Act, held that such portion of the claim must be dismissed, but gave a decree for a right of way to the extent of 3 cubits in width in respect of which the plaintiffs had proved user within two years of the suit. Both

parties appealed to the lower Appellate Court and that Court held that the right of way had been in existence from 1839 and that the same clearly proved a "right by grant or otherwise an ancient right of way for the plaintiffs in the disputed land, and a right independently of the right by user or easement right given by the Limitation Act" and that the "plaintiffs' right was not dependent on the evidence of 20 years' user and user within two years of the suit," and accordingly decreed the appeal of the plaintiffs.

The defendant has appealed to this Court and it has been contended on his behalf, that the plaintiffs having claimed a prescriptive right of way, the Court of Appeal below is wrong in giving them a decree on the basis of a "grant or ancient right," that the defendant had no opportunity of meeting a case of grant which was not set up in the pleadings, nor raised in the issues, and that as such, he was prejudiced.

Now, the evidence adduced by the plaintiffs showed the enjoyment of the right since 1839 *i. e*, for a period of over 70 years. The Court of Appeal below, therefore, was right in referring such long enjoyment to a legal origin and in presuming a grant. The only question is whether the plaintiffs were prejudiced. No doubt, in claiming a right of way the plaintiff should state whether he claims the right by prescription, or grant, or in any other way and the defendant should know by which title the plaintiff claims the right, as otherwise he might be seriously embarrassed.

In the present case the plaintiffs, it is true, did not in the plaint state that they claimed the way under any kind of grant but neither did they state that they claimed it under section 26 of the Limitation Act. Though the particulars set out are those which are required for establishing a right under the statute, the facts, which if proved would raise a presumption of grant or other legal origin, were also stated in the plaint. The issue raised, *viz.*, whether the plaintiffs had any right of easement, was sufficiently wide and the plaintiffs adduced evidence to show that they had been in enjoyment of the right for about 70 years—evidence which would lead a Court to refer such enjoyment to a grant or other legal origin. The defendant had, therefore, notice of such a claim before adducing his evidence, and it does not appear that he complained before the lower Appellate Court that he had been taken by surprise. The plaintiffs adduced documentary evidence, which in the opinion of the Subordinate Judge was "unimpeachable" and extending over 70 years. We are not statisfied, having regard to all the circumstances of the case, that the defendant has really been prejudiced.

The appeal is dismissed but we make no order as to costs.

Appeal dismissed

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 14 OF 1914.

January 5, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

MOIDEENSA ROWTHEN AND ANOTHER—DEFEDNDANTS NOS. 1 AND 2—APPELLANTS

versus

MAHAMMAD KASIM ROWTHEN—PLAINTIFF, AND OTHERS—DEFENDANTS NOS. 3 TO 8—RESPONDENTS.

Muhammadan Law—Inheritance—Suit by one heir against another for his share of property of deceased—Partial partition, principle of—Proper mode of relief.

Under Muhammadan Law the estate of a deceased person devolves on his death on his heirs, each of whom becomes entitled to his definite fraction of every part of the estate. Therefore a suit in which one heir claims to receive his share of the property of the deceased from another heir is not a suit for "partial partition," as understood in Hindu Law. Such a suit is legally maintainable though it ought, as a rule, to take the form of a suit for the administration of the estate of the deceased. [p. 896, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Negapatam in Appeal Suit No. 732 of 1910, preferred against that of the Court of the District Munsif of Negapatam in Original Suit No. 26 of 1909.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *S. Gapalaswami Aiyangar*, for the Respondents.

JUDGMENT.—The only point argued before us is that in the suit, out of which

the present appeal arises, all the property of the deceased Shaik Farid should be partitioned and that, therefore, the 1st and 2nd defendants (who are the appellants before us) should be given a share in the properties belonging to Shaik Farid in the hands of the 3rd defendant. This point was, however, not taken in the lower Courts. What the appellants contended there was that the suit should be dismissed altogether, on the ground that the plaintiff prayed for what has been referred to as partial partition. That expression, when applied to parties governed by Muhammadan Law, is misleading. In the case of Mussalmans what would be a partition suit, if the parties were Hindus, ought often to take the form of a suit for the administration of the estate of a deceased person. In the present case the suit would undoubtedly have been better framed, had it asked for administration; and had the appellants asked the lower Court, as they now ask, that the plaintiff's suit should be treated as such and that consequently one of the questions to be decided was what estate was left by the deceased, our decision might have been different or based on different grounds. But in the state of circumstances with which we have to deal we must only consider:

(1) Whether the suit as framed by the plaintiff was maintainable.

(2) Whether the appellant's contention taken in second appeal for the first time ought to prevail, or whether the balance of convenience points against the appellants.

With reference to the first point, it need only be stated that under Muhammadan Law the estate of a deceased person devolves on his death on his heirs and each of the heirs becomes entitled to his definite fraction of every part of the estate. It is, therefore, futile to describe a suit in which one heir claims to receive his share of the property of the deceased from another heir as a suit for partial partition and to say that, therefore, the suit is not maintainable. Both the terminology and the principles of the Hindu Law are in such a case inapplicable. This point must be kept distinct from the questions that may arise when an heir claims his share of the property of the deceased, and when he in reality ought to institute a suit for administration he asks for what is styled 'partial partition.' In such a case it would be a question for the Court whether in order to avoid multiplicity of suits the plea of any defendants ought not to be given effect to in order that the whole estate of the deceased should be administered and in due administraion should be partitioned for once. But the question cannot permit of a hard and fast rule to govern all circumstances. It is enough for the present purposes to say that the suit as filed was maintainable and that there was no consideration put forward by the 1st and 2nd defendants in the lower Courts which the lower Courts decided wrongly.

On the second point also we think the decision must be against the appellants. The stage at which they have taken up the only contention which they could take up with any reason, makes it necessary to consider whether there would be any useful purpose served in allowing matters in dispute to be raised and determined in the present proceedings, turning them into a number of suits of the same nature as the suits instituted by the plaintiff, or whether the 1st and 2nd defendants should be referred to a fresh suit in which the estate of the deceased should be completely administered. We are of opinion that the latter alternative would be more suitable.

The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 148 OF 1913.

January 13, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

RENKA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BHOLA NATH—PLAINTIFF, NANNHU MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow in possession of husband's estate, right of, to deal with the estate—Reversioner, right of.

A Hindu widow is entitled to remain in possession of her husband's estate during her life-time and she is not liable to account to any one. She is also

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entitled to give the property to any one she likes to enure so long as she lives, and she need ask for no rent or other compensation for what she has done. [p. 897, col. 2.]

But where she alienates or deals with the property to the prejudice of the reversioners in a way not authorized by law, the reversioners are entitled to bring a suit for declaration that the act of the widow shall not prejudice the reversioners. [p. 897, col. 2.]

First appeal from a decree of the Additional Subordinate Judge of Aligarh, dated the 25th of March 1913.

The Hon'ble Dr. *Sundar Lal* and Munshi *Gulzari Lal*, for the Appellant.

Mr. *B. E. O'Conor* and Pandit *Shiam Krishna Dar*, for the Respondents.

JUDGMENT.—In the suit out of which this appeal arises the plaintiff is the alleged reversioner to the estate of one Sewa Ram, upon the death of his widow, *Musammat* Renka, the defendant of the first party. The defendants of the second party are alleged to be the nephews of the *Musammat* on whom she has conferred certain benefits as tenants. The defendant of the third party is a lessee from the defendant of the first party. The defendants of the fourth party are other reversioners, who apparently do not join in the suit. The claim seems to us a most extraordinary one. The plaintiff alleges that a large amount of property has been given to Jwala Prasad and his brother as their agricultural holding at a very low rent. It is also alleged that the lease granted by the *Musammat* is at a low rent and that a premium was taken. Faragraph 9 states that Rs. 600 or Rs. 700 per annum would be quite sufficient for the expenses of the *Musammat* and that the rest of the income of the property should be accumulated. The plaintiff then prays that he himself should be appointed manager during the life-time of the widow, but failing this, the Court should appoint some other person as Receiver; that the lease in favour of the defendant No. 3 should be declared absolutely null and void; that failing this, the plaintiff may be declared entitled to the property comprised in the lease by way of pre-emption; and lastly, that an injunction should be granted against the defendants.

The Court below has made a decree appointing a Receiver over the property. In our opinion the plaintiff has entirely misconceived his rights and the Court below has granted him relief to which he is in no way entitled. A Hindu widow is entitled to remain in possession of her husband's estate during her life-time and she is not liable to account to any one. Of course, she can be restrained from committing wilful waste where it is clearly and distinctly proved that she has been guilty of such action. A Hindu widow is entitled to give the property to anyone she likes to enure so long as she lives, and she need ask for no rent or other compensation for what she has done. She is clearly entitled to grant a lease and to take a premium provided that that lease is not to last longer than the term of her own life. If a Hindu widow alienates or deals with the property to the prejudice of the reversioners in a way not authorized by law, the reversioners are entitled to bring a suit for a declaratiou that the acts of the widow shall not prejudice the reversioners. In our opinion in the present case no acts of any kind were proved which would in any way justify the Court in taking away the life-estate of the widow and appointing a Receiver. The widow is entitled to spend as she thinks best the entire income of the estate during her life-time.

We must set aside the decree of the Court below and dismiss the plaintiff's suit with costs in all Courts. If the Receiver has taken possession, he should forthwith file and verify his final account in the Court below and when the same has been accepted by the Court below he will be at once discharged.

Objections have been filed by the respondent upon which there was a deficiency in Court-fee which has not been made good though time has been allowed. These objections are, therefore, rejected with costs.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 18 OF 1913.

January 20, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Hannay.

C. RANGAYYA NAIDU—DEFENDANT No. 3—APPELLANT

versus

CHINNASAMY IYER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Alienee of trust property, whether necessary party to a suit under s. 92—Decree for possession or declaration, whether should be given as against him.

An alienee of trust property is not a necessary party to a suit under section 92 of the Code of Civil Procedure and no relief either for declaration or possession should be given as against him.

Asam Raghavulu Setty v. *Pellati Sitamma*, 25 Ind. Cas. 794; 16 M. L. T. 178; (1914) M. W. N. 692; 27 M. L. J. 266, followed.

Appeal against the decree of the District Court of Chingleput, in Original Suit No. 22 of 1911.

Mr. *T. R. Rama Chandrier*, for the Appellant.

Messrs. *P. M. Srinivasa Aiyangar* and *N. S. Rangasawmy Aiyangar*, for the Respondents.

JUDGMENT.—This is a suit under section 92 of the Code of the Civil Procedure in which the appellant has been joined as an alienee of the trust property and a declaration and decree for possession have been given against him. According to the recent decision in *Asam Raghavulu Setty* v. *Pellati Sitamma* (1), it is not competent to the Court to grant these reliefs against an alienee in a suit under section 92 of the Code of Civil Procedure. The appeal must be allowed and the decree varied by dismissing the suit as against the 3rd defendant with costs throughout.

We are not prepared to interfere with the discretion exercised by the District Judge in not removing the 2nd defendant

The memorandum of objections is dismissed with costs.

Appeal allowed; Suit dismissed.

(1) 25 Ind. Cas. 794; 16 M. L. T. 178; (1914) M. W. N. 692; 27 M. L. J 266.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 138, 158, 159 AND 160 OF 1911.

July 8, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

MAHARAJ BAHADUR SINGH AND OTHERS—APPELLANTS

versus

IN No. 138 OF 1911.

SURENDRA NARAIN SINGH AND OTHERS—RESPONDENTS

IN No. 158 OF 1911

CHATRAPAT SINGH AND OTHERS—RESPONDENTS

IN NOS. 159 AND 160 OF 1911

MR. A. H. FORBES AND THERS—RESPONDENTS.

Lis pendens, *doctrine of, scope of—Civil Procedure Code (Act XIV of 1882), ss. 248, 313—Notice—Sale—Auction purchase by executor of deceased judgment-debtor—Personal capacity, application in.*

The doctrine of *lis pendens* rests on the principle that the law does not allow litigant parties to give to others, pending the litigation, rights over the property in dispute so as to prejudice the opposite party. [p. 900, col. 1.]

Bellamy v. *Sabine*, (1857) 1 De G. & J; 566; 26 L. J. Ch. 797; 3 Jur. (N. S.) 943; 6 W. R. 1; 44 E. R. 842; 118 R. R. 228 and *Wigram* v. *Buckley*, (1894) 3 Ch. 483; 63 L. J. Ch. 689; 7 R. 469; 71 L. T. 287; 43 W. R. 147, referred to.

The doctrine of *lis pendens* applies to sales *in invitum*. [p. 900, col. 1.]

Radhamadhub Haldar v. *Manohur Mukerji*, 15 C. 756; 15 I. A. 97; 12 Ind. Jur. 297; 5 Sar. P. C. J. 211; *Moti Lal* v. *Karrabuldin*, 25 C. 179; 24 I. A. 170; 1 C. W. N. 639, *Dina Nath* v. *Shama Bibi*, 28 C. 23, referred to.

Non-service of notice under section 248 of the Code of Civil Procedure of 1882 vitiates the sale. [p. 901, col. 1.]

Raghunath Das v. *Sundar Das*, 24 Ind. Cas. 304; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147 (P. C.); 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72, followed.

Gopal Chunder Chatterjee v. *Gunamoni Dasi*, 20 C. 370, referred to.

Malkarjun v. *Narhari*, 27 I. A. 216; 25 B 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927, distinguished.

Where an auction-purchase is made by an executor of the deceased judgment-debtor in his personal capacity, he should not be debarred from applying under section 313 of the Code of Civil Procedure of 1882 in this capacity. [p. 901, col. 1.]

Appeals against the orders of the District Judge of Purnea, dated the 16th February 1911.

Dr. *Rash Behari Ghose* and Babu *Sarat Kumar Mitra*, for the Appellant.

Babu *Golap Chandra Sarkar*, Dr. *Dwarka Nath Mitter*, Mr. *G. Sarkar*, Babu *Jogendra Nath Mookerjee* and Mr. *Muhammad Mustafa Khan*, for the Respondents.

MAHARAJ BAHADUR SINGH *v.* SURENDRA NARAIN SINGH.

JUDGMENT.—These four appeals arise out of four applications to set aside a sale in execution of a decree, three under section 311 and one under section 313 of the Civil Procedure Code.

A short narrative of the facts, which are a little complicated, may help a clear conception of the question raised in these appeals.

Roy Dhanpat Singh Bahadur was the *zemindar* of *perganah* Hawali in the District of Purneah and his nephew, Babu Chhatrapat Singh, held a *patni* of a property named Saifgunj in this *perganah*. Dhanpat sold his *zemindari* interest in this *perganah* to one Bhagwanbati Chowdhrani in June 1893, and then brought a suit against Chhatrapat for the arrears of the *patni* rent that had accrued due prior to the said sale and ultimately obtained a decree on the 10th of July 1896. On the 12th of July 1896 Dhanpat assigned all his properties including this decree to certain trustees for the payment of his debts and died in September following. The trustees applied for the execution of the decree and on the objection of Chhatrapat, Maharaj Bahadur, the heir-at-law of Dhanpat, was added as a party to the execution.

In the meantime Chhatrapat did not pay the *patni* rent and Bhagwanbati put up the *patni* to sale under Regulation VIII of 1819. Mr. A. H. Forbes, who was the executor to the estate of his deceased father, A. J. Forbes, who was a *dur-patnidar* under Chhatrapat, deposited the arears under section 13 (4) of the Regulation for saving the *durpatni* interest from the effect of the sale and obtained possession as mortgagee under the provisions of that section.

Chhatrapat's interest in the *patni* was then sold in execution of a money decree and purchased by Surendra Narain Singh on the 1st of September 1902.

The trustees took out a second execution in 1904 and Surendra Narain objected on the ground that the *patni* could not be sold as the decree was a money decree. This objection was rejected and the *patni* was fixed for sale on the 10th of November 1904.

Mr. A. H. Forbes tried to avert the sale but was unsuccessful, and Surendra's suit for the same purpose was dismissed up to the High Court. On the 9th of July 1906, A. H. Forbes instituted a regular suit for a declaration that the decree under execution was not a rent decree and for a perpetual injunction upon the decree-holders not to execute the same against the *patni mehal*. This suit was decreed by the first Court, but dismissed by the High Court which held that the decree was a rent decree and could be executed as such. This was on the 8th of April 1908. Forbes applied for leave to appeal to the Privy Council and the trustees applied for the sale of the *patni mehal* on the 9th May 1908, and they impleaded Chhatrapat alone as judgment-debtor. The leave to appeal to the Privy Council was granted on the 30th June 1908. The property was sold on the 6th July 1908 and was purchased by Mr. A. H. Forbes in his personal capacity for Rs. 61,200.

For setting aside this sale one application under section 311 was made by Surendra Narain and his case was numbered as 665 of 1908 and has given rise to Appeal No. 138 of 1911 in this Court, and another application under section 311 was made by Chhatrapat; his case was numbered as No. 16 of 1909 and has given rise to Appeal No. 158. A third application under section 311 was made by Mr. A. H. Forbes as executor to the estate of his deceased father. This was case No. 17 of 1909, in the Court below and has given rise to Appeal No. 160.

Mr. A. H. Forbes in his personal capacity as the auction-purchaser of the *mehal* made an application under section 313 of the Civil Procedure Code, on the ground that the judgment-debtor had no saleable interest at the time of his purchase. His case was numbered as 18 of 1909 and has given rise to Appeal No. 159 of 1911 in this Court. These four cases were tried together by the District Judge of Purnea who has allowed all of them.

These appeals are by the decree-holders.

It has been contended on their behalf that the Court below has erred in setting aside the sale on the ground of non-service of notice on Chhatrapat because

(*a*) the application for execution was a continuation of the previous application and, therefore, no fresh notice was necessary;

(*b*) Chhtrapat had no subsisting interest in the property and no notice was necessary;

(*c*) Chhatrapat actually appeared in the case and, therefore, no notice was necessary;

(*d*) notice was practically served on his *am-mukhtar* Sokilal and he must have known of it:

(*e*) Surendra was not entitled to notice as he purchased *pendente lite*.

Secondly, it was argued that notice or no notice the sale could not be set aside unless the applicant could make out substantial injury.

Thirdly, that at the time of the sale there was a subsisting decree of the High Court declaring that the decree was a decree for rent for which the tenure was liable ; the subsequent reversal of the decree by the Privy Council cannot invalidate the sale.

Fourthly, that Forbes could not be allowed to take two inconsistent positions ; when he applied under section 311 he did so on the basis of the judgment-debtor having some interest, he could not at the same time say under section 313 that the judgment-debtor had no interest.

The learned Vakil for the respondents contends that it is not necessary to go into the question of notice and other questions raised by the appellants, as the doctrine of *lis pendens* furnishes a complete defence of the order made by the lower Court. This argument is based on the judgment passed by the Privy Council in the appeal of Mr. Forbes on the 4th of March 1914 more than three years after the judgment under appeal in this case. The sale took place on the 6th July 1908 pending the appeal to the Privy Council. The doctrine of *lis pendens* rests on the principle that the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party: *Bellamy* v. *Sabine* (1), *Wigram* v. *Buckley* (2), and it is now settled that this doctrine applies to sales *in invitum*. See *Radhamadhub Holdar* v. *Manohur Mukerji* (3), *Moti Lal* v. *Karrabuddin* (4), *Dinonath Ghose* v. *Shama Bibi* (5). The property in dispute was the *patni* in which the plaintiff had substantial rights ; the object of the suit was to restrain the appellants from selling this property in execution of their decree of July 1896 and the appellants brought about the sale pending the appeal to the Privy Council, which ultimately held that the plaintiff's suit ought to have been decreed. We think that the facts are sufficient to attract the application of the doctrine of *lis pendens* and the act of the appellants in bringing about the sale cannot prejudice the plaintiff and make the judgment of the Privy Council nugatory.

The learned Vakil for the appellants contends that the principle of *lis pendens* does not apply, as the *lis pendens* is the very suit in which the decree in pursuance of which the sale took place was passed; and he relies on the case of *Shiv Lal Bhagwan* v. *Shambhu Prasad Parvati Shankar* (6). The decree, however, in execution of which the sale took place was not the decree under appeal to the Privy Council. The sale took place under the decree of July 1896, and the *lis pendens* was the suit of July 1906. The decree of the High Court, which was under appeal to the Privy Council, only held that the decree of July 1896 was a rent decree and was not the decree under which the sale took place. The Bombay case, therefore, does not help the appellants and no other case is relied on in their favour.

In this view of the case it is not necessary to decide the grounds urged by the learned Vakil for the appellants. As the case, however, may not terminate in this Court, we may shortly express our views on the said grounds. Supposing that the application for execution made on the 9th May 1908 was one for the continuation or restoration of the previous application, it is not shown that it was within one year of the last order passed on that application; the issue of a notice was, therefore, necessary.

It is true that Babu Chhatrapat Singh had no subsisting interest but, the appellants chose to treat him alone as the

(1) (1857) 1 De G. & J. 566; 26 L. J. Ch. 797; 3 Jur. (N. S.) 943; 6 W. R. 1; 44 E. R. 842; 118 R. R. 228.

(2) (1894) 3 Ch. 483; 63 L. J. Ch. 689; 7 R. 469; 71 L. T. 287; 43 W. R 147.

(3) 15 C. 756; 15 I. A. 97; 12 Ind. Jur. 297; 5 Sar. P. C. J. 211.

(4) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639.

(5) 28 C. 23; 4 C. W. N. 740.

(6) 29 B. 435; 7 Bom. L. R. 585.

judgment-debtor and were, therefore, bound to serve him with notice. It has not been shown that he appeared in this case and there is nothing to show that Soki Lal was authorised to receive any notice for him. As regards Surendra his title suit had been dismissed by the High Court and the appellants were not willing to treat him as the legal representative of Chhatrapat and did not want to execute the decree against him; they were not, therefore, bound to issue notice upon him. It has been contended, however, that the non-service of notice under section 248 was a mere irregularity and as no substantial injury is found to have occurred there was no reason for setting aside the sale. Some recent cases based on the case of *Malkarjun* v. *Narhari* (7) seem to support that contention. See *Levenia Ashton* v. *Madhabmoni Dasi* (8), *Rasaraj Kunai* v. *Prosonna Kumar Roy* (9). The matter, however, was before the Privy Council in the case of *Raghunath Das* v. *Sundar Das*(10)(Privy Council Appeal No. 20 of 1912, decided on the 18th of May 1914) and their Lordships approved of the decision of this Court in *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (11) and distinguished the case of *Malkarjun* v. *Narhari* (7) as one in which notice had been actually served on a person whom the Court then held to be the legal representative. The learned District Judge was, therefore, right in holding that the non service of the notice under section 248 vitiated the sale.

The previous consideration disposes of the second and the third grounds.

As regards the fourth ground the auction-purchase was made by Mr. Forbes in his personal capacity and we do not think that he should be debarred from applying under section 313 of the Civil Procedure Code in this capacity. He had tried his best to prevent the sale in order to protect the interests that he had as the executor of his father and when all his efforts failed he made the purchase in reliance on the decree of the High Court. That decree has now been set aside and he should not be a loser because the appellants insisted upon a sale which has been interdicted by the decree of the Privy Council

In this view of the case the appeals are all dismissed with costs five gold *mohurs* in each case.

Appeals dismissed.

(7) 25 B. 337; 27 I. A. 216; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927.

(8) 5 Ind. Cas. 390; 14 C. W. N. 560; 11 C. L. J. 489.

(9) 15 Ind. Cas. 506; 40 C. 45.

(10) 24 Ind. Cas. 304; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72.

(11) 20 C. 370.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 279 OF 1913.

March 17, 1915.

Present:—Sir Henry Richards, KT., Chief Justice and Mr. Justice Piggott.

BHARAT INDU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOBARDHAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Equity of redemption, purchaser of, liability of—Attachment of equity of redemption, effect of.

H executed a mortgage in favour of *G* in 1898. *B* had a decree against *H* in execution of which he attached the equity of redemption of *H* in that mortgage in 1907 and purchased it himself in 1911. In the meantime a suit had been brought under the foot of the mortgage of 1898 and a compromise decree was passed in 1910:

Held, that in a redemption suit brought by *B* against *G*, the former was bound to pay the amount decreed in favour of the mortgagee under the decree of 1910 and that the attachment of the equity of redemption in 1907 had no effect in determining the amount which *B* had to pay to the mortgagee at the time of the redemption. [p. 904, col. 1.]

Semble:—An attachment of a property does not confer an estate. It merely operates to keep the property in the custody of the law until such time as a sale can be had to satisfy the decree by virtue of which the attachment is issued. [p. 903, col. 2; p. 904, col. 1.]

First appeal from the decree of the Subordinate Judge of Bareilly, dated the 1st May 1913.

Dr. *S. C. Banerji*, for the Appellants.

Mr. *L. M. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out o a suit in which the plaintiffs claimed to redeem a mortgage, dated the 18th of July 1898, and made by Hakim Wilayet Ali in favour of one Maharaj Gobardhan

Das, the principal amount borrowed being the sum of Rs. 6,000. There is no dispute between the parties that the plaintiffs are entitled to redeem the mortgage. The contest is that the plaintiffs say that they are entitled to redeem upon payment of the principal sum of Rs. 6,000, whilst on the other hand the defendants say that the amount due upon their mortgage has been duly and finally ascertained by a decree of this Court dated the 1st of August 1910. This decree ascertains the amount due for principal, interest and costs at the sum of Rs. 20,270-11-0 with future interest at 1 per cent. per mensem. The defendants contend that the plaintiffs cannot redeem without paying this sum. The Court below has decided in favour of the defendants.

The facts are a little complicated, but may nevertheless be shortly stated. The plaintiffs had another mortgage against Hakim Wilayet Ali affecting other property than that now in suit. They sued on foot of this mortgage, obtained a decree, sold the property and having exhausted their rights against the mortgage security, they applied for a decree under section 90 of the Transfer of Property Act, so as to enable them to follow the other property of the judgment-debtor for the purpose of realising a large sum still unpaid. This decree they duly obtained, and in execution thereof they attached the property which it is now sought to redeem; and later on, on the 21st of March 1911 and the 21st of August 1911, purchased it themselves. We may mention that the attachment was made on the 12th of November 1907, although the actual sale did not take place until the dates just mentioned. In the meantime a suit on foot of the mortgage, which it is now sought to redeem, was instituted in February 1909. It is now necessary for a moment to refer to the particular nature of the mortgage. On the face of it, it is a possessory mortgage. It expressly provides that the possession should go aginst interest, that the mortgagee should not be accountable for rents and profits, and on the other hand the mortgagor should not be liable for interest. Simultaneously, however, two other documents, namely a *patta* and a *kabuliat*, were executed and registered. These documents provided that the mortgagor should remain in possession as tenant to the mortgagee, paying a yearly rent which in fact was equal to 12 per cent per annum simple interest on the principal sum of Rs. 6,000. The mortgage was recited and there was a provision that rent in arrear should bear interest at the rate of 1 per cent. per mensem. In the plaint the mortgagee set forth that the mortgagors had only paid $1\frac{1}{2}$ years' interest, and accordingly they claimed that the full principal sum was due together with compound interest at the rate of 12 per cent. per annum after giving credit for the $1\frac{1}{2}$ years in which the rent was paid. The defence was that there was no liability in respect of interest, that the mortgagee could only sue for rent under the lease, and that this rent was in no way a charge on the property, that rent could only recovered in the Revenue Court, and that consequently the plaintiff was only entitled to sell the property to realise the principal sum of Rs. 6,000. The mortgagees on the other hand urged the Court to hold that the mortgage, *patta* and *kabuliat* all represented a single transaction and that the true intention was that, if the rent was not paid, it should be a charge on the property realisable by sale in an ordinary mortgage suit. In short, the contention was that the transaction should be regarded as a simple mortgage with interest at 12 per cent. per annum. The Court of first instance decided in favour of the defendants and held that the plaintiffs were only entitled to the principal money secured. The plaintiffs appealed, again urging that on the proper construction of the three documents they were entitled to realise the interest as well as the principal. The appeal was compromised on the 1st of August 1910. The plaintiffs were given a decree for the amount we have already mentioned, which was practically all they claimed. It is said that some small sums, amounting to a few hundred rupees, were given up in respect of costs, but in all other respects the plaintiffs' appeal succeeded as the result of the so-called compromise. The appellants here contend that, as against them, this compromise decree must be deemed fraudulent and collusive. We shall assume for a moment (without deciding) that the appellants have a right to challenge the validity of this decree on the ground that it was fraudulent. Our attention has not been called to any direct evidence of fraud. So far as we can see, Hakim

Wilayat Ali Khan fought the case as best he could at least up to the time of the compromise decree. The plaintiffs say that the very fact that he made this compromise decree, which was tantamount to confessing judgment, at a time when he knew that they were creditors for a large amount, on the face of it stamps the transaction as a fraud as against them. No doubt a good deal might be said for this proposition, if it was absolutely clear that Hakim Wilayat Ali Khan could have succeeded in having the appeal of the mortgagees dismissed, and that he and his advisers knew that they had only to prosecute the appeal to attain this result. If we were now called upon to decide between the mortgagor and mortgagee, we should hold that the mortgagee was only entitled to sell the property to realise the principal sum of Rs. 6,000, but we think that at the time a formidable argument could have been put forward in respect of the mortgagees' contention that they were entitled to interest as well as principal, based upon the decision of this Court in First Appeal No. 98 of 1907, judgment in which case was delivered on the 22nd of December 1908. That was a case rather the converse of the present. There had been a mortgage, on the face of it usufructuary. Simultaneously a lease was made to the mortgagor at a rent equivalent to 6 per cent. per annum on the principal money (admittedly far below the actual profits of the property). The mortgagor made default in payment of rent and was ejected. Thereupon the mortgagee went into possession and remained in possession taking all the rents and profits. In a suit for redemption the mortgagor contended that, inasmuch as the mortgagee had received profits which it was never intended that he should receive, he ought to give an account of so much of the profits as were in excess of the stipulated rent as against the mortgage-debt. The mortgagee, on the other hand, contended that he was entitled to rely on the terms of the mortgage-deed which expressly stated that possession was to go against interest and that he was not to be accountable for profits. A Bench of this Court decided in favour of the plaintiffs holding that the mortgagee was bound to give an account of the excess of profits. We merely mention this case as showing that it might very reasonably have been argued that the principle would equally apply to the case where the mortgagor remained in possession of the mortgaged property without paying the rent which he had covenanted to pay. We mean by this that the fact that the mortgagor allowed a decree to be made against him for the alleged interest as well as the principal does not necessarily mean that it was a fraudulent transaction. It is consistent with his admitting a debt which he believed that he was liable for and against which there was no use fighting (paper torn) was before the mortgagee's legal rights he evidently thought he could recover the interest when he left the mortgagor in possession without paying rent. In our opinion, if it was necessary for the appellants in order to sustain their present contention to show that the compromise decree was fraudulent, they have failed to do so.

We have already mentioned that the plaintiffs-appellants purchased the present property on the 21st of March 1911 and the 21st of August of the same year. If they are in the same position as any ordinary auction-purchaser who had attended and purchased at the auction sale, then it would seem that they are bound by the decree which was binding between the mortgagors and the mortgagees. In other words, they are only entitled to redeem the property upon payment of the amount ascertained to be due by the decree of the 1st of August 1910.

The appellants, however, contend that by virtue of their attachment, dated the 12th of November 1907, they were entitled under section 91 of the Transfer of Property Act to redeem the mortgage. That section provides that certain persons, and amongst others a judgment-creditor of the mortgagor who has obtained execution by attachment of a mortgagor's interest in the property, are entitled to redeem or institute a suit for redemption of the mortgaged property. The answer to this contention is that the plaintiffs at the time they instituted the present suit had long ceased to occupy the position of "creditors attaching the mortgager's interest" in the property. The property had been sold in pursuance of the attachment and they themselves became the purchasers of the equity of redemption, and stood in his shoes. Attachment does not confer an estate. It merely operates to keep the property in the custody

of the law until such time as a sale can be had to satisfy the decree (or decrees) by virtue of which the attachment issued. It seems to us, therefore, that the plaintiffs by purchasing the equity of redemption could place themselves in no higher position than if that property had been purchased by a third party, and that the mere fact that at some time prior to the sale they had got an attachment of the mortgagor's property, gave them no right at the time they instituted the present suit.

In this view we think that the decree of the Court below is correct and ought to be affirmed. We may point out that we do not affirm the finding upon which the decision in the Court below proceeds. We may also point out that the decision of this Court in First Appeal No. 98 of 1907 was reversed by their Lordships of the Privy Council in the case of *Abdullah Khan* v. *Basharat Hussain* (1). We dismiss the appeal with costs. We extend the time for payment to three months from this date.

Appeal dismissed.

(1) 17 Ind. Cas. 737; 35 A. 48; 17 C. W. N. 233; 13 M. L. T. 182; (1913) M. W. N. 131; 17 C. L. J. 312; 15 Bom. L. R. 432; 25 M. L. J. 91; 40 I. A. 31.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1563 OF 1913.

October 30, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

JACKI MINEZES—PLAINTIFF—APPELLANT

versus

VENKATRAMANA KAMTHI—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 10—Lease—Condition that lessee shall have no right to transfer his interest, validity of—Assignee, right of.

A condition in a lease that the lessee has no right to transfer his lease is one intended for the benefit of the lessor and is, therefore, not invalid under section 10 of the Transfer of Property Act.

An assignee from such a lessee obtains no rights.

Nil Madhab Sikdar v. *Narattam Sikdar*, 17 C. 826; *Parameshri* v. *Vittappa Shanboga*, 26 M. 157; 12 M. L. J. 189, followed.

Basarat Ali Khan v. *Manirulla*, 2 Ind Cas. 416; 10 C. L. J. 49; 36 C. 745; *Promode Ranjan Ghosh* v. *Aswini Kumar Nag*, 26 Ind. Cas. 23; 18 C. W. N 1138, distinguished.

Second appeal against the decree of the the District Court of South Canara, in Appeal Suit No. 196 of 1912, preferred against that of the Court of the District Munsif of Kundapur, in Original Suit No. 351 of 1911.

Mr. *K. Yegnanarayana Adiga*, for the Appellant.

Mr. *K. Sundara Row*, for the Respondent.

JUDGMENT.—We agree with the observations of Sir Bhashyam Aiyangar, J., in *Parameshri* v. *Vittappa Shanboga* (1), and hold that a stipulation that the lessee shall have no right to transfer his interest is clearly one intended for the benefit of the lessor and it would be unreasonable to hold otherwise. If so, section 10 of Act of 1882 does not invalidate such a condition. Sir Bhashyam, J., dissents from the decision in *Nil Madhab Sikdar* v. *Narattam Sikdar* (2) which held differently and we do not, therefore, feel pressed with the observations in *Basarat Ali Khan* v. *Manirulla* (3) and *Promode Ranjan Ghosh* v. *Aswini Kumar Nag* (4), which followed the same line of reasoning as in *Nil Madhaba Sikdar* v. *Narattam Sikdar* (2), and which relied on English precedents which cannot be safely followed in respect of agricultural leases in this country. [See *Abbakka Shethi* v. *Ses'amma* (5)].

Plaintiff's title as assignee being invalid, his suit was rightly thrown out and we dismiss the second appeal with costs.

Appeal dismissed.

(1) 26 M. 157; 12 M. L. J. 189.
(2) 17 C. 826.
(3) 2 Ind. Cas. 416; 36 C. 745; 10 C. L. J. 49.
(4) 26 Ind. Cas. 23; 18 C. W. N. 1138.
(5) 25 Ind. Cas. 944; 16 M. L. T. 442; (1914) M. W. N. 915.

WALA PERSHAD SAHU *v.* BIGALRAM.

ALLAHABAD HIGH COURT.
CIVIL REVISION APPLICATION No. 1 OF 1915.
March 24, 1915.
Present:—Mr. Justice Piggott and Mr. Justice Chamier.
JWALA PERSHAD SAHU—PLAINTIFF—APPELLANT
versus
BIGALRAM MANDWARI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 8, O. XI, r. 21, O. XVII, r. 2—Plaintiff not present on day he was required to produce account book—Dismissal of suit—Application for restoration rejected—Appeal—Dismissal of suit, when under O. XI, r. 21.

The plaintiff was required to produce some books of account on a fixed date. The plaintiff being absent on that day, the Court dismissed the suit. An application to restore the suit was also dismissed by the Munsif:

Held, that an appeal lay from the order of the Munsif rejecting the application for restoration inasmuch as the order dismissing the suit was passed under Order IX, rule 8, read with Order XVII, rule 2 and not under Order XI, rule 21, of the Code of Civil Procedure.

A suit can be dismissed under Order XI, rule 21, for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleadings or affidavits.

Civil revision against the decree of the District Judge of Gorakhpur, dated the 4th September 1914.

Mr. *M. L. Agarwala*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Parmeshwor Dayal* for Mr. *Iswar Saran*), for the Respondent.

JUDGMENT.—This is an application for revision of an order of the District Judge of Gorakhpur dismissing an appeal against an order of the Additional Munsif of Deoria disallowing an application for restoration of a case which had been dismissed. It appears that the plaintiff was required by the Court to produce some books of account. He failed to comply with the order of the Court and on March the 23rd, 1914, the date ultimately fixed for the production of the accounts, he was absent. The Munsif recorded an order which concluded as follows: "As the plaintiff is absent, order—the suit is dismissed with costs. The defendant shall get his costs from the plaintiff." It seems to us that there can be no doubt that the Munsif was acting under Order XVII, rule 2, read with Order IX, rule 8, Civil Procedure Code, and that he dismissed the suit because the plaintiff did not appear when the suit was called on for hearing and not because the plaintiff had failed to produce his books. The plaintiff applied for restoration of the case under Order IX, rule 9, Civil Procedure Code. The Munsif dismissed the application, because in his opinion the suit had been dismissed under Order XI, rule 21, therefore, no application for restoration was maintainable, and also because the plaintiff had failed to satisfy him that he had sufficient cause for his non-appearance. The plaintiff then appealed to the District Judge, who dismissed the appeal saying: "The application was rightly rejected because the suit had been dismissed under the provisions of Order XI, rule 21, of the Code of Civil Procedure." It seems to us that both the District Judge and the Munsif were under a misconception when they said that the suit had been dismissed under Order XI, rule 21. It is not a case of a party having failed to comply with an order for discovery or inspection of documents, for such an order could only refer to documents the existence of which was referred to in the pleadings or affidavits. The result is that through a misconception the District Judge has failed to consider whether the plaintiff was entitled to present an application for restoration of the case. It is clear that the learned Judge was of opinion that if the plaintiff objected to the order dismissing his suit, he should have appealed under Order XLIII, rule 1 (*f*). In short, the District Judge has, through a misconception, failed to exercise his jurisdiction. He ought to have heard the appeal on the merits. We allow this application, set aside the order of the District Judge and direct that the record be returned to him in order that he may dispose of the plaintiff's appeal according to law. Costs of this application will be costs in the cause.

Application allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 250 OF 1912.

APPEAL AGAINST ORDER No. 227 OF 1912.

November 18, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

ANNABATTULA VENKATARATNAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

ANNABATTULA NAYUDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 16—Transferee of decree, whether entitled to execute decree, determination of—Separate suit, whether maintainable—Judgment-debtor obtaining transfer of decree in his own name, whether entitled to execute.

Determination of the question whether the transferee of a decree is entitled to obtain execution of the decree constitutes a determination of a matter within section 47 of the Civil Procedure Code, 1908, and no suit will lie for the determination of this question. [p. 907, col. 1.]

Under Order XXI, rule 16, of the Civil Procedure Code, 1908, a joint judgment-debtor obtaining the transfer of the decree in his own name cannot subsequently execute it. [p. 907, col. 2.]

Per *Sankaran Nair, J.*—A separate suit to determine a question for execution will not lie. [p. 906, col. 2.]

Badri Narain v. Jai Kishen Das, 16 A. 483; A. W. N. (1894) 184; *Ganga Das Seal v. Yakub Ali Dibashi*, 27 C. 670, followed.

Raman v. Muppil Nayar, 14 M. 478; *Sheoraj Singh v. Amin-ud-din Khan*, 20 A. 539; A. W. N. (1898) 145, distinguished from.

Appeals against the decree of the District Court of Godaveri at Rajahmundry, in Original Suit No. 7 of 1911 in Execution Petition No. 18 of 1911, in Original Suit No. 14 of 1906.

Mr. *E. V. R. Sarma*, for the Appellant.

Messrs. *G. Venkataramiah* and *P. Somasundaram*, for the Respondents.

JUDGMENT.

SANKARAN NAIR, J.—I have had the advantage of reading the judgment which will be delivered by my learned colleague and for the reasons given by him in that judgment I agree that the Appeal No. 227 of 1912 should be dismissed with costs.

Appeal No. 250 of 1912 fails also on another ground. The original suit was brought, by the plaintiff to set aside certain orders in execution proceedings holding that the transfer by the decree-holder, the 4th defendant, of his decree in favour of the 1st defendant was not made for the benefit of the plaintiffs and for a declaration that such transfer was made for consideration paid by the plaintiffs and for their benefit. I am of opinion that such a suit is not maintainable. That question must be decided by the Court executing the decree. A separate suit to determine the question for the purpose of execution will not lie. See section 47, clause (3), Code of Civil Procedure. It is not brought here for any other purpose. The appeal is dismissed with costs.

SPENCER, J.—APPEAL No. 250 OF 1912. The 4th defendant obtained two decrees against the 1st defendant and the 2nd and 3rd defendants' father and he attached crops raised by 1st defendant and his son.

On payment of Rs. 4,000 both decrees were assigned by the 4th defendant to the 1st defendant's brothers and the attachment was released.

Afterwards the assignees, who are here, the 1st appellant, and the father of the 2nd appellant, applied to the District Munsif of Amalapuram to recognise the assignment and to permit them to execute the decree in Original Suit No. 356 of 1901 under which Rs. 2,198 were due at the date of assignment.

The District Munsif decided that the two so-called assignees were name-lenders for the 1st defendant and refused to let them execute the decree. They appealed to the District Judge but their appeal was dismissed.

They then brought this suit for a declaration that the transfer was not nominal but for their own benefit and that they themselves paid the consideration for it. The same District Judge who had previously decided the appeal tried the suit and dismissed it. They now appeal.

In my opinion the plaintiffs are clearly bound by the result of the appeal, Appeal Suit No. 45 of 1909 in the District Court. In those proceedings the same question was substantially in issue between the same parties.

Though the application purported to be made under sections 232 and 269 of the old Code, the order was one under section 244, as may be seen from the fact that an appeal was taken against it, whereas

there is no appeal provided against directions made by the Court under the two first-mentioned sections. It is unnecessary to cite authorities for this view, but I may refer to *Badri Narain* v. *Jai Kishen Das* (1) and *Ganga Das Seal* v. *Yakub Ali Dobashi* (2), where there is a full discussion of the question when the decision of a Court that a transferee is entitled to obtain execution of the decree constitutes a determination of a matter falling under section 244.

The cases in which it has been held that a suit will lie for a declaration that the plaintiff is the person entitled to execute the decree are cases such as *Raman* v. *Muppil Nayar* (3) and *Sheoraj Singh* v. *Amin-ud-din Khan* (4), where it was held that the order was passed under section 232 and was not appealable.

Here there is a final decree which binds the parties and the plaintiffs cannot be allowed to agitate the matter again by suit.

The appeal is dismissed with costs.

APPEAL AGAINST ORDER No. 227 OF 1912.

The appellants obtained a transfer of the decree in Original Suit No. 14 of 1906 on the file of the District Court of Godaveri. Rupees 3,037 were due under this decree when the decree-holder, who is the 4th respondent in this appeal, accepted Rs. 4,000 in satisfaction of his claim under this decree and under the decree in Original Suit No. 356 of 1901 on the file of the Court of the District Munsif of Amalapur, with which Appeal No. 250 of 1912 is connected, and assigned his rights under both decrees to the 1st appellant and the father of the 2nd appellant, who were related as brothers to one of the judgment-debtors who is the 1st respondent in this appeal.

The District Judge held on the evidence, which was the same as that let in in Appeal Suit No. 250 of 1912, that the assignment, while ostensibly in the name of the assignees, was in reality made for the benefit of the 1st respondent.

When the same assignees attempted to execute the other decree in the District Munsif's Court, the same conclusion as to the *benami* nature of the assignment was arrived at both by the District Munsif in the execution proceedings and by the District Judge in appeal.

On this finding of fact the District Judge was bound by the second proviso to Order XXI, rule 16, to refuse to allow the decree in Original Suit No. 14 of 1906 to be executed. The 1st respondent was himself one of the judgment-debtors and he applied to execute the decree only against the heirs of the other judgment-debtor.

It has been argued that the District Judge's finding on the evidence was wrong.

Seeing that two Courts have already found on these facts that the transfer to the appellants was a nominal one, seeing also that it was the 1st respondent who applied to the 4th respondent's *tanedar* to have the decrees transferred to the 1st appellant and the 2nd appellant's father (See Exhibits II and IV) and it was he who deposited the Rs. 4,000 (See Exhibits V and VI) and took the deeds of transfer [See Exhibit III (b)], and seeing that the evidence as to the source from which the Rs. 4,000 were raised was not very complete and satisfactory, we are not prepared to say that the District Judge's finding on this point was wrong.

We must, therefore, dismiss this appeal with costs.

Appeals dismissed.

(1) 16 A. 483; A. W. N. (1894) 184.
(2) 27 C. 670.
(3) 14 M. 478.
(4) 20 A. 539; A. W. N. (1898) 145.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REVISION PETITION No. 13 OF 1913-14 OF FARRUKHABAD DISTRICT.

March 20, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

PARSHADI—DEFENDANT—APPELLANT

versus

PARSHOTAM NARAIN—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 11—Occupancy right, acquisition of—Father ejected—Son let in—Joint family—Continuous possession.

Where a father was ejected from a holding and his son was let in and there was evidence that the father and the son were joint and undivided in cultivation:

Held, that the entry of the son's name implied no real change whatsoever in the tenancy and that the

possession of the father and of the son must be considered to be continuous for the acquisition of occupancy rights.

Second appeal from the order of the Commissioner of Allahabad Division, dated the 5th September 1913, confirming that of the Assistant Collector of Farrukhabad District in the case of ejectment.

JUDGMENT.

BAILLIE, S. M.—The following facts are ascertained. In the Settlement of 1306 *Fasli*, Nanhe the appellant's father was a tenant of four years' standing. Nanhe was ejected under section 40 of Act XII of 1881 on the 21st September 1900. There was a dispute about the crops on the ground and Rs. 14 were proffered and refused. No further proceeding in regard to the crops on the ground appear to have taken place, but in the *khasra* for that year (1308) the name of Parshadi, the appellant, appears and is continued upto the present time. From the date of Nanhe's ejectment to the institution of the suit on the 24th September 1912, period is over 12 years but the Commissioner argues that the settlement of the rate of rent and of conditions on which Parshadi was to hold must have taken more than three days and that, therefore, Parshadi could have held only for less than 12 years. This argument is supported by no evidence whatever on record and in my opinion it is unnecessary to enter into such minutiæ as to dates. The ejectment took place after the 1st July 1900. There was an enhancement of rent, but in my opinion the entry of the son's name instead of that of the father's implies no real change whatever in the tenancy. I consider that the possession of the father and of the son must be considered to be continuous and that the appellant has got occupancy rights. I would allow this appeal with costs on respondents.

TWEEDY, J. M.—I agree. The presumption is that Parshadi was in possession from the date of the ejectment of his father and there is evidence that father and son were joint and undivided in cultivation as well as messing.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 266 OF 1911 AND 153 OF 1913.

February 8, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Hannay.

O. P. UMATYORUPAGAM PILLAI AND OTHERS—DEFENDANTS NOS. 2, 3 AND 6—APPELLANTS

versus

O. P. PALANARAYANA PILLAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Agreement to divide—Intention.

Where an agreement entered into by the members of a joint Hindu family provided that all the immoveable and moveable properties relating to the co-parcenary were to be divided as from the date of the agreement and that from that time forward separate accounts were to be kept by the co-parceners and the gain or loss subsequent thereto was on no account to be binding on the other co-parceners:

Held, that the intention of the parties was to divide then and there and not to wait until a complete division of the properties had been effected. [p. 909, col. 2.]

The Court will not refuse to enforce an agreement between the members of a joint Hindu family which provides for the administration of a charity by the members of the family by annual turns. [p. 910, col. 2.]

Appeals against the preliminary and final decrees of the Court of the Subordinate Judge at Tinnevelly, in Original Sait No. 42 of 1908.

Messrs. *S. Srinivasa Aiyangar* and *C. Krishnamachariar*, for the Appellants.

Messrs. *S. E. Sankara Aiyar*, *M. D. Peradoss*, *T. R. Ramachandra Aiyar* and *P. R. Narayanasami Aiyar*, for the Respondents.

JUDGMENT.

APPEAL NO. 266 OF 19 1.

In this case the plaintiff alleged that a partition had been effected between himself and his father, the 1st defendant, two brothers the 2nd and 3rd defendants and a third brother who died before the suit by virtue of an agreement, Exhibit A, entered into on the 2nd February 1903. If this argeement effected a division in status, then on the death of the 4th brother his share would have passed by inheritance to his mother, the 6th defendant, and the devolution of the share of the 1st defendant who is also now dead would depend upon the question whether the Will, which is alleged to have been executed by him, is proved

S. N. DAR, B. A. LL. B.,
Vakil High Court.
SRINAGAR (Kashmir)

or not. The Subordinate Judge has come to the conclusion that under this agreement no division in status was effected, but that it was merely an agreement to divide at a future date. On the construction of the document we are unable to agree with him. It recites that when they began to effect a partition certain disputes had arisen as some of the co-parceners had suppressed part of the joint family property and " hence it was decided by the arbitrators that it should be solemny declared by each of the said two persons separately that he had neither appropriated nor kept any amount secretly, that if it be so declared, the other co-parceners should forego their claim in regard to it, and that a division into five shares should be made of the immoveable and moveable properties and the goods, outstandings, utensils and debts relating to the shop, and all of us have, therefore, assented to it." This seems to us a clear agreement that upon the prescribed declaration being made, an event which has happened, the parties should be then and there divided in status. The agreement then goes on to provide for such a division of the property. There are various provisions which show that the intention of the parties was that the properties should be divided at once. For instance, paragraph 2 provides that the goods relating to the shop were to be divided as from the date of the agreement and made into five equal shares and from the time forward (paragraph 4) separate accounts were to be kept by the co-parceners and the transactions and the gain or loss subsequent thereto shall on no account be binding on the other co-parceners. That clearly points to a severance of the joint status. Then similarly paragraph 5 provides: "Subsequent to this agreement none of the co-parceners shall appropriate to himself the amounts collected from the debtors." Then, paragraph 7 says: " If any co-parcener wishes to draw money for necessary expenses prior to the division of the outstandings and debts, all co-parceners may take in equal shares with the consent of all the co-parceners or on decision by the arbitrators." That is to say, there was to be no drawing in future unless the drawing be by all the co-sharers or it be done pursuant to a decision by the arbitrators. That again shows that the joint status and its incidents were considered to be at an end. We think that this agreement, Exhibit A, clearly manifests the intention of the parties to divide then and there and they were not to wait until a complete division of the properties had been effected, which would have been a very foolish thing indeed and would have really frustrated the whole object of the partition. This being so, we think that on the death of the 4th brother after the division in status his share passed by inheritance to his mother and that the father's (1st defendant's) share would pass by inheritance to his natural heirs in the absence of any testamentary disposition.

We must reverse the decree of the Subordinate Judge and remand the suit to the lower Court for disposal according to law. The costs of this appeal will abide and follow the event.

As regards items 46 and 47 the appeal against the 3rd respondent has not been pressed and must be dismissed with the costs of the 3rd respondent.

APPEAL NO. 153 OF 1913.

This is the appeal against the final decree. We have already set aside the preliminary decree and remanded the case for disposal according to law. That of itself would necessitate the modification of the final decree. We do not propose to interfere with the final decree further than may be necessary for the purpose of giving effect to our judgment as regards the appeal from the preliminary decree and with regard to the management of the charity. With regard to the grounds of objections which have been argued before us to the appeal from the final decree, two points have been taken. As to the first we think that the Subordinate Judge was justified in not going into the accounts which were tendered before him at a very late stage of the case.

With regard to the other point the decision of the Subordinate Judge is somewhat unsatisfactory. The agreement, Exhibit A, provided that the charity should be administered by the members of the family by annual turns. The preliminary judgment says that they were certainly entitled to manage the charity properties in accordance with the terms of Exhibit A and the preliminary decree says that a scheme is to be framed and that the parties should

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submit draft schemes. The final decree says the charity is to be managed by the eldest member for the time being. There does not seem to be any reason why in this partition suit the agreement of the parties to manage by annual turns, which appears to be a lawful agreement, should not be given effect to; should it afterwards turn out that this scheme is unworkable, there is the legal remedy. But we see no sufficient ground for refusing to enforce the terms agreed upon by the parties. To this extent the final decree will be modified and also to such extent as may be necessary to give effect to the modified preliminary decree which will now be passed. The decree will be modified by directing that the management shall be by annual turns. The final decree will be sent back to be modified in accordance with the modified preliminary decree. We make no order as to costs in this appeal.

The memoranda of objections in the two appeals are not pressed and are dismissed with costs.

Appeals allowed; Decrees modified.

ALLAHABAD HIGH COURT.
FULL BENCH.
FIRST CIVIL APPEAL NO. 223 OF 1913.
April 9, 1915.
Present:—Sir Henry Richards, Kt., Chief Justice, Justice Sir P. C. Banerjee, Kt., and Mr. Justice Tudball.
GAYA DIN AND OTHERS—PLAINTIFFS—APPELLANTS
versus
JHUMAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage-deed—Instalment—Construction—Mmoney, when becomes due—Limitation.

A mortgage-deed executed in 1890 provided that the mortgagors should pay the principal amount secured in ten years by instalments of Rs. 625 yearly together with interest and further provided as follows: "If we (mortgagors) fail to pay the interest aforesaid in any month or the principal by the end of the stipulated period as specified above, or no payment is made in a year, the mortgagee shall, under all these circumstances, be at liberty to realize the entire amount with the interest aforesaid in a lump sum through Court by means of a suit....If the mortgagee in order to get interest does not bring a suit in default of payment of any instalment and we are unable to pay the money, the interest should continue up to the stipulated period of ten years and also after it up to the date of realization etc." No payment was ever made upon foot of either principal or interest up to the date of the institution of the suit in 1912:

Held, [*Banerji, J.*, dissenting] that the money under the bond "became due" within the meaning of Article 132 of the Limitation Act when the first default was made in 1890 and accordingly the suit was barred by limitation. [p. 913, col. 1; p. 914, col. 2.]

Per *Richards, C. J.*—Money under a bond "becomes due" as soon as it is legally recoverable, quite irrespective of when the suit is instituted. [p. 912, cols. 1 & 2]

Reeves v. *Butcher*, (1891) 2 Q. B. D. 509; 65 L. T. 329; 39 W. R. 626; 60 L. J. Q. B. 619; *Sitab Chand Nahar* v. *Hyder Malla*, 24 C. 281; 1 C. W. N. 229; *Perumal Ayyan* v. *Alagirisami Bhagavathar*, 20 M. 245; 7 M. L. J. 222, followed.

Nettakaruppa Goundan v. *Kumarasami Goundan*, 22 M. 20; 8 M. L. J. 167, referred to.

Maharaja of Benares v. *Nand Ram*, 29 A. 431; A. W. N. (1907) 139; 4 A. L. J. 336; *Shankar Prasad* v. *Jalpa Prasad*, 16 A. 371; A. W. N. (1894) 115; *Ajudhia* v. *Kunjlal*, 30 A. 123; A. W. N. (1908) 36; 5 A. L. J. 72; *Amolak Chand* v. *Baij Nath*, 20 Ind. Cas. 933; 35 A. 455; 11 A. L. J. 664; *Juneswar Das* v. *Mahabeer Singh*, 1 C. 163; 25 W. R. 84; 3 I. A. 1; 3 Sar. P. C. J. 58; 3 Suth. P. C. J. 222, distinguished.

Per *Banerji, J.*—Upon a true construction of the bond in this case the money secured by it became due on the expiration of ten years from the date of the bond and the claim was not barred by limitation. [p. 914, col. 2.]

First appeal from the decision of the Subordinate Judge of Mainpuri, dated the 27th of March 1913.

The Hon'ble Mr. *Abdul Raoof* (with him Mr. *Muhammad Ishaq Khan*), for the Appellants.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *B. E. O'Conor*, Dr. *S. C. Banerji* and Mr. *Sital Prasad Ghose*), for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit to enforce payment of a sum of Rs. 10,000, principal and interest alleged to be due on foot of a mortgage, dated the 16th of July 1890, by sale of the mortgaged property. The mortgage-deed provided that the mortgagors should pay the principal amount secured in ten years by instalments of Rs. 625 yearly and that the interest should be paid monthly. There was this further clause: "If we fail to pay the interest aforesaid in any month or the principal by

the stipulated period, as specified above, or no payment is made in a year, the mortgagee shall, under all these circumstances, be at liberty to realize the entire amount with the interest aforesaid in a lump sum through Court by means of a suit from the mortgaged and other moveable and immoveable property and the person of us, the executants." Later on the deed has a provision which has been translated as follows:—"If the mortgagee in order to get interest does not bring a suit in default of any instalment and we are unable to pay the money, the interest should continue up to the stipulated period of ten years and also after it up to the date of realization." This last clause seems to me simply to mean that the mortgaged property should remain and be security for the interest even if no suit was brought to enforce the monthly payment. No payment was ever made upon foot of either principal or interest up to the date of the institution of the present suit on the 12th of June 1912.

The Court below has dismissed the plaintiffs' suit, holding that the claim is barred by limitation. The plaintiffs appeal.

In my opinion the decision of the Court below is correct. It is admitted that the Article of the Limitation Act which applies is Article 132. See the decision of their Lordships of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1). This Article deals with "suits to enforce payment of money charged upon immoveable property." The period of limitation prescribed is 12 years and time begins to run from the date when the money sued for *becomes due*. No doubt if the mortgagors had fulfilled their contract, the mortgagees would not have been entitled to sue until the expiration of ten years from the date of the mortgage, and in that case the present suit would have been within time. The provision, however, in the deed admittedly entitled the mortgagee to bring a suit to recover principal and interest after the first default, and if it can be said that the money then "became due" the suit is barred by limitation. It is contended on behalf of the appellant that the mortgagees were entitled to sue, or not to sue and that accordingly on the true construction of the mortgage-deed the money did not "become due" until the expiration of ten years from the date of the mortgage. I cannot agree with this contention. It seems to me that money is "*due*" when it can be legally demanded, and it is admitted in the present case that the money secured by this mortgage could have been legally demanded and recovered after the first default, and had a suit been brought for its recovery by sale of the mortgaged property the defendants could not have pleaded that such a suit was premature. For this there is the high authority of the English Court of Appeal in the case of *Reeves* v. *Butcher* (2). In that case the plaintiff lent money to the defendant under a written agreement for a fixed period of five years "subject to the power to call in the same at an earlier period in the events hereinafter mentioned." The defendant agreed to pay interest quarterly and the plaintiff agreed not to call in the money for five years if the defendant should regularly pay interest. It was further provided that if the defendant should make default in payment of any quarterly payment of interest for 21 days, the plaintiff might call in the principal. No interest was ever paid. The plaintiff commenced his action within six years from the end of the period of five years. It was held that time began to run against the plaintiff from the earliest time at which the action could have been brought, that is to say, 21 days after the first instalment of interest became due. Lindley, L. J., said: "I am of opinion that we cannot differ from the judgment below without altering the law. The agreement is one reasonably easy to be understood. It provides for a loan for five years, subject to a provision that if default is made in punctual payment of interest, the principal shall be recoverable at once. Now, the Statute of Limitations (21 Jac. 1, c. 16) enacts that such actions as are therein mentioned, including 'all actions of debt grounded upon any lending or contract without specialty,' shall be brought 'within six years next after the cause of such action or suit, and not after.' This expression, 'cause of action,' has been repeatedly the subject 'of decision, and it

(1) 30 M. 426; 17 M. L. J. 444; 4 A. L. J. 625; 9 Bom. L. R. 1104; 6 C. L. J. 379; 11 C. W. N. 1005; 34 I. A. 187 (P. C.); 2 M. L. T. 333

(2) (1891) 2 Q. B. D. 509; 65 L. T. 329; 39 W. R. 626; 60 L. J. Q. B. 619.

has been held, particularly in *Hemp* v. *Garland* (3), decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the Statute runs from the earliest time at which an action could be brought."

Fry, L. J. said: "We have not to determine whether the defence here set up is handsome or conscientious, but whether it is good at law—and I am of opinion that it is. The agreement contains a stipulation that the lender shall not call in the principal sum for a period of five years, if the borrower should so long live, and should duly and regularly pay the interest. This implies a contract by the borrower that the principal debt should be paid at once on the death of the borrower, or on default in payment of interest. The subsequent provisoes imply a contract by the lender not to enforce payment after the death of the borrower until the expiration of a six months' notice, and a contract not to enforce payment of the capital for default in payment of interest until 21 days after such default, thus giving the borrower further time. Subject to these stipulations, the implied contract to pay the principal remained in force. The principal, therefore, became payable 21 days after the first quarterly instalment of interest became due, and from that time the Statute of Limitations began to run. If authority is wanted, *Hemp* v. *Garland* (3) is in point." Lopez, L. J., said: "The defendant alleges that the cause of action arose more than six years before the action was commenced, and that the action is barred by the Statute of Limitations. Now, when first had the plaintiff a cause of action? When default was made for 21 days in payment of an instalment of interest. *Hemp* v. *Garland* (3) is in point. It is said that this case is not good law, and that it has not been referred to for many years. I think that it has not been referred to because it has been acquiesced in, and it does not appear that it has ever been questioned." It seems to me that this case is the clearest authority (if authority were needed) that money "becomes due" as soon as it is legally recoverable, quite irrespective of when the suit was instituted.

This view was taken in the case of *Sitab Chand Nahar* v. *Hyder Malla* (4) and in the case of *Perumal Ayyan* v. *Alagirisami Bhagavathar* (5).

A somewhat contrary view was taken in the case of *Nettakaruppa Goundan* v. *Kumarasami Goundan* (6). In this last case, however, the clause in the mortgage-deed was as follows: "In default of paying on the above dates, I shall pay the said sum with interest at Rs. 15 per cent. per annum, from the date of the bond, irrespective of the above due date, *whenever you make the demand.*" The Court seems to have thought that the money did not become due on default unless a demand was made. It is unnecessary to express any opinion as to whether or not the learned Judges were correct in their construction of the deed in question, because there are no similar words in the deed in the present suit.

A number of cases have been cited on behalf of the appellant, including the cases of the *Maharaja of Benares* v. *Nand Ram* (7), *Shankar Prasad* v. *Jalpa Prasad* (8), and *Ajudhia* v. *Kunjlal* (9). All these cases dealt with the construction of Article 75 of the Limitation Act which contains no reference to the money "becoming due," and in my opinion these cases have no bearing on the question which we have to consider in the present appeal [see also *Amolak Chand* v. *Baij Nath*, (10).] Article 75 is the Article applicable to quite a different suit from the present. The learned Advocate for the appellants also referred to a dictum of their Lordships of the Privy Council in the case of *Juneswar Das* v. *Mahabeer Singh* (11). The facts of that case were quite different and their Lordships expressly state that it was unnecessary to decide the question to which the dictum refers. Their Lordships have, moreover, in the recent case to

(3) 4 Q. B. 519; 12 L. J. Q. B 134; 7 Jur. 302; 3 G. & D. 402; 114 E. R. 994; 62 R. R. 422.

(4) 24 C. 281; 1 C. W. N. 229.

(5) 20 M. 245; 7 M. L. J. 222.

(6) 22 M. 20; 8 M. L. J. 167.

(7) 29 A. 431; A. W. N. (1907) 139; 4 A. L. J. 336.

(8) 16 A. 371; A. W. N. (1894) 115.

(9) 30 A. 123; A. W. N. (1908) 36; 5 A. L. J. 72.

(10) 20 Ind. Cas. 933; 35 A. 455; 11 A. L. J. 664.

(11) 1 C. 163; 25 W. R. 84; 3 I. A. 1; 3 Sar. P. C. J. 58; 3 Suth. P. C. J. 222.

which I have referred decided that Article 132 is the Article which applies to a suit on a simple mortgage to enforce payment of money charged on immoveable property. I am clearly of opinion that in the present case the money "became due" within the meaning of that expression in the Article of limitation when the first default was made and that accordingly the suit is barred by limitation. I would dismiss the appeal.

BANERJI, J.—The only question in this appeal is whether the plaintiffs' claim, which is one to enforce payment of the amount due on a simple mortgage by sale of the mortgaged property, is barred by limitation. The mortgage bond is dated the 16th of July 1890 and the time fixed for re-payment is ten years. Except for another provision in the bond, to which I shall presently refer, the amount secured by it was re-payable on 16th July 1900 and as the present suit was instituted on the 12th of June 1912, it would be within time under Article 132 of Schedule I of the Limitation Act, which has been held by their Lordships of the Privy Council to be applicable to a suit of this kind. The defendants, however, rely on the following provision of the bond and urge that the amount of the mortgage became due when default was made in the payment of the first instalment and as more than 12 years have elapsed since the date of default, the claim is time-barred. The provision is this:—"We shall pay Rs. 625 yearly and we shall pay the interest on the said amount monthly at the rate of 8 annas per month. If we fail to pay the interest aforesaid in any month or the principal by the end of the stipulated period as specified above, or no payment is made in a year, the mortgagee shall, under all these circumstances, be at liberty to realize the entire amount with the interest aforesaid in a lump sum through Court by means of a suit from the mortgaged and other moveable and immoveable property and the persons of us, the executants." Had this clause stood alone, it might perhaps be said, on the authority of the English and other cases cited on behalf of the respondents, that the plaintiffs were bound to sue when default was first made in the payment of the instalment fixed in the bond. The document, however, goes on to provide that "if the mortgagees in order to get interest do not bring a suit in default of payment of any instalment and we be unable to pay the money, the interest should continue up to the stipulated period of ten years and also after it up to date of realization." This clause, in my opinion, means that the mortgagee is competent to wait for the full period of ten years stipulated in the bond and it is not obligatory on him to call in the money on the occurrence of a default in the payment of the instalment. The bond, in its earlier provisions, made the mortgaged property security both for principal and interest, and this clause would be wholly unnecessary and redundant if the meaning of it was only to make the property security for interest or to provide for payment of interest. It says nothing about the security and it, in my opinion, clearly intends that the mortgagee might, if he so chose, wait for the full term of ten years and if he did so, interest would run till date of actual payment. This provision in the bond gives full power to the mortgagee not to enfoce his right to claim the entire amount of the mortgage on the happening of a default but to wait till the expiry of the stipulated period of ten years. It is true that under Article 132 time begins to run from the date when the money becomes due, but that date depends upon the terms of each document and a true construction of those terms. In my judgment, in view of the clause in the bond in suit to which I have referred, the money secured by the bond did not become due until the expiration of ten years from the date of the bond. Where under the terms of the document the creditor is authorized to wait for the full period stipulated for re-payment, the money cannot be held to have become due within the meaning of Article 132 until the expiry of that period. The first clause as to payment of the whole amount on the occurrence of a default was clearly inserted in the document for the benefit of the creditor and as he was expressly authorized not to take advantage of the clause I am unable to hold that he was bound to sue when default was made. Any other view would, as observed in *Maharaja of Benares* v. *Nand Ram* (7), be "very unfortunate" "It would be to punish a creditor for forbearance shown to his debtor, and compel him to press his demands at the earliest opportunity and insist upon speedy and full satisfaction of his claim." The question in that case was of

the applicability of Article 75, which, of course, does not govern this case, but the principle of the ruling applies. A similar view was held by Edge, C. J., and Blair, J., in *Shankar Prasad* v. *Jalpa Prasad* (8), which was a case of execution of a decree. The decree in that case provided that the amount of it should be paid by eight instalments and that in case of default and non-payment of any instalment, the plaintiff had power to realize in one lump sum the entire decretal money payable up to that time by executing the decree. It was held upon a construction of the decree that the "decree-holder on the happening of any default might, if he wished, execute the decree for all the decretal money then unpaid, but that it was not the intention that on the happening of a default the decree-holder should be bound to execute the decree once and for all". In *Juneswar Das* v. *Mahabeer Singh* (11), their Lordships of the Privy Council expressed a similar opinion. That was a suit to recover the amount of a hypothecation bond in which the borrower engaged to re-pay the amount with interest on a day named, with a condition that in the event of the hypothecated lands being sold in execution of a decree before the day fixed for re-payment the lender should be at liberty at once to sue for the recovery of the debt. It was contended that the plaintiffs' cause of action arose on the 18th of May 1865, when the lands pledged were sold in execution and that the suit having been brought after six years from that date was time-barred. With reference to this contention their Lordships observed: "Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this would have been barred if the limitation of six years under clause 16 had been applicable to it. They think upon the construction of this bond there would be good reason for holding that the cause of action arose within six years of the commencement of the suit." Their Lordships thus held that limitation would begin to run from the date fixed for payment and that the cause of action arose, that is to say, the money became due on that date and not on the date on which the hypothecated property was sold in execution. It it true that their Lordhsips aid that it was not necessary to decide the point in the view which they took of the period of limitation applicable to the case before them, but an expression of opinion by their Lordships is entitled to the greatest weight and ought to guide the Courts in this country. Considerable reliance was placed on behalf of the respondents on the cases of *Sitab Chand Nahar* v. *Hyder Malla* (4) and *Perumal Ayyan* v. *Alagirisami Bhagavathar* (5). In neither of those cases was there a clause in the bond similar to the one in this case which expressly empowered the creditor to wait for the full term of the mortgage. Those cases, therefore, are, in my opinion, no authority on the question before us. The decision of that question depends upon the true construction of the terms of the bond and the intention of the parties as gathered from the bond. I am of opinion that upon a true construction of the bond in this case the money secured by it became due on the expiration of ten years from the date of the bond and that the claim is not barred by limitation. I would allow the appeal, set aside the decree of the Court below and remand the case to that Court for trial on the merits.

TUDBALL, J.—I concur with the learned Chief Justice that the present suit is barred by limitation. The matter to my mind is a simple one. Article 132 clearly applies and under that Article time began to run from the date on which the money became due. To find out the date on which the money became due one has to examine the conditions laid down in the bond. They are simple and run as follows: "It is covenanted that we shall pay the said amount of principal within ten years, that is, we shall pay Rs. 625 annually, and we shall pay the interest on the said amount monthly at the rate of 8 annas per month. If we fail to pay the interest aforesaid in any month or the principal in the stipulated period as specified above, or no payment is made in a year, the mortgagee shall under all these circumstances be at liberty to realize the entire amount with the interest aforesaid in a lump sum through Court by means of a suit from the mortgaged and other moveable and immoveable property, and the persons of us, the executants. We or our heirs or representatives shall have no objection or excuse in any way." Then comes a clause on which considerable stress has been laid on behalf of the appellants but which in

my opinion is not of the slightest assistance to them. Correctly translated that clause runs as follows:—"If the mortgagee in his desire for interest does not bring a suit on any default of ours and we are unable to pay the money, the interest shall continue up to the stipulated period of 10 years and also after that up to the date of realization." It is an admitted fact that the mortgagors failed to make any payments of interest within the first year after the execution of the deed, and no instalment of principal or interest has ever been paid. Under the terms of the bond immediately on the first default occurring the mortgagor was clearly liable to pay the whole sum to the mortgagee. In other words, the money became due from the mortgagor to the mortgagee on the occasion of the first default. I fail to see how the last clause, which I have mentioned above, helps the appellants in any way. It seems to me that this clause was simply put into the document in order to make it quite clear that the interest should continue to run in spite of no suit being brought not only up to the expiry of the 10 years but also up to the date of realisation. It was simply put in to make it clear that interest would not cease to run after the expiry of 10 years. The mortgagee on the occurrence of the first default was fully entitled to demand his money and the mortgagor could not have met him with the plea that his demand was premature. There is no question of 'waiver,' for no waiver has been alleged, much less proved. Paragraph 3 of the plaint is practically a repudiation of any waiver. In my opinion under the clear terms of this bond the money "became due" in the year 1890 and the present suit was many years beyond time. I would, therefore, dismiss the appeal.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs, including in this Court fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2148 TO 2213, 2215 TO 2218 AND 2220 TO 2300 OF 1913.

January 22, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

S. R. M. A. R. RAMASAMI CHETTIAR, BY HIS AUTHORISED AGENT, R. M. ARUNACHALAM CHETTIAR—PLAINTIFF—APPELLANT (IN ALL)

versus

KATHAN AMBALAGARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Land let out on purakudi *service—Tenancy, determination of—Transfer of Property Act (IV of 1882), s.* 111—*Notice, whether necessary.*

Section 111 of the Transfer of Property Act has no application to lands held on *purakudi* service. It is the refusal or neglect to perform such service that determines the tenancy and the tenants render themselves liable to be evicted without any notice. [p. 916, col. 1.]

A notice given after the harvest of the year is completed is not an improper notice and cannot be objected to on the ground that it was given in the middle of the harvest season. [p. 916, col. 1.]

Kalianasundaram v. *Egnavedeswara*, 11 M. 261, distinguished.

Second appeals respectively against the decrees of the District Court of Tanjore in Appeal Suits Nos. 130, 126 to 129, 131 to 191, 193 to 196, 198 to 267, 274 to 280, 380 to 383 of 1913 respectively preferred against the decrees of the Court of the District Munsif of Patukota in Original Suits Nos. 165, 108 to 111, 166, 167, 169 to 174, 176 to 181, 183, 184, 186, 188, 190, 194, 200, 202, 204, 208 to 214, 216, 218, 221 to 223, 225, 227, 233, 234, 236, 237, 239, 241 to 244, 246, 247, 249, 250 to 254, 256 to 258, 260, 261, 264, 266, 269, 271, 273, 274, 278 to 281, 283 to 286, 289 to 297, 299 to 301, 307, 310 to 312, 314, 316, 319, 322, 323, 325 to 329, 332 to 334, 337 to 339, 328, 342, 343, 346 to 349, 352, 361, 362 to 364, 367, 379, 382, 387, 388, 395 to 397, 399 to 401, 410, 414, 415, 428, 175, 359, 373, 390, 388, 383, 386, 419, 206, 335, 371 and 391 of 1912.

Messrs. *S. Srinivasa Aiyangar, G. S. Rama Chandra Aiyar*, for the Appellants.

Messrs. *N. Viswanatha Aiyar, B. Narasimha Rao* and *T. V. Muthukrishna Aiyar*, for the spondents.

JUDGMENT.—The District Judge has disposed of these suits simply on the 6th issue which runs thus :

"Are the defendants entitled to notice to quit? If so, have defendants had proper notice?"

He has found both points in defendants' favour. This finding would not be conclusive of the plaintiff's right to the first relief sued for (*viz.*, a declaration that the defendants have no occupancy right), a point which appears to have escaped the notice of the learned District Judge.

Apart from this it seems to us that his finding cannot be accepted. The first point for consideration is, whether the defendants were entitled to notice before eviction: and in this connection our attention is drawn to paragraphs 10 and 11 of the plaints, in which it is stated that the plaint lands are held subject to the performance of *purakudi* service and that by reason of the defendants' neglect or refusal to perform such service, their rights in the lands have been determined; *i.e.*, they have rendered themselves liable to eviction without notice. This plea appears to have been, if not altogether lost sight of, at least observed in the lower Courts: and has certainly not been considered by the learned District Judge. He has simply dealt with the argument pressed on him by the plaintiff's Vakil in his Court, which was based on section 111 of the Transfer of Property Act, and has disposed of it with reference to the strict wording of that section which, we may remark, is inapplicable to the present case.

Again in disposing of the second question of the sufficiency of the notices given (supposing notices to be necessary) the learned District Judge appears to us to have applied the rulings quoted without regard to the distinctive facts of the present case. In the most important case referred to, *Kalianasundaram* v. *Egnavedeswara* (1), it was held that fifteen days' notice in the middle of the cultivating season was insufficient, but if, as is contended by the respondents, the notices in the present cases were given after the harvest, for the year had been completed, that fact would make a vast difference and deprive the ruling last mentioned of most of its value. This distinction appears to have been overlooked by the District Judge.

(1) 11 M. 261.

We must, therefore, set aside the decree of the District Judge and his finding on the 6th issue and remand the appeal for disposal according to law. In coming to fresh decision on the first part of the 6th issue, he should have regard to the following points:—

(1) Whether the defendants' tenancy was of the kind referred to in paragraphs 10 and 11 of the plaint,

(2) Whether they neglected or refused to perform such service as they were bound to render, and

(3) whether by such neglect or refusal they rendered themselves liable to eviction without notice.

Costs will be provided for in the District Judge's decree.

Appeal allowed; Suit remanded.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 181 OF 1913.

March 1, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

ANANTHA PADMANABHA PILLAI—APPELLANT

versus

GOPALAKRISHNAIER AND OTHERS—RESPONDENTS.

Landlord and tenant—Occupancy right, nature of—Burden of proof—Facts negativing right.

The claim of an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character, and as such it is one which the party seeking to derogate from the ordinary incidents of property is bound to establish. [p. 917, col. 1.]

Chidambaram Pillai v. *Thiruvengathadathiengar*, 7 M. L. J. 1 at p. 38, followed.

Where the defendants had been accepting leases from the plaintiff in respect of the suit lands and when the crops were attached and the defendants' claim was rejected they brought no suit to establish their claim to an occupancy right:

Held, that the defendants had failed to make out their right and that the plaintiff as *pattadar* was entitled to recover possession. [p. 917, col. 1.]

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Miller, dated the 19th of November 1913, in Second Appeal No. 734

of 1913, preferred against the decree of the District Court of Tinnevelly, in Appeal Suit No. 337 of 1911, presented against that of the Court of the District Munsif of Tinnevelly, in Original Suit No. 241 of 1910.

Messrs. *T. Rangachariar* and *E. S. Chidambaram Pillai*, for the Appellant.

Mr. *S. Viswanatha Aiyar*, for the Respondents.

JUDGMENT.

SESHAGIR AIYAR, J.—The learned Judge is right in holding that the conclusion of the District Judge is based upon facts proved in the case and that there is no question of law.

The District Judge refers to evidence which shows that the defendants have been accepting leases from the plaintiff in respect of the suit lands. This is inconsistent with their claim to an occupancy right; when the crops were attached and their claim was rejected, they brought no suit to establish their claim to an occupancy right. On these facts, the District Judge is right in concluding that the defendants have failed to make out their right and thatt he plaintiff, whose title as *pattadar* is undisputed, is entitled to recover possession. I do not express any opinion whether the view taken in *Veeranan Ambalam* v. *Annasawmi Aiyar* (1) and *Venkatachala Goundan* v. *Rangaratnam Aiyar* (2) that there is no presumption against the right of occupancy in a *ryotwari* village, is sound. I understand that the latter decision is under appeal to the Privy Council.

This appeal must be dismissed with costs.

NAPIER, J.—In my opinion the District Judge has rightly stated the law with regard to ordinary *ryotwari* land. I accept the view of Collins, C. J., and Muthusawmi Aiyar, J., stated in Appeal No. 1 of 1886 [*Chidambaram Pillai* v. *Thiruvengadathiengar* (3)]: "The claim of an occupancy right as overriding the proprietor's right to cultivate his own lands is of a special character, and as such it is one which the party, seeking to derogate from the ordinary incidents of property, is bound to establish." The District Judge has examined the evidence and found that the appellant has not established that right and in my opinion Miller, J., was right in refusing to interfere with that finding as one of fact. I would like to add that I strongly deprecate the use of the word *kudivaram* interest for such right even when established, and I can find no authority for it in the case in *Venkatachalla Goundan* v. *Rangaratnam Aiyar* (2) which is relied on.

The Letters Patent Appeal is dismissed with costs.

Appeal dismissed.

(1) 12 Ind. Cas. 1; 21 M. L. J. 845; 10 M. L. T. 183; (1911) 2 M. W. N. 162.

(2) 20 Ind. Cas. 374; 24 M. L. J. 571; 13 M. L. T. 450; (1913) M. W. N. 434.

(3) 7 M. L. J. 1 at p. 38

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 876 OF 1913.

March 3, 1915.

Present:—Mr. Justice Fletcher.

BIRESHWAR SAMANTA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Srimati PRIYA SAKHI DEBI—PLAINTIFF—RESPONDENT.

Adverse possession—Mortgagor, dispossessed—Third party, possession of, if adverse as against mortgagee.

When a mortgagor has been ousted from possession of the property, the possession of a third party becomes adverse as against the mortgagee as well. [p. 918, col. 2.]

Aimadar Mondul v. *Makhan Lal Dey*, 10 C. W. N 904; 33 C. 1015, not followed.

Nandkumar Dobey v. *Ajodhya Sahu*, 11 Ind. Cas. 465; 14 C. L. J. 292; 16 C. W. N. 351, referred to.

Ramsawmi Chetti v. *Ponna Padayachi*, 9 Ind. Cas. 23; (1911) 1 M. W. N. 209; 21 M. L. J. 397; 9 M. L. T. 264; 36 M. 87, referred to.

Prannath Roy Chowdry v. *Rookea Begum*, 7 M. I. A. 323 at p. 355; 4 W. R (P. C.) 37; 1 Suth. P. C. J. 867; 1 Sar. P. C. J. 692; 19 E. R. 331, *Sheoumber Sahoo* v. *Bhowaneedeen Kulwar*, 2 N. W. P. H. C. R. 223, referred to.

In a case of dispossession by a third party there is no distinction between the positions of the mortgagor and the mortgagee. [p. 918, col. 2.]

Karan Singh v. *Bakar Ali Khan*, 5 A. 1 (P. C.); 9 I. A. 99: 4 Saraswati's P. C. J. 382, followed.

Appeal against the decree of the Subordinate Judge, Second Court, Burdwan, dated the 3rd of October 1912, reversing that of the Munsif, first Court, Burdwan, dated the 12th June 1911

Babus *Ram Chandra Mozumdar* and *Sarat Kumar Mitra*, for the Appellants.

Babu *Bepin Behary Ghose*, for the Respondent.

In re JOUNALAGEDDA SAMBAYYE.

JUDGMENT.—This is an appeal from a decision of the learned Subordinate Judge of Burdwan dated the 3rd October 1912, reversing the decision of the Munsif. The suit was brought to enforce a mortgage security and the only question that arises in the present appeal is the question of limitation, and that question s whether when a mortgagor has been ousted from possession of the property, the possession of a third party becomes adverse also as against the mortgagee. The view that has been taken by a Division Bench of this Court in the case of *Aimadar Mondul* v. *Makhan Lal Dey* (1) is that the possession in such a case would not be adverse against the mortgagee. That decision has been commented upon by Mr. Justice Mukerjee in his judgment in the case of *Nandkumar Dobey* v. *Ajodhya Sahu* (2). The comments of the learned Judge will be found at pages 298 and 299. The case has been further observed upon and dissented from in the judgment of the Madras High Court in the case of *Ramasawmi Chetti* v. *Ponna Padayachi* (3). Of course, if the case in *Aimadar Mondul* v. *Makhan Lal Dey* (1) stands by itself, I am bound by it and I must follow it here. But the learned Judge in that case seems to have overlooked several authorities that establish a contrary proposition. Those cases are the case of *Prannath Roy Chowdry* v. *Rookea Begum* (4) (at page 355 are the observations of their Lordships of the Judicial Committee where a different view was taken), the case of *Sheonumber Sahoo* v. *Bhowaneedeen Kulwar* (5). The other decisions are cited in the course of the judgment of Mr. Justice Abdur Rahim in the case of *Ramasawami Chetti* v. *Ponna Padayachi* (3). Then we have also got the decision of the Privy Council in the case of *Karan Singh* v. *Bakar Ali Khan* (6). That case seems to one, when carefully looked at, to be inconsistent with the case of *Aimadar Mondul* v. *Makhan Lal Dey* (1). It was assumed by the Privy Council in the case of *Karan Singh* v. *Bakar Ali Khan* (6) that in a case of dispossession by a third party there is no distinction between the positions of the mortgagor and the mortgagee. That seems to me clear upon reading the judgment. I think, having regard to the decisions of the Privy Council, I am bound to follow the views taken in those cases. The clear finding of fact made by the Court of first instance is that the mortgagors of the plaintiff were ousted some time in the year 1892. This suit was not brought till the 23rd August 1905. In that view, the present appellants must have been in possession adverse to the mortgagors of the plaintiff for more than twelve years prior to the institution of the suit, and, in my opinion, on a consideration of the decision of the Privy Council, that possession was also adverse to the plaintiff, the mortgagee of the defendants Nos. 1 and 2. That finding of fact by the Court of first instance has not been overruled or dissented from by the lower Appellate Court. I think, therefore, that the judgment and decree passed by the lower Appellate Court ought to be set aside and the decree of the Munsif restored. The respondents will pay to the appellants their costs in all Courts.

Appeal allowed.

(1) 33 C. 1015; 10 C. W. N. 904.
(2) 14 C. L. J. 292; 11 Ind. Cas. 465; 16 C.W.N. 351.
(3) 9 Ind. Cas. 28; 36 M. 97; (1911) 1 M. W. N. 209; 21 M. L. J. 397; 9 M. L. T. 264.
(4) 7 M. I. A. 323 at p. 355; 4 W. R. (P. C.) 37; 1 Suth. P. C. J. 367; 1 Sar. P. C. J. 692; 19 E. R. 331.
(5) 2 N. W. P. H. C. R. 223.
(6) 5 A. 1; 9 I. A. 99; 4 Saraswati's P. C. J. 382.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 373 OF 1914.
February 10, 1915.
Present:—Mr. Justice Tyabji.
In re JOUNALAGEDDA SAMBAYYE—PETITIONER.

Legal Practitioners Act (XVIII of 1879)—Legal Practitioners Act (XI of 1896)—Admission of person as tout, whether sufficient to declare him as such—Proof, necessary

In order to declare a person a tout it is necessary to have some evidence of the facts required by section 3 of the Legal Practitioners Act XVIII of 1879, as amended by Act XI of 1896. [p. 919, col. 1.]

A person, although admitting himself to be a tout, cannot be declared as such when there is nothing to show that he intends to admit that he has been receiving remuneration from Legal Practitioners for procuring employment. [p. 919, col. 1.]

Petition, under section 115 of Act V of 1908 and section 15 of the Charter Act, pray-

ing the High Court to revise the proceeding of the District Court of Godaveri at Rajahmundry, dated the 8th July 1913, in Original Petition No. 286 of 1913.

Mr. *P. Narayana Murthi*, for the Petitioner.

JUDGMENT.—The statement in question by the petitioner that he was a tout cannot, in my opinion, be safely accepted as the sole basis for the decision. It is necessary to have some evidence of the facts required by section 3 of the Legal Practitioners Act, XVIII of 1879, as amended by Act XI of 1896, to exist prior to a person being declared a tout. The single senterce relied upon by the District Judge does not necessarily prove those facts. There is nothing to show that the petitioner intended to admit that he had been receiving remuneration from Legal Practitioners for procuring employment. The order is set aside and the petition remanded to the lower Court for disposal according to law.

Order set aside; Petition remanded.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 673 OF 1913.

January 27, 1914.

Present:—Mr. Justice Scott-Smith.

NASIB SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

HARNAM SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Jurisdiction—Civil and Revenue Court—Suit by lambardar *against* malikan-i-qabza *for value of tree—Ruling, misapplication of, effect of—Material irregularity.*

A suit by a *lambardar* against *malikan-i-qabza* for value of trees cut by the latter standing on land in their possession is triable by a Civil, and not by a Revenue Court.

The mere fact that a lower Court has misapplied a decision of the Chief Court is not a ground for revision.

Civil revision from the decree passed by the District Judge, Ambala, dated the 4th March 1913, confirming the decree passed by the Munsif, first Class, Rupar, dated the 27th May 1912.

Lala *Hukm Chand*, for Mr. *Nihal Chand Mehra*, for the Appellants.

Mr. *Sewa Ram Singh*, for the Respondents.

ORDER.—Mr. Sewa Ram Singh raises a preliminary objection that no revision lies.

Mr. Hukm Chand urges in the first place that the lower Courts had no jurisdiction to hear this case, as it was cognizable by a Revenue Court, because it was a suit between *lambardars* and tenants. No doubt in the plaint it was stated that defendants were occupancy tenants but it appears that they are also *malikan-i-qabza*. I hold that the Civil Courts had jurisdiction.

He next contends that the Courts have acted with material irregularity in misconstruing the *wajib-ul-arz*. I do not, however, find any misconstruction. In fact the *wajib-ul-arz* says nothing about the rights of *malikan-i-qabza*. Even if the lower Courts have erred in their decision as to the applicability of *Sawan Singh* v. *Jafar Khan* (1), that is not a ground for revision.

The application is rejected with costs.

Petition rejected.

(1) 13 Ind. Cas. 405; 39 P. R. 1912; 7 P. W. R. 1912; 13 P. L. R. 1912.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 54 OF 1912-13 OF GONDA DISTRICT.

August 23, 1914.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

Raja MUHAMMAD ABUL HASAN KHAN—DEFENDANT—APPELLANT

versus

KELO SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Dahyak *or* dasaundh, *decree for, effect of—Possession of land, right to—Under-proprietor or* thekadar, *possession as.*

Ordinarily a decree for *dasaundh* or *dahyak* does not in itself connote any right to possession of land, either as under-proprietor or as *thekadar*. [p. 920, col. 1.]

Parmeshar Dat v. *Raja Mohammad Abul Hasan Khan*, 13 Ind. Cas. 809; 14 O. C. 335, referred to.

Tulsi Ram v. *Lal Achal Ram Singh*, Select Decision No. 30 of 1891, dissented from.

Appeal from the decee of the Commissioner, Fyzabad, dated the 5th March 1913.

JUDGMENT.

BAILLIE, S. M.—(*August 15th*, 1914.)—In this case the Commissioner in a well-reasoned judgment following the principles laid down in

Tulsi Ram v. *Lal Achal Ram Singh* (1), found that there was *prima facie* reason to hold that the respondents had under-proprietary rights in the village now in question. Respondents are by purchase owners of a right to *dahyak* in this village. It appears to me, however, impossible at the present time to follow the principles laid down in *Tulsi Ram* v. *Lal Achal Ram Singh* (1), because since then the question as to what is implied by a decree for *dasaundh* or *dahyak* has on many occasions been before the Civil Courts and the finding invariably has been that the decree for *dahyak* does not in itself connote any right to possession of land. The latest decision on the subject is contained in *Parmeshar Dat* v. *Raja Mohammad Abul Hasan Khan* (2), in which it was held that a right to *dahyak* was not an under-proprietary right. It must now be regarded as accepted law that although there may be special circumstances in which a holder of a *dahyak* right is entitled to retain a lease of the village in which rights were decreed, no such right can be inferred from an ordinary decree for *dahyak*. It is impossible, in the face of the decision of the Judicial Commissioner just cited, to hold that the respondents have even a *prima facie* claim to be regarded as under-proprietors, nor can I hold that the respondents can be held to be entitled to remain in possession of this village as *thekadars*. In their suit at Settlement they did not in any way advance a claim to possession of the village. They claimed only a right to *dahyak* and to a share of the fruit and they showed that cash payments on both accounts have been made in the past by the *taluqdar*. Their evidence is inconsistent with their being at the time in possession of the village. It is clear that at Settlement the *taluqdar* was himself in possession and was paying allowances due to the respondents in cash. Respondents' possession of the village appears to be due to a lease granted to them in 1872 and so far as I can see, there is no evidence whatsoever of any preceding rights to possession of the village.

I would allow this appeal, cancel the order of the Commissioner and restore that of the Court of first instance.

TWEEDY, J. M.—I concur.

Appeal allowed.

(1) Select Decision No. 30 of 1891.
(2) 13 Ind. Cas. 809; 14 O. C. 335.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1464 OF 1914.

January 18, 1915.

Present:—Mr. Justice Napier

GOTIKE KESAVA REDDY—PETITIONER

versus

VUDHYA RAMAYYA AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 6 — Amendment of decree—Property erroneously described in schedule of plaint—Same copied into decree—Decree in conformity with judgment—Amendment, if allowed.

An amendment of a decree merely to correct an erroneous description of property copied into the decree from the plaint, cannot be ordered to be made when the decree is, in other respects, in conformity with the judgment. [p. 921, col. 1]

Parameshraya v. *Seshagiriappa*, 22 M. 364; *Lakho Bibi* v. *Salamat Ali*, 22 A. 337. A. W. N. (1898) 59; *Jogeswar Atha* v. *Ganga Bishnu Ghattack*, 8 C. W. N. 473, followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the amendment of the decree in a Second Appeal No. 871 of 1912 on the file of this Court (Appeal Suit No. 181 of 1909 on the file of the Court of the Subordinate Judge of Kurnool, and Original Suit No. 428 of 1908 on the file of the Court of the District Munsif of Nandyal).

Mr. *N. Rajagopalachariar*, for the Petitioner.

Mr. *C. Rajagopala Aiyangar*, for Messrs. *R. Shadagopachariar* and *V. K. Venkataram Aiyar*, for the Respondents.

ORDER.—The decree in this suit for specific performance follows the judgment but adds the details of the property sought to be conveyed, taken from the plaint. Those details are now alleged to be incorrect. The defendant raised no defence in the written statement on the description of the property and it is clear from the judgment of the District Munsif that no defence was urged before him on the description. The plaintiff now seeks to have them altered. It is argued that the alteration will not bring the decree into conformity with the judgment, as it is so already. Reliance is placed on *Parameshraya* v. *Seshagiriappa* (1), *Lakho Bibi* v. *Salamat Ali* (2)

(1) 22 M. 364.
(2) 20 A. 337; A. W. N. (1898) 59.

and *Jogeswar Atha* v. *Ganga Bishnu Ghattack*(3). I agree that the alterations cannot be made, but for the purpose of making the decree agree with the judgment within the words of Order XX, rule 6, of the Code of Civil Procedure I direct the schedule to be struck out. The plaintiff will then have got what he asked for and what the judgment gave him. If the Registration Deparment refuse to register the conveyance, he may then take such other steps as he thinks fit.

Petition dismissed; Amendment refused.

(3) 8 C. W. N. 473.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 119 OF 1913.

September 1, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

PURUSHOTTAM DAJI MANDLIK—DEFENDANT—APLELLANT

versus

PANDURANG CHINTAMAN BIWALKAR—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 39—Coercion, contract through—Plea, whether supported by suspicion or mere probability—Secundum allegata et probata—*Procedure—Substantial error—Findings of fact—Second appeal—High Court, power of, to interfere.*

A suspicion or mere probability is not sufficient to support a plea of coercion quite apart from the consideration that it is not *secundum allegata et probata*, but depends upon other circumstances coupled with doubts entertained as to the veracity of the defendant. [p. 923, col. 2, p. 924, col. 1.]

Where there is substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law, the High Court is entitled in second appeal to reverse such a finding [p. 924, col. 1.]

Per *Beaman, J.*—Where the fraud or the coercion alleged must, by law, be supported by particulars, it is only after the due proof and establishment of those particulars that the Court can find as a fact that the alleged fraud or coercion is proved. It is not open to a Court to give the go-by to every material particular alleged and yet to reach the conclusion which ought only to be reached by those steps. [p. 924, col. 2.]

Second appeal from the decision of the District Judge of Thana, in Appeal No. 130 of 1911, confirming the decree of the Second Class Subordinate Judge at Murbad, in Civil Suit No. 421 of 1909.

Mr. *B. G. Kher*, for the Appellant.
Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

HAYWARD, J.—The plaintiff sued the defendant to set aside a sale-deed on the ground of coercion under section 39 of the Specific Relief Act. The plaintiff stated in the plaint that he was able to write his signature, and that the defendant with the object of getting that signature by force came to his house on the night of the 29th November 1908, and with the assistance of six men forcibly carried him away to the defendant's *mandap*, severely beat him and made him sign his name on the document. The plaintiff further alleged in his deposition that, on the night of 29th November 1908, he was sitting in his courtyard after taking his supper, when the defendant, who was helped by five other men, at once came up to him, gave him a blow, and asked him to sign a document shown him by defendant; that, on his persisting in refusing to sign it, he was picked up bodily by the defendant and his five comrades and taken to the *mandap* in front of the house of the defendant, which was near by, and was there kicked and struck with blows so very severely that he nearly lost his consciousness; that his wife, who had witnessed from inside her house the assault committed on her husband, followed him when he was removed by the defendant and his comrades, crying for help all the while; that the wife, who was prevented by the threats of the defendant from entering the *mandap*, finding her husband being mercilessly kicked and struck with blows, cried out from the place where she was standing and advised him to sign the document rather than lose his life on account of the thrashing he was subjected to; that he, thereupon, put his signature to the document.

The defendant's allegation was that, on the night in question, the plaintiff entered his house with the object of stealing this particular document, and that whilst plaintiff was about to run away with a bundle containing this and other connected papers, he was arrested with the help of the defendant's companions.

The learned Subordinate Judge held that the plaintiff's story was not proved, and in so doing remarked that "his story as it has been unfolded in his deposition and in the depositions of his witnesses is incredible. I, therefore, come to the conclusion that the plaintiff's allegations regarding the violence used towards him and his having been subjected to severe beating are not proved. The facts show that if plaintiff was subjected to any violence by the defendant, it would not have been in the manner described by the plaintiff and his witnesses." The learned Judge then proceeded to consider certain other circumstances leading up to the document in dispute, and came to the conclusion that some other kind of coercion must have been caused in consequence of which the document was signed, and he relied in coming to this conclusion very largely on his disbelief of the counter-story of the theft told by the defendant. He remarked that "the defendant says that plaintiff had entered his house with the object of stealing the document and whilst plaintiff was about to run away with a bundle of papers he was arrested. The defendant's story is that plaintiff and his comrades stole away the sale-deed," but in view of the other circumstances he came to the conclusion that "the defendant's story regarding the theft falls to the ground." The learned Judge, accordingly, gave a decree for cancellation of the document upon these final grounds: "The irresistible conclusion, therefore, is that plaintiff must not have voluntarily signed the document. He must have been made to sign it against his will. Of course, the evidence of violence is not satisfactory. I think the evidence in the case is bound to be unsatisfactory. The defendant is not expected to be so very stupid as to openly practise violence on plaintiff. It must have been done by him privately in his house by enticing plaintiff to come there. Plaintiff must have gone voluntarily to defendant's house with his turban on, and it was there that the document was ready written, and in the presence of the attesting witnesses and the writer plaintiff's signature was taken on that night, and, in accordance with the plan previously laid out, the cry was then raised of theft by the defendant. I have already stated that an exaggerated account of the violence done has been given; that the Doctor proved that some violence was used against plaintiff, and it might have been that plaintiff affixed his signature out of fear of further violence. No stronger proof of the violence can be expected in this case. The circumstances warranted above prove that plaintiff must have made his signature to the document under coercion."

The learned District Judge on first appeal appears to have taken the same view and confirmed the decision. He did not go into the evidence in detail, but said this: "No doubt the facts may have been a little exaggerated, or the plaintiff may not have been able to substantiate all the allegations made by him, for reasons which it is not possible to explain, but all the facts and circumstances point to but one conclusion, that the plaintiff's signature on the sale-deed must have been obtained by force and against his will." He then briefly referred to the other circumstances and recorded his disbelief in the story of the theft set up by the defendant. He also appeared to rely on further unconnected circumstances said to indicate the bad character of the defendant.

On second appeal to this Court, the contention in substance has been that it was contrary to the procedure prescribed by law to reject the evidence adduced in support of the plaintiff's specific allegations of coercion and to hold on a consideration of other circumstances and a disbelief of the story of the defendant that there must have been some other undefined kind of coercion. This contention has, in our opinion, been shown to have been well founded by the detailed extracts just recited from the pleadings and the judgments. They have indicated, beyond doubt, that the specific allegations were that the plaintiff was carried off openly by force and severely beaten and under violent compulsion made to sign the document. These allegations were all disbelieved and the surprising result was arrived at, on a consideration of other circumstances, that the plaintiff must have been deceitfully decoyed into going quietly and privately through fear of possible violence, and made to sign the document. These other circumstances have not been clearly arranged either in the rambling judgment of the learned Subordinate Judge or in the

brief reference of the District Judge. But they would appear, so far as we have been able to gather, as follows:

The plaintiff originally obtained a sale-deed of the property in dispute for Rs. 900 odd on the 17th of February 1905, but was alleged by defendant to have entered at the same time into an oral agreement for re-sale, which was alleged to have been reduced subsequently to writing about June 1905. The allegations as to the re-sale agreement were held not proved. Earnest money, said to have been Rs. 400, was alleged by defendant to have been paid in respect of this agreement of re-sale on the 24th of April 1908. This allegation also was held not proved. Then plaintiff executed the re-sale-deed according to his allegation under the coercion of the defendant. The stamp paper for that document was dated the 29th of April 1908, and Rs. 500, balance of purchase-money, was alleged to have been paid on execution of the document between the 17th and 21st of September 1908. The plaintiff denied execution as on those dates, but he made an application to the Registrar alleging that a false deed had been executed, and would be presented for registration, dated the 29th of October 1908, and he explained that with a view to bringing that false deed to light—whatever he meant by that—he passed two further re-sale-deeds to his father-in-law for no consideration on the 10th and 17th of November 1908. Then plaintiff received some slight bruises or scratches in the events which have been the main subject of this trial, described by the one side as the forcible execution and, on the other, as the attempt to steal the re-sale-deed on the 29th November 1908. Criminal proceedings were instituted on either side but ended eventually in mutual failure and the re-sale-deed was registered in November 1909. It is not for us to substitute our view of what those circumstances really indicated for the conclusions of those charged with the responsibility of determining the facts, but it is clear from a consideration of those circumstances and the observations thereon in the judgments that they were regarded as establishing no more than a suspicion or mere probability that the plaintiff had been deceitfully decoyed into going quietly to the defendant's *mandap* some time on 29th November 1908, and there privately been made to sign the document by some kind or other of undefined coercion. Now such a suspicion or mere probability would, in any case, not have been sufficient to support a plea of coercion, as pointed out by the Privy Council in the case of *Motee Lall Opudhiya* v. *Juggurnath Gurg* (1), quite apart from the consideration that it was not *secundum allegata et probata*, namely, that it was not the case set up by the plaintiff nor was it supported by the evidence on which he relied, but depended on other circumstances coupled with doubts entertained as to the veracity of the defendant by both the learned Subordinate Judge and the District Judge and coupled with aspersions on the character of the defendants relied on, contrary to the provisions of section 52, Indian Evidence Act, by the learned District Judge. The rule mentioned by the Privy Council in the case of *Motee Lal Opudhiya* v. *Juggurnath Gurg* (1) would, in fact, appear to be the basis of the rule that where fraud or coercion are alleged detailed particulars must be given in the pleadings, a rule now expressly laid down in Order VI, rule 4, of the Schedule to the Civil Procedure Code. When particulars have been given, the parties should be strictly confined to that state of facts as indicated by the Privy Council in the cases of *Eshenchunder Singh* v. *Shamachurn Bhutto* (2) and *Abdul Hossein Zenail Abadi* v. *Charles Agnew Turner* (3). The necessity of strict adherence to these rules and of special care in framing an issue on a plea of fraud—the remarks apply equally to a plea of coercion—was insisted on strongly by Chandavarkar, J., in the case of *Balaji* v. *Gangadhar* (4). The present case is, in our opinion, a marked instance of the dangers of departing from those wholesome rules. Particulars of the coercion alleged were here given in the plaint and further elucidated in the plaintiff's deposition and supported by definite witnesses to the effect that there had been open and violent abduction and severe beating to procure signature of the document. These particulars were wholly rejected and the evidence held to be entirely false. Nevertheless a vague and materially different kind

(1) 5 W. R. (P. C.) 25; 1 M. I. A. 1; 1 Suth. P. C. J. 45; 1 Sar. P. C. J. 88; 18 E. R. 1.

(2) 11 M. I. A. 7; 2 Ind. Jur. (N. S.) 87; 6 W. R. (P. C.) 57; 2 Sar. P. C. J. 209; 20 E. R. 3.

(3) 11 B. 620 at pp. 642, 643; 14 I. A. 111.

(4) 32 B. 255; 10 Bom. L. R. 276.

of coercion was held to have been probable on other circumstances and doubts as to the veracity and good character of the defendant, to the effect that there had been secret abduction and probably some force or threat of violence to procure signature of the document and this was rendered possible by a loose issue as to the force and violence framed by the learned Subordinate Judge and a looser issue still as to title to cancellation of the document framed on appeal by the learned District Judge. We are, therefore, of opinion that there was substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law and that we must, therefore, reverse the decrees of the lower Courts.

With regard to the subsidiary contention raised on this second appeal, namely, that the plaintiff was not entitled to sue as he had transferred the property in suit to his father-in-law and others and, therefore, had no interest in maintaining the suit, it has been urged in reply that he was in danger by reason of the document in suit, on the one hand, of being sued by the defendant for the purchase-money in case the defendant should be ousted from possession, and, on the other hand, of being sued by his father-in-law or other vendees for damages in case the sale to them should be set aside at the instance of defendant. It appears to us that this reply must be allowed as indicating sufficient interest in the document to support the suit. We are fortified in that decision by a consideration of the remarks in the case of *Kotrabassappaya* v. *Chenvirappaya* (5).

We must, however, for the other reasons already stated, dismiss the suit with costs throughout and reverse the decrees of the lower Courts.

BEAMAN, J.—I have only come to the same conclusion after the most anxious consideration of all the arguments addressed to us in support of the decree appealed against. No Court has been more jealous, and with rare exceptions, more consistent in the construction it has always put upon section 100 of the Civil Procedure Code, and I should be sorry to think that any decision of mine might be used to let in appeals against what are really decisions upon questions of fact, however gross or inexcusably wrong such decisions might appear in the eyes of this Court. But it certainly does seem to me a strange thing that a plaintiff, who comes into Court alleging fraud or coercion, in respect of which the law, as is well known, requires him to give particulars, should give every particular which must be within his own knowledge, and, after being disbelieved upon every material one of them, should yet be given relief. It is here that I think this is a very special case and distinguishable from those innumerable cases in which the decison of the Court below is arrived at upon a question of fact and does not fall within the contemplation or the language of section 100, for, although in appearance, as Mr. Rao has strenuously contended, the finding of both Courts is a finding of fact, taking this form that the plaintiff was coerced into signing the document which he now seeks to have cancelled, that will be, I believe, found on analysis not to be really a finding of fact which binds or ought to bind this Court, for, in all such cases, it does seem to me that where the fraud or the coercion alleged must, by law, be supported by particulars, it is only after the due proof and establishment of those particulars that the Court can find as a fact that the alleged fraud or coercion is proved I do not think that it is open to a Court to give the go-by to every material particular alleged, and yet to reach the conclusion which ought only to be reached by those steps. Here, for example, the allegation of the plaintiff is that the coercion was quite open and in view of witnesses. The finding of the Court below is that what coercion there was, was done in secret, and that there can be and is no evidence of it. That appears to me then to be a finding absolutely unsupported by any evidence at all. But that again is a sufficient ground for setting aside what might otherwise be a conclusion of fact. It is quite true that the Court has sought to confirm this conclusion by reference to extraneous and surrounding cirumstances, which my brother Hayward has fully dealt with. I am not now concerned with any criticism of the Court's method there. I desire to found my conculsion on this point that what was essential to be found before there can be any finding of fact binding upon this Court never has been found, namely, the particulars alleged by the plaintiff, and that what was substituted for them, and was

(5) 23 B. 375.

absolutely necessary to be substituted for them before any of the surrounding circumstances could be brought in by way of confirmation, is a finding admittedly, I think, not supported by any evidence at all. Therefore, it does appear to me that this is clearly a case in which there has been an error of law notwithstanding the appearance of the finding of the Court below, or, to put it under another head of section 100, there is a substantial error in procedure, inasmuch as the Court has found the case required to be made by the plaintiff not proved, and has found another case, unsupported in its most essential point by any evidence at all, proved, and so substituted the latter for the former.

For these reasons I would concur with the judgment and in the order just pronounced and proposed by my learned brother.

Decree reversed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 424 OF 1914.
February 4, 1915.
Present:—Mr. Justice Ayling and Mr. Justice Tyabji.
MUHAMMAD NAINA MARAKAYAR—DEFENDANT No. 3—APPELLANT
versus
SHEIK MARAKAYAR—PLAINTIFF—RESPONDENT.

Execution of decree—Death of judgment-debtor prior to decree—Legal representatives not brought on record in Appellate Court—Appellant one of legal representatives in possession of part of deceased's estate—Right to object.

Where the party on record is himself the legal representative of a deceased judgment-debtor and in possession of part of the deceased's estate and his liability is admittedly restricted to the assets come to his hands out of the estate of the deceased, he has no right to object to execution on the ground that the legal representatives of the deceased have not been brought on the record.

Vellayan Chetty v. *Jothi Mahalinga Aiyer*, 28 Ind. Cas. 83; 28 M. L. J. 138; 2 L. W. 166; (1915) M. W. N. 201, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Mayavaram, in Appeal Suit No. 340 of 1911, preferred against that of the Court of the District Munsif of Negapatam, in Original Suit No. 78 of 1910.

Mr. *V. Venkatachariar*, for the Appellant.

Mr. *G. S. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—The learned Pleader for the 3rd defendant draws our attention to the fact that the 2nd defendant is alleged by the 3rd defendant to have died a year prior to the decree of the lower Appellate Court and his legal representatives were not brought on the record, that consequently the decree would not be binding on the estate of the 2nd defendant. The 3rd defendant alleges that he is himself one of the legal representatives of the 2nd defendant and is in possession of part of the deceased's estate. Following *Vellanyan Chetty* v. *Jothi Mahalinga Aiyer* (1), we hold that the 3rd defendant, who is now before us solely in his personal capacity, cannot now take this objection. Whether the estate of the 2nd defendant is or is not bound by the decree of the lower Appellate Court cannot affect him individually Nor is it necessary for us to decide whether the 3rd defendant is bound to the extent (if any) that he represents the 2nd defendant's estate. The respondent does not admit the truth of the allegation that the 2nd defendant had died prior to the decree of the lower Appellate Court.

It is pointed out to us that the decree of the lower Appellate Court is so worded that it might appear as if the 3rd defendant were personally liable thereunder. It is admitted that the 3rd defendant's liability must be restricted to the assets come to his hands out of the estate of the 2nd defendant and the decree will be amended so as to make the 3rd defendant liable only as legal representative of the 2nd defendant. This, of course, does not affect the liability of the property mortgaged.

The appellant will pay the costs of the respondent.

Appeal dismissed; Decree modified.

(1) 28 Ind. Cas. 83; 28 M. L. J. 138; 2 L. W. 166; (1915) M. W. N. 201.

WINKLEY *v.* WASAWA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1131 OF 1911.

October 17, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

REVEREND R. T. WINKLEY—DEFENDANT—APPELLANT

versus

WASAWA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation—Review—Time spent in review, when allowed in calculating period for limitation in appeal—Admitting fresh evidence in appeal—Interest not promised, when allowed.

The claim was for recovery of a certain amount, principal and interest, for work done. The first Court held that the whole of the work had been paid for and dismissed the suit. The plaintiffs applied for review of judgment on the ground that they had found a certain document which they had supposed was lost, but which had come to light. The Court issued notice on the petition for review and heard the case argued again, but it came to the conclusion that there was no sufficient ground for altering the decision, and dismissed the petition for review. The plaintiffs appealed. The appeal was under the ordinary law long time barred and the question was whether the time spent in review should be allowed in calculating the period for limitation in appeal. The Appellate Court held that there were excellent grounds for the review application and it admitted the appeal, and reversed the decision of the first Court. On further appeal to the Chief Court:

Held, (1) that the lower Appellate Court did not accept an appeal against the order in review, but admitted an appeal against the original judgment and decree, and in hearing it admitted authentic fresh evidence for the late production of which plaintiff had satisfactorily accounted; [p. 928, col. 1.]

(2) that there was nothing illegal or irregular in the procedure. [p. 928, col. 1.]

Where there was no promise to pay interest on overdue payments, nor was there any indication in the evidence that any such promise was implied, nor was any notice given by plaintiff to defendant threatening to charge interest, no interest could be allowed. [p. 928, col. 2.]

Second appeal from the decree of the Divisional Judge, Rawalpindi, dated the 30th of June 1911, reversing that of the District Judge, Rawalpindi, dated the 22nd of December 1909, dismissing the suit.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Mr. *Broadway* and Bhai *Sewa Ram Singh*, for the Respondents.

JUDGMENT.—In this case the District Judge of Rawalpindi dismissed the plaintiffs' claim with costs. The plaintiffs are timber merchants and contractors and the defendant is Reverend R. T. Winkley, Roman Catholic Chaplain, West Ridge, Rawalpindi. It is explained in the District Judge's judgment that Father Winkley is not in any way personally liable, the real defendant being the Roman Catholic Mission. The claim was for Rs. 4,000, principal and interest, on account of work done on the West Ridge Church, that is to say, Rs. 3,295-9-4, principal, and Rs. 704-6-8, interest or damages. The latter item is claimed on the ground that the work was finished in March 1907, that it was measured up to the satisfaction of the parties in May 1908, and yet, notwithstanding repeated demands, the money had not been paid at the time of the institution of the suit, 9th February 1909. The first Court states at some length the pleadings of the parties, and inasmuch as the matter has been discussed at considerable length both by that Court and by the lower Appellate Court, it is not necessary for us to re-state the pleadings at length. The first Court drew four issues and held that the plaintiffs had failed to prove that only Rs. 16,200 were paid to them for the work at West Ridge and that the sum of Rs. 3,295-9-4 was still due to them on account of that work. In short, it held that the whole of the West Ridge work had been paid for. The suit having thus been dismissed with costs, the plaintiffs first applied for review of judgment on the ground that they had found a certain document, which they had supposed was lost but which had come to light. This document consists of a receipt for Rs. 3,500 given by the defendant to the plaintiffs, and it is in connection with this receipt that all the difficulty in the case arises, and it is upon this receipt and its interpretation that the learned Divisional Judge reversed the decision of the District Judge. The District Judge issued notice on the petition for review and heard the case argued again. He came to the conclusion that there was no sufficient ground for altering the decision. He looked at the new document produced and he seems to have given his decision after taking that document into account. The review petition was dismissed, and plaintiffs then appealed to the Divisional Court, which, of course, at once observed that the appeal was under the ordinary law long time-barred, and the first question for decision was whether the time spent in

review should be allowed in calculating the period of limitation for appeal. The Divisional Judge held that there were excellent grounds for the review application and it admitted the appeal. In coming to this conclusion the Court referred to *Karm Bakhsh* v. *Daulat Ram* (1) and *Musadi Lal* v. *Badhawa* (2), held that the document produced was a new and important piece of evidence, that it was admittedly genuine, that there was no reason to impute any bad faith to the plaintiffs in connection with it, that it put a completely new complexion upon the facts of the case, and that, therefore, the review petition should have been accepted. This being so, it condoned the delay in appeal, reversed the decision of the Court below and gave plaintiffs a decree for Rs. 3,500, that being the sum which, on the basis of the new document aforesaid, the Court held had been transferred from its original position as a payment against the West Ridge work to the position of a payment against other work plaintiffs were doing for the defendant in Rawalpindi proper. The claim for interest or damages was disallowed, on the ground that the plaintiffs were themselves partly to blame for the delay and difficulty in settling the accounts.

The defendant has filed a further appeal in this Court under the old law. Briefly summarized the points taken in argument are that inasmuch as the first Court rejected the application for review, the lower Appellate Court should not have condoned the delay in appealing; that, further, the first Court refused in review to admit the new document produced by the plaintiffs, and that the lower Appellate Court, in admitting that document and using it against the defendant, virtually accepted an appeal against the order dismissing the review and that in so doing it acted without jurisdiction, there being by law no appeal against an order rejecting a review; that even if the new document be admitted to the record and used in the case, it does not properly give rise to the inference drawn by the lower Appellate Court; and that, as a matter of fact, the defendant has paid off the whole of the plaintiffs' claim upon work done at West Ridge. The plaintiffs also have filed cross-objections asking for the item of interest or damages disallowed.

We have heard arguments on all the points raised by both parties and we now proceed to state our decision upon those several points.

It is convenient to take up first the question of the effect upon the case of the new decument aforesaid. The learned Divisional Judge has, in our opinion, rightly gauged this, and Mr. Shafi has not been able, on the record, to show that the view taken is incorrect. He has virtually admitted this in argument, and it is sufficient, therefore, for us merely to put the matter in the simplest way. Plaintiffs were simultaneously doing for defendant work on the Church at West Ridge and on a school house, etc., in Rawalpindi. For the school work a grant-in-aid had been promised by Government, but, when the Inspector arrived in June 1906, defendant had apparently not paid plaintiffs anything for the school work. How much of that work had been completed, is not very clear, nor does it much matter; but anyhow it was thought necessary to show the Inspector that substantial progress had been made in order that he might under the rules pass the aforesaid grant of Government money. Two sums had been paid to plaintiffs by defendant against the West Ridge work, namely, Rs. 2,500 on 12th May 1906 and Rs. 1,000 on June 5th 1906 (cheque dated June 4th); and it was arranged that these payments should be treated as having been made for the school work. To adjust this transfer on paper plaintiffs gave defendant a receipt for Rs. 3,500 as paid for the school work, while defendant gave plaintiffs another receipt for the same sum, which is the new document mentioned above produced on review of judgment. This receipt was intended to import a refund by plaintiffs to defendant of the two sums of Rs. 2,500 and 1,000 aforesaid, and indeed it expressly mentions those sums and gives the correct dates on which they were paid (12th May and 5th June 1906). When the case was heard in the first Court, Father Wagner, Prefect Apostolic and Manager of business for the Mission, the receipt produced on review not being then in Court, said there was such a receipt, but denied that it

(1) 183 P. R. 1888.
(2) 8 Ind. Cas. 1156; 100 P. R. 1910 43 P. L. R. 1911.

had any concern with the two payments aforesaid. Perusal of it, however, shows that this denial is not in accordance with the facts, the Reverend Father's memory or understanding of the matter having been evidently at fault; and thus on the record the interpretation above given of the transaction clearly holds the field, and we must take it that the version given by Sundar Singh, witness for plaintiffs, is the correct one.

The next point is whether it was right for the learned Divisional Judge (*a*) to condone the delay in appealing, and (*b*) to accept the new document in evidence. The way we look at these questions is this. The law certainly prohibits an Appellate Court hearing an appeal against an order rejecting an application for review; but in our opinion, though the lower Appellate Court's judgment contains ambiguous and perhaps not altogether judicious phrases, this is not what it has really done. It has ruled that there was reasonable cause for the review application, which should in its opinion have been accepted, and hence sufficient cause had been shown for the delay in appealing. In this opinion we heartily concur, and thus we reach this point that the lower Appellate Court found itself seized of an appeal, a vital matter in which had been obscured by the want of a certain document, and was asked by the plaintiffs to look at that document, which is admittedly genuine, and to re-decide the case. The new document was not an unknown thing sprung upon defendant, for Father Wagner had already admitted its execution; and defendant does not appear to have asked for an adjournment to prepare evidence or arguments to meet that document and to explain it away. The case was argued on the record *plus* that document and was decided, and in our opinion correctly decided. The lower Appellate Court did not accept an appeal against the order in review, but admitted an appeal against the original judgment and decree, and, in hearing it, admitted authentic fresh evidence, for the late production of which plaintiffs had satisfactorily accounted. We can find nothing illegal or irregular in this procedure.

But, Mr. Shafi argues, when the new evidence was admitted, there should have been a remand to enable his client to meet the new case. There was, however, no new case: plaintiffs' *case* remained as before; and we are not at all impressed by Mr. Shafi's suggestion that, perhaps if a remand had been granted, which was apparently never asked for, his client might have shown that, taking in a lump *all* the work done by plaintiffs for defendant and *all* the payments by the latter both in Rawalpindi and West Ridge, he had really paid plaintiffs in full or had even overpaid them. We do not think the case should be re-opened in order to facilitate an inquiry of this sort. The parties pleaded in the first Court and issues were drawn. Though defendant did in his pleas make statements as to work done and payments, lumping together all the contracts between the parties, the issues, the evidence and the whole subsequent history of the case show clearly that the defendant was content to base his defence on the question whether or not Rs. 3,500 first paid for West Ridge was transferred so as to figure as a payment for the school work. In these circumstances we cannot accede to the request that there should be a remand now, and we dismiss the appeal.

The cross-objection we must also dismiss on the strength of Act XXXII of 1839 and the ruling *Rukun Din* v. *Rikhi Kesh* (3). There was no promise to pay interest on overdue payments and we cannot find in the evidence any indication that any such promise was implied, nor was any notice given by plaintiffs to defendant threatening to charge interest. It follows, on the ruling of 1894, that no interest (or damages) up to date of suit can be allowed. As to interest after date of suit, we have considered the whole of the circumstances of the case and we think that we should allow none.

The appeal and cross-objections are, therefore, both dismissed; and taking everything into account, we are of opinion that the most equitable order is to direct that the parties do bear their on costs.

Appeal and cross-objections both dismissed.

(3) 36 P. R. 1894.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 25 OF 1909-10 OF GONDA DISTRICT.

March 16, 1915.

Present:—Mr. Porter, S. M., and Mr. Baillie, J. M.

COURT OF WARDS, AJODHYA ESTATE —DEFENDANT—APPELLANT

versus

PARMATMA DIN AND OTHERS—PLAINTIFFS RESPONDENTS.

Dasaundh, *right to—Possession of land, right to—Settlement decree, interpretation of—Lease, termination of—Terms of lease—Notice of ejectment, validity of—Decree of Court, tenant holding under—Oudh Rent Act (XXII of* 1 86), *s.* 52.

A right to *dasaundh* does not in itself imply a right to hold the lands on which the *dasaundh* is imposed. [p. 929, col. 2.]

The plaintiffs held a village under a settlement decree under which they were entitled to *dasaundh* and also to hold the village as lessees, such lease to be determined if the village came under direct management or if the lessees refused to accept a lease on the terms offered by the *talukdar*. Subsequently on their refusal to accept the terms proffered by the *talukdar*, he issued a notice of ejectment against them:

Held, that the plaintiffs had a right to hold the village only till the *talukdar* chose to take it under direct management or till they refused to accept the terms he proffered. [p. 929, col. 2.]

Held, further, that when the plaintiffs refused to accept the terms proffered by the *talukdar*, they ceased to hold under the decree, although their rights to *dasaundh* remained unaffected, and thus it was not necessary for the *talukdar* to have proceeded by suit under section 52 of the Oudh Rent Act. [p. 930, col. 1.]

Appeal from the decree of the Commissioner, Fyzabad, dated 9th August 1907.

JUDGMENT.

BAILLIE, J. M.—(*March* 10*th*, 1915.)—Respondents contest a notice of ejectment issued by the Manager of the Ajodhya Estate. The Commissioner has found that they hold under a settlement decree under which they are entitled to *dasaundh* and also to hold the village as lessees, such lease to be determined if the village comes under direct management or if the lessees refuse to accept a lease on the terms offered by the *taluqdars*. The judgment proceeds :—"The grounds on which it is sought to eject them is that they refused to accept a lease on the terms offered to them by the *aluqdar*. The Settlement Court decree gives the *taluqdar* power to fix the terms of the lease, but I do not think that this can reasonably be construed to mean that the *taluqdar* is entitled to fix his demand so high as to render it certain that the lease will be refused. The lease was offered for Rs. 1,100. Shambhu Nath, Deputy Collector, found that Rs. 740 would be a reasonable sum for lessees to pay. It appears from this that the *taluqdar's* demand is exorbitant. I do not think that a refusal to accept these exorbitant terms has the effect of terminating the lease." In my opinion, the Commissioner in his judgment has completely misunderstood the nature of the rights respondents enjoy and the terms of the decree in their favour in the Settlement Court. The sole right that they have been found to be in perpetuity entitled to is that of *dasaundh*, that is to say, of receipt of one-tenth profits. It is well understood that a right to *dasaundh* does not in itself imply a right to hold the lands on which the *dasaundh* is imposed and in this particular case the decree makes this position plain. They were permitted to hold so long as they paid a rent fixed by the *taluqdar*. They were entitled to one-tenth profits if the village was made *kham*, that is, taken under the direct management of the *taluqdar*, or if they refused to accept a lease proffered by the *taluqdar*. It appears to me clear that all rights under the settlement decree, so far as the village is concerned, cease when they refuse to accept the rent the *taluqdar* fixes. The Commissioner, in holding that the rent fixed by the *taluqdar* must be such as a Court of law would regard as reasonable, has placed the respondents in a position entirely different from that implied by the decree or such as usually is associated with the enjoyment of rights of *dasa ndh* : *vide* Sykes' Compendium of Oudh Taluqdari Law, page 175. The Commissioner virtually finds that they have a right of occupancy at a rental to be approved by the Courts. There is no justification for this in the decree. I consider, therefore, that respondents had a right to hold the village only till the *taluqdar* chose to make it *kham*, or till they refused to accept the terms he proffered as regards rental. This disposes of the ground on which the Commissioner upheld the decree of the lower Court, but the objection has been placed

MAHOMED MUSA v. AGHORE KUMAR.

before me in the argument in this case in a different light. It is claimed that even if respondents have no permanent rights under the decree, they nevertheless now hold under a decree of Court and are, therefore, not liable to ejectment by notice. This is a purely technical objection and I should be loth to give this prolonged litigation a fresh lease of life by accepting it. In a case recently disposed of by the Privy Council it was held that a person, in whose favour a lease had been decreed by the Settlement Court, ceased to hold under that lease and became liable to ejectment by notice when the period of the lease determined. The position is analogous. Respondents in this case are not entitled under their decree to hold when they refuse to accept the rental determined by the *taluqdar*. They, therefore, when they so refuse, cease to hold under the decree. I do not think that it is necessary to hold that the *taluqdar* should have proceeded by a suit under section 52. I would on these grounds allow this appeal and uphold the notice of ejectment. It is, of course, understood that respondents' rights to *dasaundh* are not affected.

PORTER, S. M.—I concur.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 25, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

MAHOMED MUSA, SINCE DECEASED (NOW REPRESENTED BY MAHOMED ABDUL AZIZ AND OTHERS), AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AGHORE KUMAR GANGULI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Contract—Mortgagor and mortgagee—Compromise—Equity of redemption, agreement to release—No writing or registration—Agreement acted upon for 35 years—*Locus penitentiæ *and* rei interventus, *doctrines of—Mortgage, whether can be re-agitated—Equity.*

The *locus penitentiæ* or "the power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which a writing is requisite, and has not been adhibited in an authentic shape," exists only where the parties stand upon nothing but an engagement not final or complete. If, however, the actings and conduct of the parties are founded on, then the plea of *locus penitentiæ* is excluded by *rei interventus*, which raises a personal exception. Such an inference is drawn "from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect, provided that they are unequivocally referable to the contract and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable." [p. 934, col. 1.]

Maddison v. *Alderson*, 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821, referred to.

Equity will support a transaction, though clothed imperfectly in legal forms to which finality attaches, especially if it had been acted upon by the parties for a long time. [p. 934, col. 2.]

In certain proceedings between the mortgagor and mortgagees, in 1873, prior to the passing of the Transfer of Property Act, in respect of certain mortgages of 1848 and 1871, the parties entered into a compromise whereby it was agreed that the equity of redemption in a portion of the mortgaged properties should be released in favour of the mortgagees, who were from that time forwards to be solely entitled to the ownership of the portion so released, that the mortgagor was to be absolutely entitled to the portion retained by her *free* of the encumbrance and that a conveyance was to be executed by the mortgagor to the mortgagees in respect of the properties in which the equity of redemption had been so released. No conveyance was actually executed, but the parties acted up to the terms of the said arrangement and enjoyed their respective lands and alienated them also. In a suit brought in or about 1908 for redemption of the mortgages of 1848 and 1871.

Held, that as the transaction took place before the Transfer of Property Act came into force no writing or registration was necessary to complete the conveyance, that even if it was defective or inchoate, the conduct of the parties and the approbatory acting or homologation of the mortgagor had supplied the necessary defects and that the existence of the mortgages could not be re-opened. [p. 933, col. 2.]

Appeal from a judgment and decree of the High Court, dated June 16th, 1909, reversing a judgment and decree of the Subordinate Judge of 24-Pergannahs, dated August 31, 1908.

FACTS.—On July 22, 1848, one Fazlul Karim mortgaged his *zemindari* with one Ram Chand Mukerji to secure a loan of Rs. 1,40,000 with interest at 12 per cent. On September 20, 1850, Fazlul Karim by a bill of sale conveyed the *zemindari* to his wife Khodajanessa in lieu of her dower. On February 14, 1851, Khodajanessa filed a bill in the Supreme Court at Calcutta for redemption of all the mortgaged properties against both Ram Chand Mukerji and Fazlul Karim. On February 18, 1851, a decree was made by

consent of all parties in the suit by which it was found that Rs. 1,37,500 was due upon the said mortgage for principal and Rs. 1,063 for interest. It was ordered that Mukerji should pay the costs of the suit and on payment of principal and interest and costs, he should convey and assign the mortgaged properties to Khodajanessa. On August 16, 1853, she granted a *patni* lease of the *zemindari* to one Premnath Rai Chowdhri leaving a *malikana* for the lessor. On May 20, 1856, Fazlul Karim died leaving his widow, Khodajanessa, and his sons, Atya, Musa and Jakeria, and two daughters. These were his heirs and legal representatives and were substituted as defendants in his stead in the suit. On December 2, 1857, an order was passed, varying some of the terms of the decree of February 18, 1851. On October 1, 1862, Ram Chand Mukerji died leaving three sons, Panchanan, Ram Lal and Sashi Bhushan. He left a Will of which the sons as executors obtained Probate. The right in the mortgaged property was devised to them. On November 14, 1870, an agreement was executed by Khodajanessa and the three sons of Ram Chand Mukerji in reference to the mortgage in question. Certain terms were thereby arranged. On April 4, 1871, she executed a second mortgage of all the properties subjec to the first mortgage of 1848 in favour of Arun Prokash Ganguly. In the year 1873 differences arose between Khodajanessa and the sons of Ram Chand Mukerji in respect of the terms of the agreement of 1870. They, therefore, instituted a suit for the enforcement of the said agreement. The suit was compromised and a *razinama* was signed and filed by Khodajanessa in the Court, accepted and signed by the sons of Ram Chand Mukerji. It was agreed that the mortgagees should release all the properties covered by the mortgages from the liability of all debts and she was to execute deeds of absolute sale or transfer to give effect to the arrangement, (1) that a share of 3 odd annas to be transferred to Ganguly in full payment and satisfaction of the said second mortgage, (2) that a share of 9 odd annas to be transferred to the three sons of Ram Chand Mukerji in full payment of the mortgage created first and (3) that the remaining 3 odd annas to remain the property of Khodajanessa, free from all incumbrances. A decree was accordingly made. Deeds of sale or transfer were not executed as contemplated by the *razinama* and decree. The arrangement itself and the division of the property was given effect to and carried out by all parties. In 1890 Khodajanessa died leaving three sons, Atya, Musa and Jakeria, and two daughters. In 1908 the sons and daughters of Khodajanessa instituted a suit for the redemption of the property in question, on the ground *inter alia* that no conveyance had taken place as contemplated by the decree of 1873. The Subordinate Judge decided in favour of the heirs of the mortgagor. On appeal to the High Court the judgment of the lower Court was reversed. An appeal was then made to the Judicial Committee of the Privy Council in due course.

Mr. *De Gruyther, K. C.* (with him Mr. *Dube*), for the Appellants, contended that the *razinama* could not be sued on. It was not registered as required by section 17 of the Registration Act (III of 1877).

[LORD DUNEDIN: The Act in force was the Act of 1859.]

It was impossible to say that either party could take advantage of the agreement to take effect in the future by virtue of a mere decree. Conveyances were never executed and in point of fact the so-called decree remained a dead letter. Parol evidence was wrongly admitted to prove that the equity of redemption was released by the lady. This was in contravention of the Evidence Act, section 92 (4). (At this stage of the argument their Lordships intimated a desire to hear Mr. Upjohn, K. C., on the point).

Reference was made to *Ma Ywet* v. *Ma Me* (1); *Pranal Annee* v. *Lakshmi Annee* (2); *Basanta Kumari Debi* v. *Kamikshya Kumari Debi* (3); *Khiarajmal* v. *Daim* (4).

Mr. *Upjohn, K. C.* (with him Mr. *Dunne*), for the Respondents, contended that what he relied upon was not a document, but a verbal

(1) 3 Ind. Cas. 797; 5 L. B. R. 118; 6 M. L. T. 302; 36 I. A. 192; 14 C. W. N. 111; 11 Bom. L. R. 1 93; 19 M. L. J. 577; 10 C. L. J. 253; 36 C. 978.

(2) 26 I. A. 101; 22 M. 508; 3 C. W. N. 485; 9 M. L. J. 147.

(3) 32 I. A. 181; 10 C. W. N. 1; 2 A. L. J. 810; 2 C. L. J. 238; 7 Bom. L. R. 904; 15 M. L. J. 320; 33 C. 23.

(4) 32 I. A. 23; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 C. 296.

contract followed by a continuous acting on it for thirty-five years. As it was a verbal contract, the provisions of section 49 of Act VIII (Registration) of 1871 did not apply. There was part performance and the wholesome doctrine of equity which removed all the harshness and injustice which might be occasioned by not complying with some of the formalities of the law. This was recognised by all systems of law and the Indian system was not an exception. (At this stage their Lordships stopped Mr. Upjohn and did not call upon Mr. De Gruyther to reply).

Reference was made to *Maddison* v. *Alderson* (5).

JUDGMENT.

LORD SHAW.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 16th June 1909. That judgment was pronounced upon and reversed a judgment and decree of the second Subordinate Judge of the 24-Pergannahs, dated the 31st August 1908.

The object of the suit is for the redemption of two mortgages, dated 22nd July 1848 and 4th April 1871. The defence which has been sustained is that the right to redeem was extinguished many years ago, in circumstances which will now be mentioned.

Many of the facts of the case are comprised in a chapter which may be said to have definitely closed in the year 1873; and it is accordingly unnecessary to narrate them in detail. After the 1848 mortgage was granted by one Fazlul Karim, his wife Khodajanessa obtained from him a conveyance of her husband's *zemindari* as a gift in lieu of dower. This occurred in 1850. In 1851 she began proceedings for redemption of the mortgaged properties. Many and various legal steps took place in that decade, and from at least the year 1863 no record remains of any proceedings in the suit. It is admitted that no useful light can now be thrown upon that litigation, —which, in any view, appears never to have been determined.

In 1870 a certain agreement was executed by Khodajanessa Begum and three sons of one Ram Chand Mukerji in reference to the 1848 mortgage. A sum was fixed as the principal due and another sum as interest due, and arrangements were made for payment by yearly instalments and for management of the property and the like.

On 4th April 1871 the second mortgage was granted. In 1873 differences, however, arose between Khodajanessa and the mortgagees, and a suit was brought by Ram Chand Mukerji's three sons to enforce against her the agreement come to. This suit was compromised. On 26th November 1873 Khodajanessa entered into a *razinama*, or agreement of compromise, which *razinama* was signed by the plaintiffs. What happened under it may be expressed in Khodajanessa's own words in evidence given by her in a litigation in 1875, and printed on the record. In that suit on 30th April she testified as follows:

"The suit in the 24-Pergannahs Court was settled and a *solenama* executed by the three brothers, a deed of compromise, what is termed a *razinama* and *safinama*. On my agreeing to execute a conveyance of the 12-annas share to the three brothers, it was settled. The three brothers and myself all agreed and made the settlement. I spoke to all the three brothers on the subject of that settlement."

The *razinama* contains a full narrative of the transactions with the property mortgaged, and of the financial embarrassments which had occurred. It appeared, as was the fact, that after the death of the *putnidar* of the property the realisation of the rents had come under the charge of the Court of Wards. And the true point, so far as the present litigation is concerned, of the *razinama* was this, that it was arranged that from the year 1874 onwards the realisation of *malikana* profits should be as follows: – To the plaintiffs in that case and Arun Prokash Ganguly "the *malikana* profits in respect of 12-annas, 7-*gundas*, 2-*karas*, 1-*kag* share and the Collectorate revenue both amounting to Rs. 27,336-7-10 as per account given above and I shall realise the profits in respect of the remaining 3-annas, 12 *gundas*, 1-*kara*, 3-*kags* share and Collectorate revenue both amounting to

(5) 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

Rs. 8,013-8-10 *kist* by *kist* according to the terms of the *kabuliyat.*" The other parties named were to get their names registered in the Collectorate. These parties, it may be mentioned, had expressly "consented to such arrangement and released the said *taluks* and all the properties covered by the mortgage-deed to me free from the liability for the debt."

It is impossible to read this *razinama* without concluding that the mortgage debts were to be thenceforward for ever extinguished, that the property itself was to be divided among the parties in specific shares, and that with regard to one share—set forth as 3 annas, 12 *gundas*, 1 *kara* and 3 *kags*—it was to become and be dealt with by Khodajanessa as her separate property, disburdened of debt. The remainder of the 16 annas was also to be similarly and separately owned and enjoyed.

The concluding prayer of the *razinama* was :

"That the Court may be pleased to decide the suit declaring that the plaintiffs shall get the amount claimed to their satisfaction in the manner stated above."

The *razinama* was accordingly produced to the Court, which pronounced upon it as follows :

"It is, therefore, ordered that the suit be decided in pursuance of the terms of the *razinama*, and that the suit be struck off from the list of pending cases."

The point which is made against giving effect to this compromise is that a conveyance was not made by Khodajanessa in completion of the contract of purchase narrated in the *razinama*. This is true. But no written conveyance by the Law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882.

But even if a transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction are manifold, and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors-in-title from that date to this. The suit was dropped, the division of shares of the property was made, and it may be said generally that from its date until the date of Khodajanessa's death in the year 1890, and, indeed, from that date until the present time the property has been managed upon the footing of that division, of the extinction of the mortgage debts, of the division of the disburdened proprietary interests in the shares set forth in the compromise, and of the receipt and enjoyment of rents and profits accordingly. The detail need not be given.

As to Khodajanessa herself, her own view is set forth in her evidence as already given. A striking instance of her approbatory acting, or homologation, may be mentioned. In the same year, 1875, she executed a mortgage for her own 3-annas share, and in this deed she recites at length the whole transactions, the separation into shares and so forth.

Transactions of mortgage, sale, etc., have been also carried out by the other sharers with reference to their properties. And, in short, it may be said that for a period of between 30 and 40 years prior to the initiation of this suit the rights of all parties have been dealt with precisely upon the same footing as if Khodajanessa had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees, and reserving one share to herself.

In these circumstances their Lordships are of opinion that the proposition that the equity of redemption still remains with the representatives of Khodajanessa cannot be maintained. Even if the *razinama* itself was insufficient, yet in their Lordships' view the decree of the Court, to the sufficiency of which an objection was taken in argument, was obtained upon one footing, and one footing alone, *i.e.*, that the parties to the suit had in fact arranged their rights in the property in terms of the compromise.

Their Lordships in view of the argument strongly pressed upon them, think it right further to say that even although the *razinama* and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of

redemption, the actings of parties have been such as to supply all such defects. To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson* (5) in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhibited in an authentic shape." This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his Principles, section 26, "*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiæ*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable."

Their Lordships do not think that there is anything either in the Law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. *Alderson* (5), founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow. The Lord Chancellor then enumerates a series of acts referable to the parol contract, and he adds, "the matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded." Many authorities are cited in support of these propositions from English and Scotch Law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange, *Potter* v. *Potter* (6), may be here repeated: "If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity." Their Lordships do not think that the Law of India is inconsistent with these principles. On the contrary it follows them.

A review by their Lordships of the judgment of the learned Judges of the High Court of the case has convinced them that the facts have been correctly appreciated, and they concur with the legal result arrived at.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Burton, Yeates and Hart.*

(6) 1 Vesey (Senior) 437 at p. 441; 27 E. R. 1128.

MADRAS HIGH COURT.

ORIGINAL CIVIL APPEAL No. 103 OF 1913.

January 26, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MAHOMED KADIR MOHIDEEN SAIB MAGHRIBI—PLAINTIFF—APPELLANT

versus

THE HON'BLE SIR GHULAM MAHOMED ALI KHAN BAHADUR, THE PRINCE OF ARCOT, AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Waqf property—Resumption by Government—Property given back to grantor—Grantor issuing inam *deeds in favour of* mutwalli—*Inference—*Mutwalli, *subject to* waqif—*Removal of* mutwalli—*Resumption of* inam *by Sovereign—Courts, jurisdiction of—Mosque, object of—Succession to office of mosque, principle of—Kazi, power of—Age of majority, whether applicable to offices involving performance of religious duties—Right to collect Government Revenue, suit for—Certificate—Pensions Act (XXIII of* 1871),

s. 6.

MAHOMED KADIR *v.* GHULAM MAHOMED ALI.

Sadasiva Aiyar and Napier, JJ.—Where the villages granted by the Muhammadan Government as *inam* for carrying on the religious worship in a mosque, were resumed by the British Government and given back to the grantors, but the *inam* title-deeds were issued in the name of the *mutwalli* for the time being to be nominated by the grantors:

Held, that the intention was to make a grant of the villages an *inam* to the original *waqif* or founder of the endowment and not to the *mutwalli* himself personally. [p. 937, col. 1; p. 944, col. 1.]

Where the *mutwalli* of a mosque has to be recognised and re-appointed at each succession by the *waqif* the former cannot claim a hereditary right in such office nor can a Will made by his father in his favour enhance his right in this respect. [p. 938, col. 1; 945, col. 2.]

A *mutwalli* of a mosque is entirely subject to the control of the *waqif* and is removeable by him at his will for proper reasons. [p. 938, col. 2.]

Where a *mutwalli* defies the authority of the *waqif* and fails to submit accounts when required to do so, a proper reason exists for his removal. [p. 941, col. 1.]

A resumption by the Sovereign of an *inam* is an act of sovereignty which cannot be questioned by Municipal Courts. [p. 936, col. 2.]

East India Company v. *Syed Ally*, 7 M. I. A. 555; 1 Sar. P. C. J. 867; 19 E. R. 417, followed.

Sadasiva Aiyar J.—No distinction should be drawn between mosque and mosque, and all mosques should be treated as being intended for use of the Mussalman public in the same degree. [p. 936, col. 1.]

Queen-Empress v. *Ramzan*, 7 A. 461 at p. 469; A. W. N. (1885) 117, followed.

A determination of the question of succession to an office in a mosque endowment depends not on the general law of property, but upon the rules which the founder of the endowment established. [p. 937, col. 2.]

Rahumutulla Sahib v. *Mahommed Akbar Sahib*, 8 M. H. C. R. 63, followed.

Ordinarily under the Muhammadan Law the power of the removal of the *mutwalli* is vested in the *Kazi* but if under the original scheme, settled by the *waqif* the grantor reserved to himself and to his heirs the power of removing the *mutwalli* and of making nominations from time to time, such a power would not be illegal, provided it is not detrimental to the interests of the mosque. [p. 938, col. 2.]

Khajeh Salimulla v. *Abdul Khayer Mohammad Mustafa*, 3 Ind. Cas. 419; 14 C. W. N. 497; 11 C. L. J. 304; 37 C. 263, followed.

The age of majority fixed by the Indian Majority Act does not apply to offices which involve the performance of religious duties. [p. 941, col. 2.]

A right to collect Government Revenue from the villages granted as an endowment to a religious office, cannot be sued for in a Civil Court, unless upon a certificate obtained under section 6 of the Pensions Act (XXIII of 1871). [p. 941, col. 2; p. 942, col. 1.]

Appeal from the judgment of the Hon'ble Mr. Justice Wallis, dated the 26th day of November 1913, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 345 of 1912.

Messrs. *D. Chamier, M. D. Devadoss, R. N. Aiyangar, Rencontre* and *Tirumalai Pillai*, for the Appellants.

Messrs. *T. Pattabhirama Aiyar* and *C. P. Ramaswami Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff (appellant) was born on the 28th May 1895, (See Exhibit K). This suit was brought in October 1912, when he was a minor, through a next friend. The plaint prayed (mainly) for the following reliefs: (*a*) A declaration that the plaintiff was the lawful *mutwalli* of the two mosques in Madras called the Wallajah and Anwari Mosques and of the endowments attached thereto; (*b*) that the agreement, Exhibit A, executed by the plaintiff in December 1911 when he was 16 years old in favour of the 1st defendant, the Prince of Arcot, was null and void and not binding on the plaintiff; (*c*) that the alleged dismissal of the plaintiff from the office of *mutwalli* (Exhibit G) by the 1st defendant was *ultra vires* and wrongful and the alleged appointment of the 2nd defendant as *mutwalli* by the 1st defendant was also *ultra vires*; (*d*) that an account be taken from the 1st defendant of the receipts and disbursements of money made by him from January to June 1912; and (*e*) that the defendants may be restrained by an injunction from collecting the rents and profits of the plaint property and interfering with the management of the mosques and properties of the plaintiff.

It is clear from the plaint that, though the fact that from the time of the plaintiff's great-great-grandfather the office of *mutwalli* has been held by him and his descendants in regular succession, is mentioned, the plaintiff does not claim that the office itself is a hereditary one in the sense that a son is entitled as of right to succeed to his father. The plaintiff is himself only a younger son, his elder brother being alive. In paragraph 6 of the plaint, the plaintiff says that he succeeded to the office of *mutwalli* on or about 28th December 1911 in accordance with the Will, dated 16th November 1911, made by his father (his predecessor-in-office) who died on the 12th January 1912. It is rather difficult to understand how, when the father died only on the 12th January

redemption, the actings of parties have been such as to supply all such defects. To use language common from very early times in Scotland, and highly approved in the case of *Maddison* v. *Alderson* (5) in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite, and has not yet been adhibited in an authentic shape." This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his Principles, section 26, "*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiæ*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable."

Their Lordships do not think that there is anything either in the Law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. *Alderson* (5), founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have had in contemplation would follow. The Lord Chancellor then enumerates a series of acts referable to the parol contract, and he adds, "the matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded." Many authorities are cited in support of these propositions from English and Scotch Law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange, *Potter* v. *Potter* (6), may be here repeated: "If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity." Their Lordships do not think that the Law of India is inconsistent with these principles. On the contrary it follows them.

A review by their Lordships of the judgment of the learned Judges of the High Court of the case has convinced them that the facts have been correctly appreciated, and they concur with the legal result arrived at.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Burton, Yeates and Hart.*

(6) 1 Vesey (Senior) 437 at p. 441; 27 E. R. 1128.

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*Muhammadan Law—*Waqf *property—Resumption by Government—Property given back to grantor—Grantor issuing* inam *deeds in favour of* mutwalli—*Inference—*Mutwalli, *subject to* waqif—*Removal of* mutwalli—*Resumption of* inam *by Sovereign—Courts, jurisdiction of—Mosque, object of—Succession to office of mosque, principle of—Kazi, power of—Age of majority, whether applicable to offices involving performance of religious duties—Right to collect Government Revenue, suit for—Certificate—Pensions Act (XXIII of* 1871),

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Sadasiva Aiyar and Napier, JJ.—Where the villages granted by the Muhammadan Government as *inam* for carrying on the religious worship in a mosque, were resumed by the British Government and given back to the grantors, but the *inam* title-deeds were issued in the name of the *mutwalli* for the time being to be nominated by the grantors:

Held, that the intention was to make a grant of the villages an *inam* to the original *waqif* or founder of the endowment and not to the *mutwalli* himself personally. [p. 937, col. 1; p. 944, col. 1.]

Where the *mutwalli* of a mosque has to be recognised and re-appointed at each succession by the *waqif* the former cannot claim a hereditary right in such office nor can a Will made by his father in his favour enhance his right in this respect. [p. 938, col. 1; 945, col. 2.]

A *mutwalli* of a mosque is entirely subject to the control of the *waqif* and is removeable by him at his will for proper reasons. [p. 938, col. 2.]

Where a *mutwalli* defies the authority of the *waqif* and fails to submit accounts when required to do so, a proper reason exists for his removal. [p. 941, col. 1.]

A resumption by the Sovereign of an *inam* is an act of sovereignty which cannot be questioned by Municipal Courts. [p. 936, col. 2.]

East India Company v. *Syed Ally*, 7 M. I. A. 555; 1 Sar. P. C. J. 867; 19 E. R. 417, followed.

Sadasiva Aiyar J.—No distinction should be drawn between mosque and mosque, and all mosques should be treated as being intended for use of the Mussalman public in the same degree. [p. 936, col. 1.]

Queen-Empress v. *Ramzan*, 7 A. 461 at p. 469; A. W. N. (1885) 117, followed.

A determination of the question of succession to an office in a mosque endowment depends not on the general law of property, but upon the rules which the founder of the endowment established. [p. 937, col. 2.]

Rahumutulla Sahib v. *Mahommed Akbar Sahib*, 8 M. H. C. R. 63, followed.

Ordinarily under the Muhammadan Law the power of the removal of the *mutwalli* is vested in the *Kazi* but if under the original scheme, settled by the *waqif* the grantor reserved to himself and to his heirs the power of removing the *mutwalli* and of making nominations from time to time, such a power would not be illegal, provided it is not detrimental to the interests of the mosque. [p. 938, col. 2.]

Khajeh Salimulla v. *Abdul Khayer Mohammad Mustafa*, 3 Ind. Cas. 419; 14 C. W. N. 497; 11 C. L. J. 304; 37 C. 263, followed.

The age of majority fixed by the Indian Majority Act does not apply to offices which involve the performance of religious duties. [p. 941, col. 2.]

A right to collect Government Revenue from the villages granted as an endowment to a religious office, cannot be sued for in a Civil Court, unless upon a certificate obtained under section 6 of the Pensions Act (XXIII of 1871). [p. 941, col. 2; p. 942, col. 1.]

Appeal from the judgment of the Hon'ble Mr. Justice Wallis, dated the 26th day of November 1913, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 345 of 1912.

Messrs. *D. Chamier, M. D. Devadoss, R. N. Aiyangar, Rencontre* and *Tirumalai Pillai*, for the Appellants.

Messrs. *T. Pattabhirama Aiyar* and *C. P. Ramaswami Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff (appellant) was born on the 28th May 1895, (See Exhibit K). This suit was brought in October 1912, when he was a minor, through a next friend. The plaint prayed (mainly) for the following reliefs: (*a*) A declaration that the plaintiff was the lawful *mutwalli* of the two mosques in Madras called the Wallajah and Anwari Mosques and of the endowments attached thereto; (*b*) that the agreement, Exhibit A, executed by the plaintiff in December 1911 when he was 16 years old in favour of the 1st defendant, the Prince of Arcot, was null and void and not binding on the plaintiff; (*c*) that the alleged dismissal of the plaintiff from the office of *mutwalli* (Exhibit G) by the 1st defendant was *ultra vires* and wrongful and the alleged appointment of the 2nd defendant as *mutwalli* by the 1st defendant was also *ultra vires*; (*d*) that an account be taken from the 1st defendant of the receipts and disbursements of money made by him from January to June 1912; and (*e*) that the defendants may be restrained by an injunction from collecting the rents and profits of the plaint property and interfering with the management of the mosques and properties of the plaintiff.

It is clear from the plaint that, though the fact that from the time of the plaintiff's great-great-grandfather the office of *mutwalli* has been held by him and his descendants in regular succession, is mentioned, the plaintiff does not claim that the office itself is a hereditary one in the sense that a son is entitled as of right to succeed to his father. The plaintiff is himself only a younger son, his elder brother being alive. In paragraph 6 of the plaint, the plaintiff says that he succeeded to the office of *mutwalli* on or about 28th December 1911 in accordance with the Will, dated 16th November 1911, made by his father (his predecessor-in-office) who died on the 12th January 1912. It is rather difficult to understand how, when the father died only on the 12th January

1912 and when the Will (Exhibit O) dated 15th November 1911 could and does speak only from the date of the death of the father, the plaintiff could have succeeded to the office on the 28th December 1911 itself, which date is neither the date of the Will nor the date of the father's death. Paragraph 4 of the Will (Exhibit O) clearly says "on my death, you Muhammad Kadir Mohideen *alias* Badsha shall forthwith take charge of the mosque properties and Shayanavaram *jagir* and conduct the office of *mutwalli* in accordance with the provisions of Muhammadan Law." However, the plaintiff, as I said before, does not claim a hereditary right in the office but lays claim to it because he was nominated by his father, the previous *mutwalli*, as successor. One of the principal questions in this case, therefore, is whether the succession to the office of *mutwalli* of the two plaint mosques takes place by the nomination and appointment of the prior office holder, or whether the power of appointment on a vacancy rests in the Prince of Arcot (the 1st defendant).

The learned trial Judge has dealt with the history of the institution at great length (see from line 25 in page 21 of the printed judgment to the end of page 30) and it is, therefore, unnecessary for me to go through the same ground in detail. The first *mutwalli* was appointed in 1792 by the then Nawab of Arcot. The Nawabs of Arcot were independent Sovereigns till 1801. In 1801, the East India Company as sovereign authority took possession of all the properties belonging to the Nawab or over which the Nawab exercised sovereign rights, including the two plaint mosques and the *jagirs* of Ismail Kuppam and Shayanavaram connected with the mosque endowments. Though these mosques were named after two deceased Nawabs and were treated as if the Royal House of the Nawab of Arcot was more specially connected with these mosques than with ordinary mosques erected for the use of the public, I am of opinion that under the Muhammadan Law no distinction should be drawn between mosque and mosque and that all mosques should be treated as being intended or the use of the Mussalman public in the same degree [See *Queen-Empress* v. *Ramzan* (1)]. The founder, *wakif* of these mosques and their endowments was the Nawab, of Arcot. The Government Revenue obtainable from the tenants of Ismail Kuppam amounting to about Rs 150 a year, was dedicated to the endowments in order to meet he expenses of lighting the mosques and of maintaining the establishment connected with the services in the mosques. The Government revenue income from the *jagir* of Shayanavaram, amounting to about Rs. 200 or Rs. 195 a year, was granted to be enjoyed by the plaintiff's great-great-grandfather who was appointed the first *mutwalli* in or about 1792. These *jagirs* were granted in 1797 and 1798 (see Exhibits W and Y), the expenses of the endowments having been met ill then by a daily payment of Rs. 3 to the *mutwalli* (See Exhibit U). When His Highness Oomdatul Oomrah, Nawab of Arcot, died in 1801, the Company assumed the sovereign powers nd resumed, as such Sovereign, the plaint *jagir* villages and took possession of all the territories of the last Nawab. Such a resumption was an act of sovereign power which cannot be questioned by the Municipal Tribunals, [see *East India Company* v. *Syed Ally* (2)]. The heir of the Nawab of Arcot in November 1802 requested the Government to restore to himself the *jagirs*. Thereupon in April 1803, the Government passed proceedings in accordance with which the Secretary to Government wrote to the Collector of North Arcot (Exhibit IX), which directs the Collector to restore to the servants of His Highness the Nawab of the Carnatic the two *jagir* villages. In issuing the title-deeds in obedience to the above order, some mistakes were made by the Collector at first. But the final order of the Government in this matter is evidenced by Exhibit XVII, dated the 27th December 1822, which recites that the Collector has been instructed to enter the two villages in the *Inam* Register as an endowment to the two mosques to be administered by the *mutwalli* so long as he shall retain the situation of *mutwalli* of the said mosque under the orders of His Highness the Nawab of Carnatic. These proceedings of the Governor-in-Council, dated December 1822, were passed in accordance with the

(1) 7 A. 461 at p. 469; A. W. N. (1885) 117.

(2) 7 M. I. A. 555; 1 Sar. P. C. J. 867; 19 E. R. 417.

request of the Nawab of the Carnatic contained in his letter, Exhibit XVI, dated July 1822. It is quite clear to me that the Madras Government intended that the Nawab of the Carnatic should have full power to deal with the office of *mutwalli* and intended to recognise as *jagir*-holder whomsoever, from time to time, His Highness thought fit to recognise as *mutwalli*. When the *Inam* Commissioner came to deal with these *Inam* villages, the Prince of Arcot wrote a letter (Exhibit XXIIA) in October 1872 requesting that the *inam* title-deeds of these two villages may be issued in His Highnes's own name instead of that of the *mutwalli* as the *matwalli* was merely a servant of His Highness and as the real superintendence of the mosque rested in the Prince himself (See paragraphs 3 and 4 of Exhibit XXIIA). The *Inam* Commissioner was asked by the Government to report upon this letter. The Commissioner made a report to the Government on the 17th October 1872, which report is found in page 58 of the documents. In paragraph 2 of that report he says "In 1822 (the last time when any question about them was raised) it was decided by Government that the *mutwalli* was entirely dependent upon the Nawab's favour and approval, and now, as would appear clear from enclosure Exhibit EE (a document of 1863), it has been further determined that the superintendence of all mosques and tombs in this Presidency connected with the Carnatic family shall be entrusted to His Highness the Prince Azum Jan Bahadur and his successors-in-title ... ... I have the honour to recommend that I may be authorised to cancel the existing title-deeds and to issue new ones as prayed for by His Highness." On this report of the *Inam* Commissioner, the Governor-in Council directed that the title-deeds may be issued in the name of the *mutwalli* for the time being of the Wallajah and Anwari *Musjids* by nomination of His Highness the Prince of Arcot and they further stated that by this means, the intention of His Highness will be effected and the endowments will follow the nomination of the Prince of Arcot for the time being. In effect, the Government said that the title-deeds need not be issued directly in the name of His Highness as requested by His Highness, but the result desired by His Highness and recommended by the *Inam* Commissioner may be brought about as effectively, though somewhat indirectly, by issuing the *inam sannads* in the name of the *mutwalli* for the time being by nomination of His Highness. So that, whomsoever His Highness nominates from time to time at his full discretion will be registered as the *jagirdar* from time to time. I agree respectfully with the learned trial Judge that the appointment from time to time of the *mutwalli* was vested in the Nawab of Arcot (later the Prince of Arcot) for the time being and that the *mutwalli* for the time being had no power himself to appoint his successor. The matter is cleared by the contents of the petitions made by the *mutwallis* to the head of the House of Arcot for the grant of the office of *mutwalli* and of the *sannads* granted in accordance with such petitions (one of the alleged petitions, Exhibit 23, seems to be inadmissible in evidence as not proved to be a correct copy and I shall ignore it). The *sannads* [Exhibit XXVI and 46 (*a*)] granted to the plaintiff's grandfather state that he should do his duty of *mutwalli* in obedience and submission to the Prince of Arcot and his successors and that the submission and obedience to the Prince of Arcot and his successors is the cause of the permanency of the office. I, therefore, agree with the trial Judge that the appointment to the vacancy of the office of *mutwalli* rests absolutely with the Prince of Arcot and not with the *mutwalli* for the time being. The original *sannad* of 1792 appointing the plaintiff's great-great-grandfather has not been produced by the plaintiff and what the terms of that appointment were cannot be found out directly.

In *Rahumutulla Sahib* v. *Mahommed Akbar Sahib* (3), it was held that the determination of the question of succession to an office in a mosque endowment depended not on the general law of property, but upon the rules which the founder of the endowment established, whether such rules were defined by writing or were to be inferred from

(3) 8 M. H. C. R. 63.

evidence of usage and that the Will of the founder could be so ascertained from the usage of former days. I think that in the present case, there can be no doubt from the documentary evidence already set out (see also Exhibit XII, dated 1816, and the other documents referred to by the learned trial Judge) that the appointment of *mutwalli* is vested in the head of the House of Arcot for the time being and does not depend in any degree upon the Will of the previous *mutwalli*. Hereditary tenure and tenure by appointment of the previous *mutwalli* were set up in previous litigations by the plaintiff's predecessors and were given up (see Exhibits 34 to 37 and 45 and 46 series).

The next questions to be decided in this case are (*a*) who has the right to remove the *mutwalli*? (*b*) If the Prince of Arcot has that power, has His Highness the absolute right to remove at his discretion or has he the right to remove only for certain defined causes and if so, for what causes? (*c*) Whether the plaintiff has been removed for proper causes?

I might state shortly that the documentary evidence in the case from Exhibit 12, dated 1816, downwards leaves little doubt that the head of the House of Arcot asserted all along the absolute right to deal with the office of *mutwalli* in these mosques and that that right was recognised from 1822 by the Madras Government. In Exhibit XII, the Nawab said: "The office of superintendent is not confined to the same person who is liable to be removed and succeeded by another, the appointment of whom rests invariably with the choice of His Highness." In Exhibit XIII, dated 1824, the Nawab recites that he conferred the appointment on plaintiff's great-grandfather as per his petition of July 1822 and that the appointee should file the accounts of his receipts and disbursements in the Nawab's Sircar office. The title-deeds, Exhibits 24 and 25, issued to the plaintiff's grandfather in 1812 inform the *mutwalli* plainly that he holds that office under the orders of His Highness the Prince of Arcot for the time being. When the litigations of 1883 and 1884 were concluded by the *razinamahs* of 1888 [see Exhibits 23 and 45 (*a*)], the power of dismissal was recognised to be in the hands of the Prince of Arcot. It is admitted that these endowments are not governed by the provisions of the Religious Endowments Act of 1863 and that we must resort to the terms of the original grant or to the Muhammadan Law to ascertain who has the power to dismiss the *mutwalli*. The terms of the original grant are not before us, but the usage so far as could be gathered, from the declarations made before disputes arose and from acknowledgments of the plaintiff's two immediate predecessors in the office, is proved to be that the head of the House of Arcot has the power to dismiss the *mutwalli*. The Muhammadan Law allows to a *waqif* the right to reserve to himself the power of removing the *mutwalli* as stated by Mr. Syed Ameer Ali at page 447 of Volume I of his Muhammadan Law. That this right of removal could be reserved by the *waqifs* to the *waqif*' descendants seems also to follow from the principles gatherable from the texts. The *wakif* can himself be the first *mutwalli* and in fact, is the most appropriate *mutwalli* and his executor will become the next *mutwalli* in the natural course even without appointment by the *waqif*. Now a *mutwalli* is stated to be merely an agent on behalf of the *waqif* (see page 462 of Mr. Syed Ameer Ali's Muhammadan Law) and his agency terminates on the death of the *waqif* unless he has been appointed for the *waqif's* life and after his death. Ordinarily, under the Muhammadan Law, the power of removal of the *mutwalli* is vested in the *Kazi* (now, in the Courts), but, as I said, if under the original scheme settled by the *waqif*, he reserved to himself and his heirs the power of removing the *mutwalli* and of making nominations from time to time, I do not think that the exercise of such a power would be illegal under the Muhammadan Law, provided it is not exercised to the detriment of the interests of the mosque. If the *mutwalli* comes in only as the agent of the *waqif*, an agent's power can be put an end to at any time and the principal can himself take up the management. In all these matters, however, the primary consideration is the interest of the religious endowment and though the *waqif* is superior to anybody else (see page 763), even he could be removed from the post of *mutwalli* in the interests

of the endowment, that is, for manifest breaches of trust or misfeasances or incapacity to discharge the duties of the office as well as immorality, even if the *waqif* has made a condition to the effect that in the case of breach of trust on his part either the *Kazi* or the Sultan shall not have the power of removing him. In he present case, can we say that the reservation by the head of the House of Arcot (as proved by the evidence of usage) in himself and his successors of the power to remove the *mutwalli* is detrimental to the interests of the institution? On the other hand in the circumstances of these particular institutions connected closely with the House of Arcot, the existence of such a power seems to me to be in the best interests of the institutions.

I must, however, admit that on this subject of the power of removing the *mutwalli*, I have felt considerable difficulty in coming to a conclusion satisfactory to my mind. So far as the power of removing the first *mutwalli* is concerned, the *wakif* and his executor's power seems to be clear. But whether that power can be lawfully reserved to remoter successors in the life of the *wakif* was not so very clear to my mind. But after the best consideration I could give to the question, I think the reservation of such a power, if it is not manifestly against the interests of the endowment, may be upheld. In the case in *Khajeh Salimulla* v. *Abdul Khayer Mohammad Mustafa*(4), Mookerjee and Vincent, JJ., quoted many of the original texts on this branch of the law. One dictum of the Jurists seems to be that "any condition imposed by the founder of the *wakf* is like an express text of the law-giver." And when such a condition is proved by long usage and is not against the interests of the institution, I do not see why it should not be respected like an express text of the law-giver. On the question (*a*) therefore, which I formulated, I hold that the head of the House of Arcot for the time being has the power to dismiss the *mutwalli* for the time being. I might here say a few words on the question of the management itself as that question has some bearing on the consideration of the point whether the power of dismissal can, properly in the interests of the institution, be vested in the head of the House of Arcot. In the first place, it is to be remembered that though the title-deeds of these *jagirs* were issued from time to time in the names of the nominees of the Prince of Arcot, the title-deeds of the two mosques themselves and of the shops, lands, gardens of the mosque (an income of about Rs. 60 a year to be spent upon the improvement of the mosque buildings, etc., being derived from the rents of these shops, sites and gardens) have always been issued in the names of the heads of the House of Arcot themselves, (see Exhibits 20, 21, etc.)

Again though a person called *mutwalli* has been appointed from time to time, his powers have always been very much less than that of an ordinary *mutwalli*. The head of the House of Arcot retained most of the powers of superintendence and management and in fact the head of the House treated himself as the principal *mutwalli* and treated the officer called *mutwalli* as a sort of delegated agent under himself. In the *sannad* appointing the plaintiff's great-great-grandfather (Exhibit 13) the *mutwalli* was required to file accounts in the office of the Nawab. In the *sannad* (Exhibit III, dated 1894) the Nawab directs the *mutwalli* to obey and submit to himself, his successors and his *naibs* or deputies and the *mutwalli* is directed to register a Power-of-Attorney in the name of any person whom the Prince of Arcot shall appoint for working and collecting the incomes from the *mouza* (village) of Ismail Kuppam. That is, the *mutwalli* is not even to collect the income of the village of Ismail Kuppam, but is bound to grant a Power-of-Attorney to the Prince's nominee, and that nominee was to collect and pay the collections into the Nawab's treasury. It is further said that as regards the shops, etc., and the land round the mosque, he should not do anything without the permission of the Prince of Arcot and his *naibs* or deputies: "You should always pay in all the income from shops and land aforesaid into the office for *intizam* (management) and *ihthimam* (superintendence) of the mosques connected with our *sirkar*, which is located at Amir Mahal, and defray the expenses for both the mosques aforesaid, distribute the salaries of the servants there and execute repairs to shops, etc., with the money which will be paid out

(4) 3 Ind. Cas. 419; 37 C. 263; 14 C. W. N. 497; 11 C. L. J. 304.

from our office when needed as per accounts." Thus except the income of Shayanavaram *jagir* which was the salary of his office, the *mutwalli* had no right even to handle directly the other incomes connected with the maintenance of the mosques and their lighting charges and he was merely a sort of sub-agent acting under the *naibs* or deputies appointed by the Prince of Arcot. The documentary evidence leaves little doubt that though the plaintiff's ancestors were given the sonorous title of *mutwalli* by the Princes of Arcot, the actual superintendence was retained in the House of Arcot itself, the *mutwalli* being treated as an agent in the matter of distribution of some salaries, etc., connected with the mosques. By the *razinamah*, Exhibit 34, dated 1888, the plaintiff's grandfather agreed that all rent bills in respect of the said charity properties shall be made out in the name of the 1st defendant, His Highness the Prince of Arcot but the same shall be signed by the plaintiff as such *mutwalli* or by the *naibs* duly authorized on that behalf for and on behalf of the said *mutwalli*, that the plaintiff shall not be at liberty to dismiss the said *naibs* without the consent of the 1st defendant, His Highness the Prince of Arcot, and that the plaintiff shall himself bear the expenses of the employment of the said *naibs* out of his income from the Towbath Jaghire of Shayanavaram The only tangible power given to him was the power to fine and suspend all servants employed in the mosque for any misconduct, negligence or dereliction of duty. He cannot, however, even appoint or dismiss such servants without the consent of the Prince of Arcot previously obtained (See paragraph 4 of Exhibit 34). The vesting of the power of dismissal of such a nominal *mutwalli* in the Prince of Arcot who was the real *mutwalli* cannot be said to be detrimental to the interests of the mosque.

Coming to the question (*b*), the documentary evidence clearly leads to the conclusion that till the date of the *razinamah* (Exhibit 34) the Prince of Arcot claimed and had the power of dismissal of the *mutwalli*. This power was impliedly, if not expressly, acknowledged by the *mutwalli* and was recognised by the Government of Madras. In these *razinamahs* [Exhibits 34 and 45 (*a*)], however, the Prince agreed that the then *mutwalli* should be liable to dismissal from office in case of wilful disobedience of legal orders or gross misconduct and in such circumstances where his dismissal would be warranted or sanctioned by Muhammadan Law [though the word before the phrase 'in such circumstances' in Exhibit 34 is 'and' and not 'or,' the context and the terms of Exhibit 45 (*a*) show that "and" is a mistake for 'or']. Thus, the Prince of Arcot, so far as the plaintiff's grandfather was concerned, restricted his own unfettered powers of removal of that particular *mutwalli* and agreed that he personally can be removed only for wilful disobedience of legal orders, etc. I am not at all sure that the Prince of Arcot gave up his usual absolute right to remove the *mutwalli* after the plaintiff's grandfather's death and to curtail his powers of dismissal to the case of wilful disobedience of lawful orders etc., or gross misconduct in the case of the plaintiff's father. I do not see anything in the *sannads* of appointment granted to the plaintiff and to the plaintiff's father (Exhibits 3 and 2 respectively) which restricts the said absolute discretion of the Prince of Arcot. In Exhibit 41 the plaintiff's father admitted that he held the *mutwalli* office "at the pleasure and under the orders of the founder of the endowment, His Highness the Prince of Arcot, and that he cannot even grant a lease of the land belonging to the mosque for a term of even five years." The plaintiff in the agreement (Exhibit A) signed by him agreed to obey His Highness the Prince of Arcot in all matters in every way. I might here state that in 1890 [see Exhibit 49 (*a*)] the Government recognised the Prince's power to nominate anybody at any time and to terminate the appointment of one nominee, whenever the Prince desired, by making another nomination. I do not say that the order or the opinion of the Government is binding upon this Court except as regards the right to receive the *jagir* incomes, but it shows that the Prince of Arcot has always asserted his right and his right was accepted by everybody including the Government and the plaintiff's ancestors, except during the period of the litigation between the plaintiff's grandfather and the then Prince of Arcot which ended in the Prince's restricting his

powers of dismissal as regards the plaintiff's grandfather personally. My conclusion, therefore, is that so far as the plaintiff is concerned, the Prince of Arcot had the absolute power to dismiss him from the office.

Supposing that I am wrong in this view and that the Prince of Arcot can dismiss the plaintiff only on one of the grounds mentioned in the *razinamah* (Exhibit 34), I agree with the learned trial Judge that the plaintiff was guilty of gross misconduct and wilful disobedience of legal orders. It is clear from the evidence that the plaintiff did not allow the Prince's nominee (to whom the plaintiff had given a Power-of-Attorney) to collect the rents of the shops attached to the mosques from June 1912, that the plaintiff did not submit accounts of his collections from about May 1912, that from July 1912 he collected the income of Ismail Kuppam also preventing the Prince's nominee from collecting such income and that his conduct was continuously contumacious towards the Prince for about four months till he was dismissed in September 1912 (Exhibit G). The Muhammadan Law says that a *mutwalli* can be removed for incompetence and the removal from office of the plaintiff, who was a minor till after this suit was brought, who says in his evidence that he did not keep any accounts and who tried to make himself a sort of idiot in the evidence according to the learned trial Judge, was, in my opinion, not improper. Admittedly the plaintiff did not send accounts from May 1912. In his evidence he was asked "why did you not send the accounts?" His answer was "They were not sent." He was again asked "you cannot give any explanation." His answer was "I cannot." It is also clear from the plaint in this suit and from the lawyer's notice, Exhibit D, sent by him in July 1912, that he meant to defy the authority of the Prince of Arcot. While I do not think that the letter (Exhibit 43) written by the plaintiff in July 1912 is so very disrespectful or impertinent as the learned trial Judge seems to have considered it to be (on the other hand I am disposed to think that there is no want of respect at all in the terms of the letter), I think that the conduct of the plaintiff in dismissing the Prince's deputy in breach of the conditions of the plaintiff's appointment and in patent defiance of the Prince, his deliberate omission to submit accounts and the other circumstances mentioned by the learned trial Judge justify the dismissal of the plaintiff, especially as, in my opinion, he was not a *mutwalli* in the full sense of the term but was a sort of special agent of the real superintendent, the Prince of Arcot.

Lastly, I must notice one point which is relied on by each side as in its favour. The plaintiff contended that the agreement, Exhibit A, in which he practically acknowledged the Prince of Arcot to be the real *mutwalli* and himself to be a nominal *mutwalli* with very restricted powers, is not binding upon him because he was a minor when he executed it. It is unnecessary for me to give a final opinion on this question as I have held, apart from the agreement, that the Prince had full powers of appointment and dismissal. On the other side the Prince of Arcot (the 1st defendant) relied upon the plaintiff's minority in support of his contention that the appointment itself of the plaintiff was invalid because a minor cannot be appointed as *mutwalli* under the Muhammadan Law. The reply of the plaintiff to this contention was that though he was a minor under the Indian Majority Act, he was a major under the Muhammadan Law and the Indian Majority Act would not affect the religion or religious rites or usages of any class. (Section 2, clause (*b*) of the Indian Majority Act) I was at first inclined to think that as the office of *mutwalli* can be held by a woman or even by a non-Moslem, the age of majority for the holding of such an office is not a question connected with the religion or religious rites and usages of the Mussalmans and hence the age of majority for the holding of such an office should be 18. But it appears from the evidence of the defence first witness himself that there are some religious duties connected with the office of *mutawalli* in these mosques and I am not, therefore, free from doubt on this point.

I might in conclusion add that as regards the right of the plaintiff to receive the Government Revenue granted as *jagir* to nominees of His Highness the Prince of Arcot, the Government's orders are conclusive in respect of the said right and without a certificate from the proper officer

of Government a Civil Court cannot take cognisance of the claim relating to the said land revenue grants. (See sections 4 and 6 of the Pensions Act, XXIII of 1871.)

In the result I would dismiss the appeal with costs.

NAPIER, J.—This appeal arises out of a suit brought by one Mahomed Kadir Mohideen Sahib Maghirbi (by his next friend) against the Prince of Arcot and one Mahomed Abdur Raheman Sahib, sued as an attendant on the 1st defendant, for a declaration that the plaintiff is the lawful *mutwalli* of the plaint mosques and of the endowments attached thereto and is entitled to collect the rents and profits of the plaint properties and to manage the mosques and that the alleged appointment of the 2nd defendant as *mutwalli* is *ultra vires* and for an injunction to restrain them from both collecting the rents and profits of the plaint properties or in any way interfering with the management of the plaint mosques.

The basis of the plaintiff's claim is that he succeeded to the office of *mutwalli* on the 28th December 1911 in accordance with the Will of his father, the previous *mutwalli*, dated the 16th November 1911. He further contended that the 1st defendant had no power to remove the plaintiff from the office, that being hereditary in the plaintiff's family. He admitted that he had signed an agreement on the 28th December 1911, and a Power-of-Attorney dated 20th January 1912, limiting his powers, but alleged that as he was a minor at that time these documents were not binding on him and further that they were obtained by fraud and undue influence of the 1st defendant. Issues were framed on these allegations and a further issue, whether the 1st defendant was entitled on the terms of the agreement to remove the plaintiff from the office, was also framed.

Two of the allegations in the plaint are contradictory; for if, as strenuously argued in appeal, a *mutwalli* has the right to appoint his successor, it is obvious that the office cannot be hereditary; but for reasons which will be given later I do not propose to deal with that question. The basis of the plaintiff's claim is that the office of *mutwalli* is a *waqf*, that it is created by a document called a *parwanah*, that although a *waqif* has power to reserve to himself and his descendants the right to appoint and dismiss and to impose conditions, the original *parwanah* under which the first *mutwalli* was appointed contained no such limitations and that, therefore, he cannot be disturbed in his possession of the office. He puts forward three documents, Exhibits U, W and Y, as the original *parwanahs* and points to the absence of any conditions in them and contends that any variation of these *parwanahs* is *ultra vires* and not binding on him. This argument is based on an entire misconception of the nature of the documents Exhibits U, W and Y. Their true nature appears from an examination of the history of this office and its endowments. It has been elaborately examined by the Chief Justice, then Mr. Justice Wallis, who tried this case *vide* his judgment pages 21 to 30 of the printed record. The office must have been created about the year 1792, because the Wallajah Mosque was not built till then. At that time the Nawab of Carnatic created the office, appointed the *mutwalli* and endowed the mosque. The documents Exhibits U, W and Y are not *parwanahs* appointing the *mutwalli*, but are at the highest assignments of revenue for the endorsement of the office. I say at the highest, because it may be that there were other formal *inam*-deeds addressed to the *mutwalli*. These documents are *takeeds* or orders issued to the revenue officials. The first document, Exhibit U, directs the payment of the *youmia* (allowance) to the *mutwalli* and is dated 1792. Exhibit W (1797) is another direction to the revenue officers to leave the whole of the *mouza* of Ismail Kuppam in the possession of the *mutwalli* so that he might apply the income thereof towards the expenditure of the said mosque; while Exhibit Y (dated 26th November 1798) is a similar direction with regard to the *mouza* of Shayanavaram to be left in possession of the *mutwalli*, so that he might use the income thereof towards his maintenance and "engage himself in performing the duties of the *mutwalli*." It is possible that these are the only documents assigning the revenue, for Mr. Devadoss has invited our attention to documents of a similar nature in Atkinson's Treatise which were treated as the title-deeds

to certain *jagirs*. The fallacy of the argument lies, however, in supposing that there are the deeds of appointment of *mutwalli*. They are nothing of the sort. It is not to be expected that the conditions on which the *mutwalli* held his office would be found in these directions to the revenue officials, who are simply concerned with the proper disposal of the revenues accruing from their charge. The evidence to be referred to later shows clearly what the form of the *parwanah* was.

But perusing the history of the endowment the next stage is after the treaty of 1801, under which the sovereignty of the Carnatic passed to the Crown. Exhibit 9 is an order passed by Government on the 3rd April 1802 to the Collector, stating that the Governor-in-Council having resolved to restore the lands with which the mosque was endowed directs the Collector "to restore to the servants of His Highness the Nawab the villages of Ismail Kuppam and Shayanavaram." This document indicates two things; (1) that Government had resumed the *inams*; (2) that Government decided to restore them. Of the right of Government to resume there cannot be a shadow of doubt. First it was an assignment of the public revenues and it is sufficient to say that the whole work of the *Inam* Commissioner in the middle of the last century consisted of deciding what assignments of public revenues and public lands were to be continued and what were to be resumed. Further there is the decision of the Privy Council in the well-known case of *East India Co.* v. *Syed Ally* (2) that a resumption by the Madras Government of a *jagir* granted by former Nawabs before the date of the treaty and a re-grant by the Madras Government to another for the life-estate only was such an act of sovereign power by the East India Company as precluded the Supreme Court of Madras from taking cognizance of a suit by the heirs of the alleged grantee in respect of such resumption. That was a still stronger case for the grantee because the grant was one of lands and villages, not of revenue. The right is undoubted and I only refer to the case because the learned Counsel for the appellant did not appear to appreciate the distinction between a grant of an *inam* of revenue from a Government order which might or might not be *ultra vires*.

It is to be noted that the form of this *inam* approximates closely to that of Exhibits W and Y, in that it is a direction to the revenue officials and not a title-deed issued to the grantee. Exhibit 10 is a document in the same form drawn up in 1804, granting the *jagir* of Shyanavaram to the then *mutawalli*, though not named as such, for life subject to certain Police duties. It is dated 1804, but nothing evidently was done on this document until 1816 when the Collector endeavoured to enforce it. The Nawab instantly wrote Exhibit 12 on the 11th October 1816 to the Government agent inviting the attention of Government to this, stating that the office of *mutwalli* was not confined to the same person but that he was liable to be removed and succeeded by another, the appointment of whom rested invariably with His Highness; and asks that the villages should be allowed to remain as usual under His Highness's authority. Six years later the Nawab wrote again stating that the *mutwalli* had died and forwarded a copy of his letter, Exhibit 12, asking that the two villages should continue as usual for the maintenance of the mosques and the maintenance of the *mutwalli*, the letters being Exhibits 14 and 16. In reply he was informed (Exhibit 17) that the Collector had been instructed to enter the two villages in his *inam* register as an endowment for the mosques to be administered by the then incumbent "so long as he shall retain the situation of the *mutwalli* of the said mosques under the orders of His Highness the Nawab of Carnatic." Exhibit 18 is the order of Government to the Collector in the same words. This order operates as a cancellation of Exhibit 10 and a definition of the terms under which the servants of His Highness were to hold the *inam* granted by the Government under Exhibit 9. The right of Government to do this cannot be disputed. Fifty years later in the year 1872, the Prince of Arcot again raised the question of the form of the *inam* and asked that it should be varied by inserting his own name as *inamdar* in the place of the *mutwalli*, on the ground that the affairs of the mosque were being conducted in a very unsatisfactory manner (Exhibit 22 A). The *Inam* Commissioner in dealing with the application pointed out that in 1822 it had been decided by the Government that the *mutwalli* was entirely dependent

on the Nawab's favour and approval, and recommended the issue of a *sannad* in the form asked for, *vide* Exhibit 22. But the Government, by general order dated 25th October 1872, decided not to issue the *sannad* in the name of the Prince of Arcot, but recognising the force of the Prince's objections to the form cancelled the old *sannads* and ordered their re-issue in another form stating that "by this means the intention of His Highness will be effected and the endowments will follow the nomination of the Prince of Arcot for the time being."

Exhibits 24 and 25 are the new *inam* title-deeds. They are in the usual form of religious service *inam* of Government revenue and contain the paragraph: "This *inam* is conferred on you and your successors tax free to be held without interference as long as the conditions of the grant are duly fulfilled." They are stated to be "granted to the *mutwalli* for the time being" of the mosques "by nomination of His Highness the Prince of Arcot." These title-deeds were sent not to the *mutwalli*, but to the Prince of Arcot and were delivered to the then *mutwalli* with an endorsement by the Prince which runs as follows: "This title-deed is delivered to Khitabuth Khan to be retained by him as long as he holds the service of the *mutwalli* of the Anwari and Wallajah Mosques under the orders of his Highness the Prince of Arcot for the time being." These are the *inam* title-deeds under which the *mutwalli* draws the Government Revenue of those two villages for the maintenance of the mosques and for his own support. For the reasons given above it is clear that the Government had the right to vary the terms of this *inam* from time to time as it thought fit and that no one but the *mutwalli* for the time being nominated by the Prince of Arcot could draw the revenues. This being the history of the *inam*, it is clear that the grants were always silent as to any conditions which the Prince of Arcot attached to the nomination, but they certainly indicate that the appointment was at his entire discretion. This view is supported by reference to an entirely different class of documents. These are the *parwanahs*; and it is the appellant's case that the *parwanahs* were nothing but formal approval by the Nawab of an appointment which was either hereditary or testamentary—the appellant not being clear as to which of these two positions he would take up.

It has been pointed above that Exhibits U and W and Y are not *parwanahs*. We have, therefore, to ascertain from the *parwanahs* that have been exhibited and from the usage during the hundred years of the existence what those conditions were of this office. Now, the first thing to be borne in mind is that this is not a *waqf* created by a private person but is one created by the Sovereign; and it is in the highest degree improbable that the Sovereign, in appointing to an office of a mosque which was admittedly his own property and the title to which has been confined to him personally by Government on two occasions (by Exhibits 11 and 20), should have deprived himself of the power to keep the office under his own control. That any Court of law during the continuance of that sovereignty would venture to question any act of His Highness is a suggestion to my mind quite out of the question. But I agree that since the reduction of the Sovereign to the status of a private person it is open to the Courts of this country to enquire into the conditions and adjudicate on them.

The first *parwanah* filed is Exhibit 13, dated 8th May 1824. It states that the office was conferred upon the then holder as per petition signed by him and requires him to utilise the income for the mosques and repairs and to file accounts in the office of the *sircar*. This is with reference to the *mouza* of Ismail Kuppam. Exhibit 19, likewise issued on a petition, directs him to utilise the income of the *mouza* of Shayanavaram for his maintenance and to perform the duties of *mutwalli* for the mosques. The petition has not been produced. The next *parwanahs* are of the year 1872, Exhibits 26 and 46 (*a*). Then again the office of *mutwalli* is conferred on a petition from the applicant; he is required to do his duties in adherence to the commandments of the law of Islam and "in obedience to and submission to us and to our successors." Exhibit 23 purports to be a copy of the petition to the Prince, but we have held it to be inadmissible. The nature of the petition, however, is apparent from the following fact. These *parwanahs* were granted on the 29th November 1872. Exhibits 24 and 25 above referred to are the

inam title-deeds, dated 2nd November 1872, which were sent to the Prince. They bear endorsement of the 29th November as follows: "This title-deed is delivered to Kitabuth Khan to be retained by him as long as he holds the service of *mutwalli* of the Anwari and Wallajah Mosques under the orders of His Highness the Prince of Arcot for the time being." There can be no doubt, therefore, that Kitabuth Khan petitioned the Prince for the appointment and undertook to obey his orders, recognising the right of His Highness to nominate him and his own right only to hold the office as nominee for the time being. The next is Exhibit 47 which is dated 17th December 1888. This contains an additional clause that the *mutwalli* should pay the income of the *mouza* of Ismail Kuppam into the office of the superintendent of the mosques. It recites a petition of the 2nd August 1888 and the *razinamah* in a suit, dated 16th October 1888. It also recites that Kitabuth Khan had been suspended and that in consequence of the petition and the *razinamah* he was again allowed to remain, as he was, undisturbed subject to his being faithful to the conditions and terms mentioned in the petition and the *razinamah*. The petition is not produced but the *razinamah* is Exhibit 34. It is full of onerous conditions and paragraphs 11 and 12 recognise his right to the office as long as he would duly and faithfully perform the duties and is not guilty of wilful disobedience of legal orders or gross misconduct, and his liability to dismissal in case of wilful disobedience of legal orders or gross misconduct. The last *parwanahs* are Exhibits 2 and 3 under which the plaintiff was appointed. They appoint him as *mutwalli* as long as he performs the duty with perfect straightforwardness "carrying out our orders and those of our successors." They require him to deliver the collections of the income of the village of Ismail Kuppam to the office and to draw the amount required for the salaries from the office, and like all the others are given on the conditions recorded in the applicant's petition; they further purport to be on conditions of his abiding himself by the agreement of the 15th June 1894 and make a special provision under which he is to give a Power-of-Attorney to the person, this latter provision being due to his extreme youth. The agreement is Exhibit A of the 28th December 1911. The petition, Exhibit L, is dated 27th December 1911. In the latter he applies for the *parwanah* after giving an agreement and undertaking to obey the "illustrious royal persons." The agreement contains all the conditions referred to above together with several others.

Now, what is the inference to be drawn from these documents? The original *parwanahs* of 1792 are not produced. The later *parwanahs* contain conditions limiting the rights of the *mutwalli*, conditions which become more detailed in each successive *parwanah*. These *parwanahs* are all granted on petitions and the later ones are specifically stated to be on terms of agreement. An effort was made between the years 1881—1888 by the *mutwalli* to assert the right, which is put forward here, by a suit in the High Court. That suit was compromised on the terms that appear in the *razinamah* decree and amount to a complete submission to the Prince of Arcot. The Prince has invariably claimed in correspondence with the Government, that the office is subject to his disposal. Mr. Chamier has argued that those letters were written behind the back of the *mutwalli* and could not, therefore, be used against him. If there was nothing but these letters, that argument would have considerable force. But seeing that every *mutwalli* has accepted the position claimed by the Prince, I can only arrive at one conclusion, namely, that by the original *parwanah*, which has not been produced, the Nawab reserved to himself an absolute right of appointment and dismissal—a right which would be in entire accordance with his position as a Sovereign Prince.

I do not think it necessary to go into the evidence as to breach of the conditions of service. But I entirely agree with the learned Judge who tried the case that there has been a breach. I was at one time inclined to think that the breach was not wilful. But on further examination of the evidence as to what occurred and bearing in mind the attempt by the predecessor of the plaintiff to establish his right to do the very thing which the plaintiff has done and also the

attitude taken up by the plaintiff through his Vakil before the suit and the claim put forward in the plaint, I have no doubt that his action was due to a desire to assert his right which he claims in the suit. For the above reasons I am of opinion that the appeal fails and must be dismissed with costs. In this view of the case, I think it unnecessary to express any opinion on the many other questions raised during the argument, namely, the limitations that can be attached to a *mutwalli's* office under the Muhammadan Law; the nature of succession where it is not provided for by the *waqfnamah*; the effect of the plaintiff's minority and his position if he was not nominated, and last the effect of the Pensions Act on the suit. These questions would require among other matters a very careful examination of the provisions of the Muhammadan Law which I do not find it necessary to make for the disposal of this case.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 941 OF 1913.

February 19, 1915.

Present:—Mr. Justice Batchelor.

TIMANGOWDA VENKANGOWDA—PLAINTIFF—APPELLANT

versus

BENEPGOWDA CHHENAPGOWDA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Contract of sale unregistered, whether creates interest—Possession delivered, effect of—Suit for possession—Contract, if can be pleaded—Interpretation of Statute—Express words of Statute, whether overriden by equitable principles.

Under section 54 of the Transfer of Property Act, a contract of sale, followed by delivery of possession, does not, when there is no registered sale, create any interest in the property agreed to be sold, and therefore, cannot even if enforceable at the date of suit or decree, be pleaded in defence to an action for ejectment by a person having a legal title to recover. [p. 947, col. 1.]

The express words of an Indian Statute are not to be overriden by reference to equitable principles which may have been adopted in the English Courts. [p. 947, col. 1.]

Second appeal from the decision of the District Judge of Bijapur, in Appeal No. 49 of 1912, amending the decree passed by the Additional Subordinate Judge at Bagalkot, in Civil Suit No. 227 of 1910.

Mr. *P. D. Bhide*, for the Appellant.

Mr. *K. H. Kelkar*, for the Respondents.

JUDGMENT.—The facts upon which this appeal has to be decided lie within very small compass, and may be briefly stated. The plaintiff sued to recover possession of a house, and admittedly he purchased that house from the defendants under a registered sale-deed. But the defendants are still in possession, and the contesting defendant, that is the 1st defendant, met the plaintiff's claim with the plea that the defendant was entitled to retain possession, because the plaintiff had agreed to re-convey the house to the defendant on payment of Rs. 400, and this sum of Rs. 400 had been paid. The finding of fact of the lower Appellate Court is, however, that the Rs. 400 have not been paid so that in the defendant's favour there is this circumstance, and nothing more, that the plaintiff is found to have agreed to re-convey, on payment of Rs. 400. In this state of the facts the learned District Judge has made a decree directing that the plaintiff is entitled to recover possession of the house if, and only if, the defendant fails to pay him Rs. 400 within a period of three months. The decree provides further that if that payment is made within the time limited, then the defendant is entitled to retain possession.

The question of law raised in these circumstances is whether, on the findings stated, the agreement by the plaintiff to re-convey to the defendant can be pleaded in bar of the plaintiff's present right to recover possession of the house under his purchase. If that question had to be decided on grounds of general principles, or by reference to equitable doctrines, much might be said in favour of the decree which the District Judge has made, for we are, for the purposes of the present argument, entitled to assume that the plaintiff would have no answer to a suit brought by the defendant for specific performance, and upon that assumption it would seem that the District Judge's decree operates to effect speedy and complete justice between the parties. But the question, as it seems to me, is not open to be decided on any such broad principles, but is concluded by the express words of the Statute governing such

transactions. That is, section 54 of the Transfer of Property Act. That section lays down that "a contract for the sale of immoveable property does not, of itself, create any interest in or charge on such property." And it is clear that if these words are to be read strictly, there is no defence to the plaintiff's suit in this case. The exact question now under consideration occurred in Madras, and was fully considered by a Full Bench of that High Court in *Kurri Veerareddi* v. *Kurri Bapireddi* (1), where the learned Judges adopted the strict interpretation of this paragraph of section 54, and held that a contract of sale, followed by delivery of possession, does not, when there is no registered sale, create any interest in the property agreed to be sold, and cannot, even if enforceable at the date of suit or decree, be pleaded in defence to an action for ejectment by a person having a legal title to recover. I have studied the judgments which the learned Judges delivered in this case, and no good purpose would be served by any attempt to repeat the arguments which were there used. It is enough for me to say that I follow this ruling, not only because it is a ruling of a Full Bench, but because my own opinion is in entire agreement, both with the decision come to and with the reasoning upon which that decision is grounded. It will be observed that the judgments of Sir Arnold White and Mr. Justice Subrahmania Ayyar deal with the apparent difficulty caused by the decision of the Privy Council in *Immadipattam Tirugnana* v. *Periya Dorasami* (2), and I agree in the construction there placed upon the language used by their Lordships of the Judicial Committee. The judgments of the learned Judges of the Madras High Court contain, as it seems to me, convincing arguments for the view that the express words of an Indian Statute are not to be overridden by reference to equitable principles which may have been adopted in the English Courts; and I find that since the Madras case was decided, further authority for this view has been supplied by a later decision of the Privy Council. I refer to the case of *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* (3), which, as the judgments of the High Court show, was a strong case for the application of equitable principles, if recourse could ever be had to such principles for the purpose of qualifying the clear words of the Indian Statute. But their Lordships of the Privy Council held fast to the exact terms of section 130, sub-section 1, of the Transfer of Property Act, and, in reversing this Court's decision, observed that the error arose from the learned Judges not having appreciated that the proceedings under that section precluded the application in India of the principles of English Law on which they based their decision.

It appears to me, therefore, that the proper decision of this appeal is to hold that there is no escape from the plain language of section 54 of the Transfer of Property Act, and that, in consequence, the lower Appellate Court's decree must be reversed. There is not, so far as I am aware, any Indian decision which is in conflict with the ruling in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) and the case of *Karalia Nanubhai* v. *Mansukhram* (4), on which Mr. Kelkar relied for the defendants, is distinguishable, inasmuch as in that case the Court had before it, not only the agreement, coupled with possession, but the fact of the payment of the whole of the purchase money. I cannot, therefore, regard the Bombay decision as modifying or casting doubt upon the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (1).

For these reasons, I reverse the decree of the District Court, and make a decree as prayed for by the plaintiff. The plaintiff must have his costs in this Court, and there will be no order as to any other costs. The amount of mesne profits will be determined in execution.

Decree reversed.

(1) 29 M. 336; 1 M. L. T. 153 (F. B.); 16 M. L. J. 395.

(2) 28 I. A. 46 (P. C.); 5 C. W. N. 217; 24 M

(3) 17 Ind. Cas. 627; 15 Bom. L. R. 9; 37 B. 198; (1912) M. W. N. 1247; 12 M. L. T. 652; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 17 C. L. J. 162; 40 I. A. 24.

(4) 2 Bom. L. R. 220; 24 B. 400.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 170 OF 1914.

February 26, 1915.

Present:—Mr. Justice Chamier.

Musammat FAKHRAN—APPLICANT

versus

RAJAB ALI KHAN AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Attaching creditor, right of, to have sale set aside.

A decree-holder who attaches a property before it is put to sale at auction, is not entitled to get the sale set aside under Order XXI, rule 89, of the Code of Civil Procedure.

Civil revision against an order of the District Judge of Shahjahanpur, dated the 4th May 1914.

FACTS.—The petitioner as attaching creditor put in an application under Order XXI, rule 89, Civil Procedure Code, for setting aside a sale. The Courts below held that she had no right to apply.

The petitioner applied to the High Court in revision.

Mr. *Lakshmi Narayan*, for the Applicant:—Under the present Code of Civil Procedure, "any person holding an interest in the property by virtue of a title acquired before the sale" can apply under Order XXI, rule 89, to have the sale set aside. Under the former Code of Civil Procedure the right was limited to the owner of the property only. The change in the law clearly suggests that other persons who do not 'own' the property have a right to apply. An attaching creditor is certainly a person 'holding an interest in the property.' He has been held to be entitled to redeem the property in certain cases. The word 'title' means nothing more than a claim to a certain right and it cannot connote ownership merely. If that were so, the change in the law would be meaningless.

Moti Lal v. *Karrab-ul-din* (1) and *Kedar Nath Sen* v. *Uma Charan* (2) are against me, but these cases were decided when the former Code was in force and consequently they do not apply to the present case.

Mr. *Hameedullah*, for the Opposite Party, was not heard in reply.

JUDGMENT.—I doubt whether this application for revision is maintainable at all; but assuming that it is maintainable I think it should be dismissed on the merits. Certain property was sold in execution of a decree. The applicant had attached the property before the sale took place and after the sale she made an application under Order XXI, rule 89, to have the sale set aside. The Courts below have held that she is not a person who is entitled to ask the Court to set aside the sale. It is admitted that she does not own the property. The only question is whether she has any interest in it by virtue of any title acquired before the sale within the meaning of Order XXI, rule 89. A person who has attached property may for some purposes be regarded as having an interest in it; for example, it has been held that an attaching creditor is entitled to redeem mortgaged property. But what is required to entitle the present applicant to ask the Court to set aside a sale under rule 89 is an interest in the property by virtue of a title acquired before the sale. The applicant has acquired no title whatever to the property. I, therefore, hold that she is not a person who has an interest in the property by virtue of a title acquired before the sale within the meaning of rule 89 and, therefore, she is not entitled to ask the Court to set the sale aside. The application is dismissed with costs.

Application dismissed.

(1) 25 C. 179; 24 I. A. 170; 1 C. W. N. 639.
(2) 6 C. W. N. 57.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATIONS Nos. 279 AND 280 OF 1914.

March 9, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

CHHAGANLAL HIMATLAL AND OTHERS—APPLICANTS

versus

THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXV, r. 5—Interpleader suit—Agent—Railway Company accepting goods for carriage, whether agent of consignor.

A Railway Company by accepting goods for carriage does not become an agent of the consignor within the meaning of Order XXXV, rule 5 of the Civil Procedure Code, 1908, and can file an interpleader suit against the consignor and any party claiming adversely to the consignor. [p. 949, col. 1.]

Civil Extraordinary Applications Nos. 279 and 280 of 1914, from the decision of the District Judge of Surat, in Miscellaneous Appeals Nos. 5 and 4 of 1913, confirming the orders passed by the first Class Subordinate Judge at Surat, in Civil Suits Nos. 224 and 225 of 1911.

Mr. *Coyaji* (with him Mr. *N. K. Mehta*), for the Applicants.

Mr. *Indranarayan Brijmohanlall*, for the Railway Company.

JUDGMENT.—The only point urged in these applications by way of objection to the decision of the lower Appellate Court is that, in virtue of Order XXXV, rule 5 of the Civil Procedure Code, it was not competent to the Railway Company to institute an interpleader suit as it was an agent of the consignors. No authority has been cited in support of the proposition that the Railway Company by accepting goods for carriage becomes an agent of the consignors within the meaning of this rule. We do not think that the provisions of the Indian Railways Act and the Indian Contract Act lend any colour to such a contention; on the contrary, they indicate that by accepting the goods the Company enters into an independent contract with the consignors for the carriage of the goods.

The result, therefore, is that the Rules must be discharged with costs.

Rules discharged.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 241 OF 1913.

March 6, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

JUGGI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

KISHEN LAL AND OTHERS—PLAINTIFF AND ANOTHER DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 60—Suit to recover money deposited with firm—Limitation—Time runs from demand.

A suit to recover money deposited on interest with a firm is governed by Article 60 of the Limitation Act and the time runs from the date of demand. [p. 951, col. 1.]

Dharam Das v. *Ganga Devi*, 29 A. 773; 4 A. L J. 628; A. W. N. (1907) 263, referred to.

First appeal from the decision of the Subordinate Judge of Cawnpore, dated the 21st April 1912.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Gulzari Lal*), for the Appellants.

Messrs. *B E. O'Conor*, *W. Wallach* and *Shiam Krishna Dar*, for the Respondents.

JUDGMENT.—This is an appeal by one set of defendants as against the plaintiff and the second set of defendants and arises out of a suit for the recovery of money brought in the following circumstances.

The plaintiff's father used to deposit sums of money on interest with the firm of Baij Nath-Ram Nath until his death in August 1897. He left him surviving his widow and the plaintiff, his son, who was then a minor and who at the date of the present suit in 1912 was about 19½ years old. Payments of various sums on account were made by the firm to the plaintiff's mother from time to time up to the year 1905.

In this year the firm of Baij Nath-Ram Nath which was a joint family concern, split up into two firms, owing to a separation of the family. These two new firms were Baij Nath-Juggi Lal, represented by the present appellants, and Baldeo Das-Kedar Nath, represented by the second set of defendants-respondents.

The two branches divided up not only their properties but also their liabilities. Each of the new firms took over those liabilities which were due to relations more closely connected to it than to the other firm. For this reason the second set of defendants took over the liability for the debt due to the plaintiff, inasmuch as the plaintiff's father's sister was the wife of Kedar Nath. The defendant Murli Dhar *alias* Mul Chand (of the second set) is the son of Kedar Nath and he has in clear terms admitted that his branch took over this liability.

It is also a fact that after the partition a number of payments were made to the plaintiff's mother and they were all made by the branch firm of Baldeo Das-Kedar Nath. When the plaintiff came of age (eighteen years), he asked for payment of the amount standing to his credit. Both branches refused payment to the present appellants, stating that they were no longer liable and the plaintiff

must seek his remedy against the second set of defendants.

The plaintiff has accordingly sued both sets of defendants.

The pleas raised in defence by the present appellants with which we are now concerned in this appeal were three in number, no others having been pressed before us.

The first was that at the time of the separation the liability in question was taken over by the second set of defendants and the plaintiff's mother expressly consented to this and agreed to look to Baldeo Das-Kedar-Nath for payment. The plaintiff is bound by this consent and the appellants are no longer liable for the money. The next is that the suit is barred by limitation. The third is that the appellants are entitled to set off a sum of money about Rs. 5,100.

The Subordinate Judge held as follows:—

(1) that the evidence was insufficient to prove the alleged consent of the mother,

(2) that the suit was not barred by limitation,

(3) that the defendants had failed to prove that any sum as mentioned was due from the firm of Jodh Ram Chunni Lal, for which the plaintiff's father was liable and which the appellants were entitled to debit to the account of the plaintiff.

It repelled the other defences and gave the plaintiff a decree for the sum of Rs. 13,231-10-3 with future interest and costs.

The above three pleas are again pressed before us.

Taking first the question of the mother's alleged consent and assuming that it would be binding if proved on the plaintiff, we find ourselves unable to hold that the evidence establishes beyond reasonable doubt that the mother actually came to such an agreement as is contemplated in section 62 of the Contract Act.

The only evidence is the statement of Lala Juggi Lal alone and the fact that after the separation whatever payments were made to the mother were made by Murli Dhar. Murli Dhar states openly that as between his branch and the appellants the former alone is liable if the suit be not barred by limitation, but he denied that the plaintiff's mother was a party to the agreement between the two branches. Lala Juggi Lal's evidence is too vague and wanting in detail to carry conviction to our minds that the widow gave any intelligent consent to the agreement. We doubt very much that she could have understood the legal effect thereof and she at the most probably merely did as she was told to do, in going to Murli Dhar for money. The alleged novation is not proved.

The next question is that of limitation. It is urged that under Article 59 of the Act of 1877, the present claim had become time-barred before the present Act had come into force and that under the ruling of this Court in *Dharam Das* v. *Ganga Devi* (1), Article 59 of the Act of 1877 applied to the circumstances of this case.

The firm of Baij Nath-Ram Nath did banking business and the plaintiff's father deposited his money with them on the condition that interest would be payable and that the banker would re-pay the money on demand. Article 59 of the Act of 1877 applied to the case of money lent under an agreement that it shall be payable on demand. Article 60 referred to the case of money deposited "under an agreement that it shall be payable on demand."

The basis of the decision in *Dharam Das* v. *Ganga Devi* (1) was that the ordinary dealings between a native banker and his customers are in the nature of loans made by the latter to the former.

In the course of their judgment the learned Judges said:—"It is far from easy to say to what class of cases the Legislature meant Article 60 to apply. It may apply to the transactions between a banker and his customers known as 'fixed deposits' or it may apply only to deposits of money made with a private person."

They pointed to the conflict of authority on the question and referred to an unreported decision in First Appeal No 96 of 1882, decided on 4th April 1885, as a guide and held that Article 59 applied. Personally we have doubts as to the correctness of the decision.

Article 60 was a new Article and appeared for the first time in the Act of 1877 and drew a distinction between money "*lent*" and

(1) 29 A. 773; 4 A. L. J. 628; A. W. N. (1907) 263.

money "*deposited*" under an agreement that it shall be payable on demand. In the one case the time began to run from the date of the loan and in the other case from the date of the demand. It seems to us that it was necessary to see in each case whether in fact the transaction was a loan or what in ordinary banking language is known as a "deposit." It does not suffice to say that a deposit is in the nature of a loan. Every deposit, fixed or otherwise, is in the nature of a loan in a banking concern but the Legislature, it seems to us, clearly wished to draw a distinction between the ordinary loan and that class of loan usually known as a deposit, when it introduced Article 60 for the first time. None of the parties to this suit have called the present transaction a loan. They all speak of it as a deposit in the usual banking sense and it can easily be distinguished from an ordinary loan. However it is apparent that there was considerable conflict of opinion. The various cases are noted in the judgment in *Dharam Das* v. *Ganga Devi* (1). The Limitation Act of 1877 has now been replaced by the Act IX of 1908 and it is evident from the addition made therein to the language of Article 60, that the Legislature had before it this conflict of opinion and to make its intention clear and remove the doubt, added the words "including money of a customer in the hands of his banker so payable" to Article (60). In our opinion this was no alteration of the law, but only language used to make clear the real intention of the Legislature when in 1877 it for the first time enacted Article 60. The Legislature having thus stepped in and made its meaning clear, there is no necessity for us to refer the point for decision of a larger Bench.

We, therefore, hold that Article 60 does apply. Time began to run from the date of the demand and as the suit was brought within three years thereof, there is no bar of limitation in favour of either set of defendants.

The third plea is that the defendants are entitled to deduct the sum of about Rs. 5,100. which was due from the firm of Jodhraj-Chunni Lal. The story is that the plaintiff's father Ram Chandra, when he deposited money with Ram Nath-Baij Nath, was in the employment of the firm of Jodhraj-Chunni Lal, that the two firms began to deal with each other and Ram Chandra agreed that his money should be security for any sum which might fall due to Ram Nath-Baij Nath from Jodhraj-Chunni Lal and that any such sum should be deducted when the money of Ram Chandra was re-paid. We agree with the Court below that the evidence on the point is most unconvincing. As a matter of fact the sum which Jodhraj-Chunni Lal owed to Ram Nath-Baij Nath was actually written off by the latter firms as a "bad debt." Ram Chandra died in 1897. At no time has the sum ever been debited to his account, as it most certainly would have been debited if he had stood surety for Jodhraj-Chunni Lal. We do not believe the story and the evidence does not convince us and we hold against the appellants. The result of our findings is that the appeal fails and we dismiss it. We award costs to the plaintiff. The second set of defendants, who are the persons really at fault in the matter, will bear their own costs of this appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 769 OF 1912.

February 26, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Rossignol.

AHMAD KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat BAKHTAWAR, PLAINTIFF, *Musammat* ZAINAB—DEFENDANT—RESPONDENTS.

Custom—Inheritance—Arains of Lahore District—Females succeeding male proprietors as heirs, extent of rights of—Suit for declaration that sale by defendant shall not affect plaintiff's reversionary right—Onus.

Among the tribe of Arains in the Lahore District the rights of females who succeed male proprietors as heirs in certain contingencies are wider than the rights possessed by females among other agricultural tribes in the Province. [p. 952, col. 2.]

Where, therefore, the plaintiff sued for a declaration that the sale by her sister shall not affect her reversionary rights in land which was inherited by both the sisters in equal shares:

Held, (1) that inasmuch as there was no express rule of custom applicable to the parties according to which both the sisters succeeded to the land merely on a life-estate analogous to the estate of a widow, it

could not be assumed that their interest was not that of a full owner; [p. 952, col. 1.]

(2) that the *onus* was on the plaintiff to prove affirmatively that she had a right to challenge the alienation made by her sister; [p. 953, col. 1.]

(3) that as the plaintiff had failed to establish that her sister was holding only a life-estate she could not get the declaration prayed for. [p. 953, col. 1.]

Chiragh Bibi v. *Hassan*, 19 P. R. 1906; 70 P. L. R. 1906, distinguished.

Maqsud-ul-nissa v. *Kaniz Zohra*, 135 P. R. 1908; 194 P. W. R. 1908, referred to.

Second appeal from the decree of the Divisional Judge, Lahore, dated the 3rd of January 1912, confirming that of the Subordinate Judge: first Class, Lahore, dated the 22nd June 1910, decreeing the claim.

Mr. *Badr-ud-Din Kureshi*, for the Appellants.

Bakhshi *Tek Chand* and Sheikh *Gulab Din*, for the Respondents.

JUDGMENT.—The following pedigree will show the relationship of the parties in this case.

FATEH DIN.

Ilahi Bakhsh.	*Musammat* Bakhtawar (plaintiff.)	*Musammat* Zainab (defendant.)

Fateh Din, who was an Arain of *Mouza* Nawankot in Tahsil Lahore, died leaving a son, Ilahi Bakhsh, and two daughters, *Musammat* Bakhtawar and *Musammat* Zainab. Ilahi Bakhsh succeeded to his father's land situate in villages Nawankot and Mozang; he died without issue, and the land was inherited by his sisters, *Musammat* Bakhtawar and *Musammat* Zainab, in equal shares. By a registered deed, dated the 7th January 1908, *Musammat* Zainab sold her half share in the land to Maula Bakhsh and Ahmad Khan, defendants. In July 1909 *Musammat* Bakhtawar brought the present suit for a declaration that the sale of half share in the land by *Musammat* Zainab shall not affect her reversionary rights after the death of *Musammat* Zainab. *Musammat* Zainab pleaded, *inter alia*, that both she and the plaintiff had succeeded to their respective shares in their brother's land as full owners and not on a life-estate; that the plaintiff had no power to object to the sale in question; and that the sale had been made for consideration and legal necessity and was, therefore, valid.

The Subordinate Judge drew four issues which arose out of the pleadings of the parties. The first two issues were, (1) "Is the plaintiff by custom a reversioner of her own sister? (2) Was *Musammat* Zainab competent to alienate her share in the joint property in suit?" As neither party stated that Ilahi Bakhsh, deceased, had left any male collaterals, it has been assumed throughout this litigation that there are no such collaterals in existence. The Subordinate Judge held that each sister had only a life-interest in the land in her possession; that on the death of each the land would devolve on the other sister as her next heir (there being no other heirs of Ilahi Bakhsh in existence); and that *Musammat* Zainab was not competent to alienate her share in the land without legal necessity. He further held that no legal necessity existed for the sale by *Musammat* Zainab. Upon these findings the Subordinate Judge decreed the plaintiff's suit.

On appeal the learned Divisional Judge held, agreeing with the Subordinate Judge, that *Musammat* Zainab's estate was not that of a full owner but analogous to that of a widow, and that there being no male collaterals of Ilahi Bakhsh in existence, the plaintiff was competent to challenge the sale made by *Musammat* Zainab of her share in the land. On these grounds the learned Divisional Judge dismissed the appeal.

In our opinion the decision of the Courts below is erroneous, and the plaintiff's suit must be dismissed. Admittedly, there is no express rule of custom applicable to the parties according to which *Musammat* Bakhtawar and *Musammat* Zainab succeeded to the land left by their brother, Ilahi Bakhsh, merely on a life-estate analogous to the estate of a widow; and in the absence of a definite rule of custom on the subject the Courts below were not justified in assuming that *Musammat* Zainab's interest in the land was not that of a full owner. It is not disputed that among the tribe of Arains in the Lahore District, to which the parties belong, the rights of females who succeed male proprietors as heirs in certain contingencies are wider than the rights possessed by females among most other agricultural tribes in this province. If Fateh Din had left no son, his daughters, *Musammat* Baktawar and *Mu-*

sammat Zainab, would have succeeded to his land to the exclusion of his male collaterals, and there is no warrant in the rules of custom applying to the parties for the position that their estate would have been analogous to that of a widow holding a mere life-interest in the inheritance of her husband. Here the two sisters succeeded their brother in their capacity as his sisters, and it is an unjustifiable assumption to hold that the estate held by each is a limited estate like that of a widow simply because they happened to be females.

If, then, the plaintiff has failed to show that the estate held by *Musammat* Zainab was merely a life-estate, it is obvious that she must prove affirmatively that she has a right to challenge the alienation made by *Musammat* Zainab, simply and solely on the ground that she (the plaintiff) would in certain contingencies succeed her sister. *Chiragh Bibi* v. *Hassan* (1), cited by the Pleader for the respondents, is not in point, inasmuch as there a daughter (among the Arains of Lahore) was held entitled to contest an alienation of her father's estate made by her step-mother, who admittedly was holding the estate on the usual widow's life-tenure. To the present case the principle laid down in *Maqsud-ul-nissa* v. *Kaniz Zohra* (2) applies, and the plaintiff cannot succeed in her present suit unless she is able to show (1) that she is in fact entitled to succeed on the death of her sister under all circumstances, and (2) that her sister was holding a limited estate resembling that of a widow. The plaintiff has certainly failed to establish the second of these two conditions and it is doubtful whether she has succeeded in establishing the first; and the Courts below were wrong in granting her the declaration prayed for. The decision of this Court in Civil Appeal No. 581 of 1898, which was referred to in argument by the respondents' Pleader, has no bearing upon this case, inasmuch as there two Arain females, who had succeeded to their father's land, had sold it and the sale was successfully objected to by the male collaterals of their father and by the son of one of the vendors. In the present case the objector is a female who does not stand on the same footing as a male agnate or as the son of vendor.

For these reasons we accept this appeal and setting aside the decree of the Divisional Judge dismiss the suit with costs throughout.

Appeal accepted.

(1) 19 R. R. 1906; 70 P. L. R. 1906.
(2) 135 P. R. 1908; 194 P. W. R. 1908.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 269 OF 1913.

March 9, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

PARSOTAM RAO TANTIA AND ANOTHER —DEFENDANTS—APPELLANTS

versus

RADHA BAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Partition, suit for—Property, specific, of members of Hindu family, managed by one member—Receipt of amounts invested by manager—Suit to recover, nature of.

N made a Will in which he divided up his property between his three sons, *R*, *V* and *P* but urged them to continue to live together in an amicable and friendly way. The property was managed by one member of the family *P*. He received the rents and profits of the immoveable property and invested them in the ordinary course of business. He had invested a considerable sum of money in Railway Debentures and more than three years after he received the money from Government in redemption of the Debentures, the widow of a son of one of the brothers claimed to be put into possession of a third of specific portions of the property:

Held, that the suit was in reality a suit for partition of the moveable and immoveable property and was governed by Article 120 of Schedule I of the the Limitation Act. [p. 955, col. 1.]

First appeal from the decision of the Subordinate Judge of Cawnpore.

Dr. *S. C. Banerji*, for the Appellants.

The Hon'ble Mr. *Moti Lal Nehru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit which related to property which at one time belonged to a man named Nana Narayan Rao. We do not for the moment specify the exact nature of the suit, inasmuch as our decision upon a law point raised by the appellants depends to some extent upon the view we take of the nature of the suit. Nana Narayan Rao made a Will in which he divided up his property between his three sons, Ram

Chander Rao, Vasudeva Rao and the defendant, Parsotam Rao Tantia. Whilst dividing up the property he urged his family to continue to live together in an amicable and friendly way. There has been a good deal of litigation between the members of this family. In the first place a suit was brought by Ram Chander Rao, which was continued after his death in the name of his widow, Janki Bai. Partition of the family property, or so much of it as had not already been divided by the Will, was claimed. Madho Rao and Parsotam Rao were defendants to that suit. It was pleaded by way of defence that the family constituted a joint Hindu family and that *Musammat* Janki as the widow of Ram Chander had no right to anything save maintenance. It was decided that the family was separate. Again Parsotam Rao brought a suit against Radha Bai (the present plaintiff), widow of Madho Rao, after the death of the latter for a declaration that the family was joint and that the widow, Radha Bai, had no interest. It was again decided that the family was separate. In the present suit the defendant, Parsotam Rao, pleads once more that the family is joint. In our opinion on the evidence and also as the result of the previous litigation, we entirely agree with the decision of the Court below that Ram Chander Rao, Vasudeva Rao and Parsotam Rao, the three sons of Nana Narayan Rao, did not constitute a joint Hindu family according to Hindu Law, in that they had specific shares in the property. Neverthless while the family was in law separate, in many respects it differed very little from a joint Hindu family. So long as the three brothers lived they appear to have been on friendly terms, and it was only shortly before the death of Ram Chander that he brought a suit for partition. The Court below has found, and we entirely agree with its finding, that the greater part, if not the whole of the property, was managed by one member of the family, who occupied the position of a manager. The family nevertheless was separate, because notwithstanding the mode of enjoyment and management they were entitled to the property in specific shares. When the present suit was instituted there had already been a considerable amount of litigation and the Courts had held that the family was not joint, and in bringing her present suit the plaintiff has claimed to be put into possession of a third of specific portions of the property. Amongst the items of property claimed was the sum of Rs. 69,790-8-8. This claim was in respect of certain debentures in the Cawnpore-Achnera State Railway. It appears that the defendant, Parsotam Rao, had invested the joint funds in debentures in this Railway. In course of time Government paid off the debentures at a substantial premium and the money was received by the defendant. The Court below decided in the first place that the family was separate. It has given the plaintiff a decree for partition of a portion of the immoveable property and also for the sum of Rs. 69,790-8-8 mentioned above. It has made also a decree in respect of other items to which it is unnecessary specifically to refer at present. Agreeing as we do with the Court below the plaintiff was clearly entitled to partition, and in this respect we have no hesitation in saying that the decree of the Court below ought to be affirmed.

The appellants have contended very strongly that the Court below ought not to have made a decree in the plaintiff's favour for the sum of Rs. 69,790-8-8, on the ground that her claim in that respect was barred by limitation. The money was paid over to the defendant on or before June 1908 and the present suit was not instituted until the 2nd of April 1909, that is to say, more than three years after the money was received by the defendant. The appellants accordingly contend that the plaintiff's claim in respect of the item was a claim for "money had and received for the use of the plaintiff" within the meaning of Article 62 of Schedule I of the Limitation Act. The way in which the plaintiff claimed this sum lends some colour to this contention, and had the present suit been a suit simply to recover this sum of money upon the allegation that the plaintiff was entitled to one-third of the debentures and that all the redemption money had been paid to Parsotam as the person in whose name the debentures stood, we might have been inclined to agree with the contention of the defendant that the claim came within the purview

of Article 62 and that the suit ought to have been brought within three years. Reading, however, the plaint as a whole, and having regard to the nature of the evidence and the defence, we think that the suit was in reality a suit for partition of the moveable and immoveable property which had been held by the three brothers and in which the plaintiff's husband had a third share. We have already pointed out that the property was managed by one member of the family. He appears to have received the rents and profits of the immoveable property and to have invested and dealt with their money-making investments in the ordinary course of business. When he received the money from Government in redemption of the debentures, he still received it in his capacity of manager. When we speak of manager, we do not mean the managing member of a joint Hindu family but the individual to whom this particular family entrusted the management of their affairs. In this view we think that the suit was a suit governed by Article 120, which provides a period of six years' limitation for all suits not specifically provided for by the other Articles in the Schedule.

There was one other item to which Dr. Banerji specifically called our attention, namely the *dera* (or collection house) in this village, Lalpur. Dr. Banerji contends on behalf of his clients that while the village of Lalpur was specifically bequeated to the plaintiff's husband, nevertheless as collections generally of several of the villages were made at this house, it must be regarded as joint property and should have been partitioned. The learned Subordinate Judge considers that the provisions of the Will ought to be given effect to, which specifically gave the village of Lalpur to the plaintiff, and that this house ought to be regarded as an appurtenant of that village. We see no reason to differ from the view taken by the learned Subordinate Judge. On full consideration of the entire case, we think the decree of the Court below ought to be affirmed in its entirety. We accordingly dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 802 OF 1913.

January 4, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

A. KRISHNASWAMI AIYANGAR—PLAINTIFF—PETITIONER

versus

P. K. POOVANNA NADAR—DEFENDANT—RESPONDENT.

Accounts, suit for—Relationship of parties—Jurisdiction.

A suit is for accounts only when the relationship of parties is such that one is bound to render accounts to the other.

Chidrie Kristappa v. *Siddamsetti Yamanappa*, 13 Ind. Cas.159; 11 M. L. T. 13; (1912) M. W. N. 36; *Varadarajulu Chettiar* v. *Pattra Narayanaswamy Chetty*, 20 Ind. Cas. 518; 14 M. L. T. 46; (1913) M. W. N. 879; 24 M.L. J. 693, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Tiruvalur, dated 15th July 1913, in Small Cause Suit No. 452 of 1913.

Mr. *C. Krishnachariar*, for the Appellant.

Mr. *G. S. Rama Chandra Aiyar*, for the Respondent.

JUDGMENT.—I am clear that the suit as brought is not a suit for an account. It is only "where the relationship of the parties is such that one of them is bound to render accounts to the other" that the suit can come under the category of suits for account. [See *Chidrie Kristappa* v. *Siddamsetti Yamanappa* (1) quoted with approval in *Varadarajulu Chettiar* v. *Pattra Narayanaswamy Chetty* (2)].

The District Munsif's order returning the plaint cannot be supported. I reverse it and remand the case for disposal according to law. The respondent must pay the costs of this petition to the petitioner. Other costs will abide.

Petition allowed; Suit remanded.

(1) 13 Ind. Cas. 159; 11 M. L. T. 13; (1912) M. W. N. 36.

(2) 20 Ind. Cas. 518;24 M. L. J. 693; 14 M. L. T. 46; (1913) M. W. N. 879.

PALANIANDI MALAVARAYAN *v.* VADAMALAI ODAYAN.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 277 TO 279 OF 1914.

March 25, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PALANIANDI MALAVARAYAN—PLAINTIFF—APPELLANT

versus

VADAMALAI ODAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Permanent occupancy—Uniform rate of rent for 80 years—Presumption.

Long possession for a period of 80 years at a uniform rate of rent raises a clear presumption of a permanent right of occupancy.

Veeranan Ambatam v. *Annasawmi Iyer*, 12 Ind. Cas. 1; 10 M. L. T. 185; (1911) 2 M. W. N. 162; 21 M. L. J. 845; *Nilratan Mandal* v. *Ismail Khan*, 32 C. 51; 31 I. A. 149; 8 C. W. N. 895, followed.

Second appeals against the decrees of the District Court of Tanjore, in Appeal Suits Nos. 937, 938 and 939 of 1909, preferred against those of the Court of the District Munsif of Tanjore, in Original Suits Nos. 326, 327 and 328 of 1908, respectively.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Messrs. *V. C. Seshachariar* and *P. S. Vaidyanatha Aiyar*, for the Respondents.

JUDGMENT.—There is much force in the contention of the appellant's learned Vakil that the observations in *Veeranan Ambalam* v. *Annasawmi Iyer* (1) as regards burden of proof in such cases are not reconcilable with the dictum of the Privy Council in *Nilratan Mandal* v. *Ismail Khan* (2). But on the facts found in this case including the long possession for 80 years at an uniform or almost an uniform rate of rent by the tenants, the lower Courts were entitled to find that the tenants have a permanent right of occupancy (see the above Privy Council case), and we must accept that finding of facts.

No question of forfeiture by denial of the landlord's title before suit arises in these cases on the facts found.

The second appeals are dismissed with costs.

Appeals dismissed.

(1) 12 Ind. Cas. 1; 10 M. L. T. 185; (1911) 2 M. W. N. 162; 21 M. L. J. 845.

(2) 32 C. 51; 31 I. A. 149; 8 C. W. N. 895.

KUPPU RAO *v.* NARASIER.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 260 OF 1914.

March 10, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

KUPPU RAO—DEFENDANT—APPELLANT

versus

NARASIER—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 7—Cook, whether domestic servant—Suit to recover wages—Limitation.

A cook is a domestic servant although he may be an expert in cooking, and a suit by him to recover wages due is governed by Article 7 of Schedule I of the Limitation Act, 1908.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Tyabji, dated 20th March 1914, in Civil Revision Petition No. 433 of 1913, presented against the decree of the Court of the District Munsif of Dharmapuri, in Small Cause Suit No. 1055 of 1912.

Mr. *P. R. Narayanasamy Aiyar*, for the Appellant.

Mr. *T. Pattabiramier*, for the Respondent.

JUDGMENT.—We excuse the delay in the presentation of the appeal.

For the claim as stated in the plaint, Article 7 of the Limitation Act, Schedule I, applies as ordinarily the wages will be payable the next month after it accrues due. A cook is a domestic servant, although he may be an expert in cooking. Therefore, there is no necessity for resort to the residuary Article 102 of the Limitation Act, Schedule I. We doubt whether this Article is applicable to the case. It is for the plaintiff to prove how this bar of limitation is saved. It may be that the time for payment of the wages was agreed to be at a later date, or there is some acknowledgment. The plaint vaguely refers to an agreement, but as the Munsif has not recorded any evidence, we think it desirable to give the plaintiff an opportunity of proving circumstances which would take away the bar of limitation.

The decree of the Munsif is reversed and the suit is remanded to him for disposal. We make no order as to costs in this Court.

Petition allowed; Suit remanded.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 3601 OF 1914.

January 6, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

In re PARAMASIVAM PILLAI—PETITIONER.

Civil Procedure Code (Act V of 1908), *O. XLIV, r.* 1—*Appeal* in forma pauperis—*Applicant, right of, to be heard—Court, power of.*

An applicant applying for permission to appeal against a decree *in forma pauperis* is not entitled to be heard in person or by Pleader before the Court exercises its power to allow or reject the application.

Sakubai v. *Ganpat Ramkrishna*, 28 B. 451 at pp. 452, 453; 6 Bom. L. R. 442, followed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to allow the petitioner to appeal *in forma pauperis* against the decree of the District Court of Coimbatore, in Appeal Suit No. 145 of 1914, preferred against that of the Court of the Subordinate Judge of Ootacammand in Original Suit No. 87 of 1912.

Mr. *G. S. Rama Chandra Aiyar*, for the Petitioner.

ORDER.—There is no provision in the Civil Procedure Code which gives any right to the petitioner to be heard before the Court exercises its power to allow or reject an application to be permitted to appeal as a pauper. On the other hand the proviso to Order XLIV, rule 1, of the Civil Procedure Code clearly enacts that the Court should peruse the application and the judgment and decree appealed from and unless upon such perusal (and I take it to mean, upon such perusal without the perusal being supplemented by argument on petitioner's side), the Court sees reason to think that the decree is contrary to law, the Court shall reject the application. Even if it sees reason to think that the decree is contrary to law, the Court under the first paragraph of Order XLIV, rule 1, "may" allow the application, the use of the word "may" indicating that the Court has the power not to allow the application even in such a case. In *Sakubai* v. *Ganpat Ramkrishna* (1) . Jenkins, C. J., says: "That proviso" (the proviso to section 592 old Civil Procedure Code corresponding to Order XLIV, rule 1) "is a very necessary safeguard introduced by the Legislature for the benefit of litigants who find themselves opposed by paupers.....It is to be noticed that the Court must come to its conclusion upon a perusal only of the application, the judgment and the decree. This proviso is apt to be overlooked," etc.

(1) 28 B. 451 at pp. 452, 453; 6 Bom. L. R. 442.

I, therefore, declined to hear Mr. G. S. Rama Chandra Aiyar who wished to be heard on the application.

After perusing the pauper application and the judgment and decree of the District Court, I hold that this is not a fit case to allow the petitioner's application to file and conduct a second appeal as a pauper. I, therefore, reject the application. I give four weeks' time to the petitioner to pay the necessary Court-fee on the memorandum of second appeal. If the Court-fee is not paid, the second appeal will stand rejected.

Application dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1814 OF 1912.

October 29, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Shadi Lal.

GOBIND RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BASHESHAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Custom—Kucha *Dalo—Lahore City.*

The custom of pre-emption prevails in *Kucha* Dalo, Lahore City, irrespective of the fact that it is called Wachhowali or Kanjar Phala. [p. 959, col. 1.]

Second appeal from the decree of the Divisional Judge, Lahore, dated the 15th of August 1912, reversing that of the Subordinate Judge, First Class, Lahore, dated the 20th January 1912, decreeing plaintiff's claim.

Mr. *Jai Gopal Sethi* (for Mr. *C. Bevan Petman*), for the Appellants.

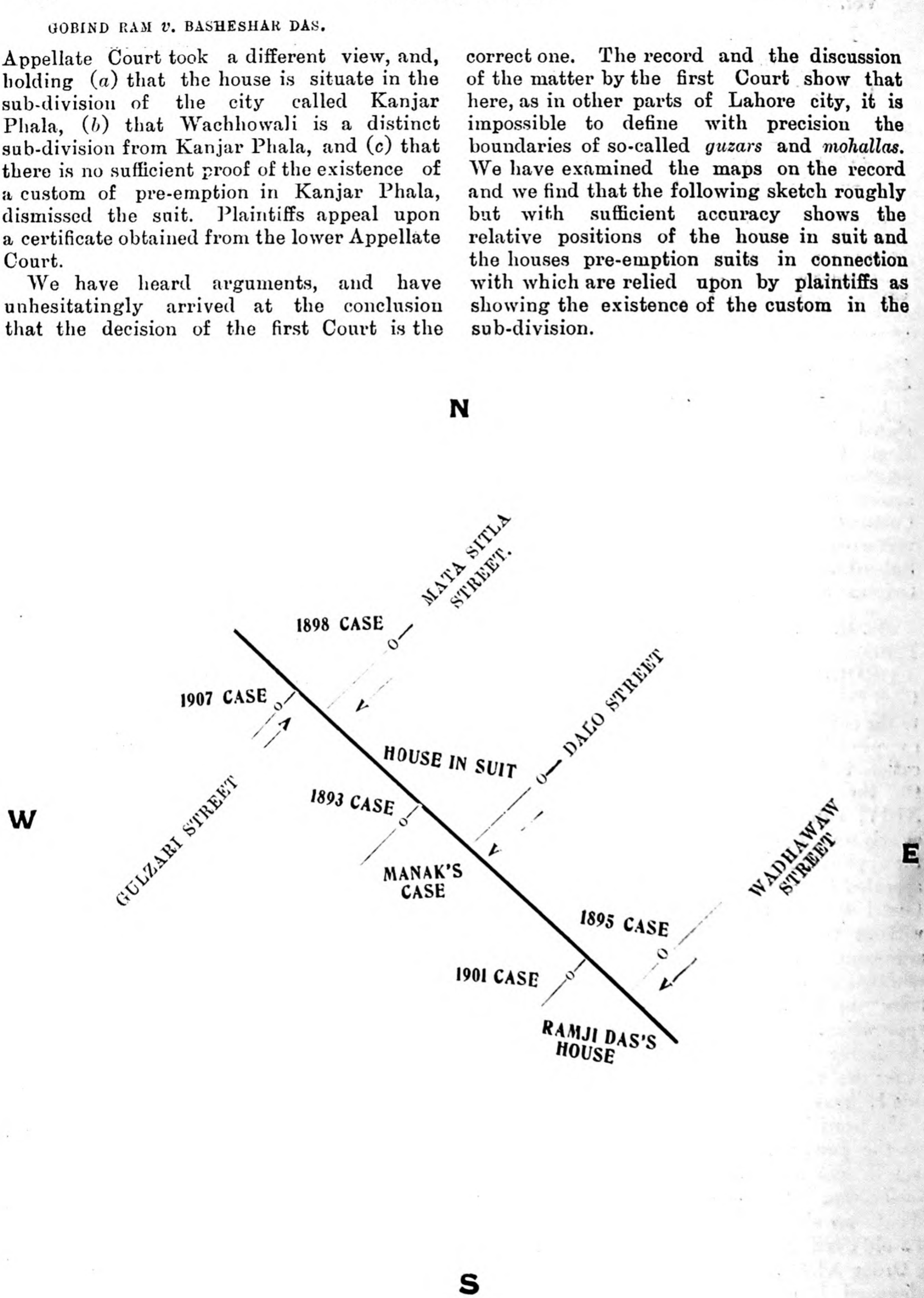
Rai Bahadur Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—A house has been sold in *Kucha* Dalo in the City of Lahore and the sole question for us is, whether the sale can by law be made the subject of a pre-emption suit. The first Court answered this question in the affirmative and gave a decree; but the lower

GOBIND RAM *v.* BASHESHAR DAS.

Appellate Court took a different view, and, holding (*a*) that the house is situate in the sub-division of the city called Kanjar Phala, (*b*) that Wachhowali is a distinct sub-division from Kanjar Phala, and (*c*) that there is no sufficient proof of the existence of a custom of pre-emption in Kanjar Phala, dismissed the suit. Plaintiffs appeal upon a certificate obtained from the lower Appellate Court.

We have heard arguments, and have unhesitatingly arrived at the conclusion that the decision of the first Court is the correct one. The record and the discussion of the matter by the first Court show that here, as in other parts of Lahore city, it is impossible to define with precision the boundaries of so-called *guzars* and *mohallas*. We have examined the maps on the record and we find that the following sketch roughly but with sufficient accuracy shows the relative positions of the house in suit and the houses pre-emption suits in connection with which are relied upon by plaintiffs as showing the existence of the custom in the sub-division.



[In the 1901 case there was a somewhat ambiguous finding, but the claim was rejected really, because it was held that no sale took place at all. There are really no precedents on the other side.]

The long street running N. W.—S. E. is Kanjar Phala street, though a good deal of it towards the N. W. is apparently treated now as in Wachhowali, a region to the north. In all the above cases, with the doubtful exception of the 1901 case, it was found that a custom of pre-emption prevailed. The arrows in the above sketch show that all the instances not actually on Kanjar Phala street are at least on offshoots of that main street, and in these circumstances it seems to us that we must find in favour of the plaintiffs. The instances are sufficiently numerous and are clear enough; and it is admitted that in Wachhowali the custom of pre-emption does prevail. Whether Wachhowali is a part of Kanjar Phala or *vice versa*, or whether they are distinct we think that in a case like this, in which it is impossible to say where Wachhowali and Kanjar Phala begin and end, the fact of the existence of the custom in the former is a strong point in plaintiffs' favour.

Mr. Sheo Narain, when asked by us which of the cases shown in the above sketch are inside and which outside of the sub-division containing the house in suit, was unable to make any definite allegation. Mr. Jai Gopal, on the other hand stoutly maintains that all are inside that sub-division, and in the absence of all indication as to where we are to draw the line of demarcation, we are disposed to agree with him.

Mr. Sheo Narain refers us to rulings such as *Kishen Singh* v. *Jai Kishen Das* (1) and *Ilahi Bakhsh* v. *Miran Bakhsh* (2), but we think it is better to decide each case on its own merits. The above seems to us the common-sense way of dealing with the case. We are unable to give a definite *name* to the sub-division in which the house in suit is situate, but we find that in that region of the city, whether it be called Wachhowali or Kanjar Phala the custom of pre-emption undoubtedly prevails.

For these reasons we accept the appeal, set aside the judgment and decree of the lower Appellate Court, restore the decree of the first Court and direct that the contesting defendants do pay plaintiffs' costs throughout. The plaintiff must pay the price and the cost of improvement, *minus* the costs of suit, within sixty days from the date of this decree. If the sum specified above is not so paid, the suit shall stand dismissed with costs.

Appeal accepted.

(1) 2 P. R. 1903; 53 P. L. R. 1903.
(2) 68 P. R. 1906; 123 P. L. R. 1906.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 52 OF 1914.

March 22, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

S. NAMBERUMAL CHETTY—DEFENDANT—APPELLANT

versus

PASUMARTY KANNIA CHETTY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Will—Terms approved by testator—Document need not be read at the time of signing—Sound disposin mind.

Where the testator approves of the terms embodied by his legal adviser in the final Will, it is not necessary that it should be read out to him when he affixes his signature to it. [p. 961, col. 1.]

Venkata Ragavulu v. *Baggiammal*, 14 Ind. Cas. 550; 23 M. L. J. 54, followed.

It is necessary for the validity of a Will that the testator should have a sound disposing mind, that is, sufficient capacity to deal with and appreciate the various dispositions of property to which he is about to affix his signature. [p. 962, col. 1.]

Appeal from the decree of the Hon'ble Mr. Justice Bakewell, dated 13th March 1914, in Ordinary Original Testamentary Jurisdiction of the High Court in Testamentary Original Suit No. 14 of 1913.

FACTS.—One Audikesavulu Chetty died in Madras, leaving a Will giving several legacies.

Messrs. Venkatasubba Rao and Radhakrishnayya, High Court Vakils, drafted the Will after embodying the instructions given by the testator in a memorandum kept by them. The provisions were copied into a document and when the testator signed the document, it was not read out to him. When

Probate of the Will was applied for, it was objected to on the ground that the testator was not in a sound and disposing state of mind at the time of the execution of the Will and, therefore, the Will was invalid.

Bakewell, J., held that the testimony of Messrs. Venkatasubba Rao and Radhakrishnayya was enough to show that the testator was in a sound state of mind at the time of execution and accordingly granted Probate for the Will, disallowing the contentions of the caveator.

Mr. *T. R. Venkatarama Sastriar*, for the Appellant.

Messrs. *Venkatasubba Rao* and *Radhakrishnayya*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The caveator-defendant is the appellant. The respondents are the two executors mentioned in the Will of the late K. Audikesavulu Chetty who died in George Town, Madras, on 21st July 1913 at about 10 P. M. The Will is dated 20th July 1913. The Probate was granted to the respondents by the trial Judge on the following findings: (*a*) that the testator actively approved of the draft Will, (Exhibit C); (*b*) that he signed the fair copy, Exhibit A, with the intention of making his Will and (*c*) that he was of sound and disposing mind both when he approved of the draft and when he signed the Will.

The contention in appeal is that he was not of a sound and disposing state of mind when the draft (Exhibit C) was read out to him, and when the fair Will (Exhibit A) was signed by him and that, therefore, the Will, Exhibit A, was not his last Will and testament.

As regards the testator's approval of the terms embodied in Exhibit C, four witnesses have been examined on the plaintiffs' side. The first witness is a Vakil of this Court of some standing and had been the testator's legal adviser for about ten years before the testator's death. He says "Exhibit C was read out to the testator at 3-30 P. M. On several topics we had discussions. He quite understood it. I spoke to the testator and he answered my questions. He was not sleepy or drowsy." (The memorandum of the notes of the evidence omits the word 'not' by inadvertence in the last sentence as also in two other places in the notes as we ascertained from the learned trial Judge.) "I heard his voice well and could understand what he said. He understood the Will."

The next witness is Mr. Radhakrishna Aiyar, who is another practising Vakil of this Court. He proves that the testator was of sound mind, that there was a discussion with the testator before the terms were finally settled, that the draft (Exhibit C) was fully read over to the testator, that there were alterations made in it at the testator's instance, that the testator understood perfectly that he was making his Will and disposing of his property and that he was even anxious to do so. The evidence of these two respectable witnesses is corroborated by the memorandum which they prudently prepared on the date of the Will (See the memo. (Exhibit D). The draft Will (B) given to them by the testator at about 9-30 A. M. on that day to be their guide in the preparation of the Will differs, no doubt, in several details from the final draft (C), but Exhibit D shows that the testator's instructions were taken as regards many of the alterations and the evidence of the plaintiffs' witnesses Nos. 1, 2 and 4 almost conclusively shows that the final draft (C) was fully understood in all its details by the testator and approved of by him before it was fair-copied as Exhibit A. Mr. T. R. Venkatarama Sastriar, for the appellant, argued that the memorandum (D) does not explain 8 or 9 of the differences between the terms of disposition in Exhibits B and C. As regards most of these differences none of the three witnesses for the plaintiff above-mentioned was cross-examined, and as they are positive that the terms of Exhibit C were fully understood and approved by the testator while he was of sound and disposing mind and as it appears from the evidence that the plaintiffs' witnesses Nos. 1 and 4 were going from the upstairs room of the testator's house to the downstairs room for consultation on doubtful points with the testator (who was lying ill in bed downstairs) while the draft (Exhibit C) was being prepared, I do not think that the evidence of these witnesses is, in any way, weakened

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by their not having voluntarily expanded their statements by declaring expressly that these differences in some matters of detail between Exhibits B and C were also known to the testator and were approved of by him. Another respectable witness, Parthasarathy Chetty (plaintiffs' 3rd witness), who attested the Will also speaks to the testator having been of sound and disposing mind at the time of the execution of Exhibit A. I think the evidence on the plaintiff's side is very strong, especially as the defendant admits the fact of the execution of the Will and he does not venture to state in his evidence that the testator was not of sound and disposing mind when he executed the Will. On the other hand he said in cross-examination:—"If I am allowed to join in the application for Probate and admitted as a partner in the business, I have no objection to the Will." The testator not only signed the Will (Exhibit A) at the end, but also initialled at the bottom of every folio.

As regards the evidence of the quack doctor (D. W. No. 3) he is clearly a perjured witness, as he had admitted in Exhibit F, a letter written by him about three months after the execution of the Will, that the testator was able to clearly express his thoughts in the matter of the powers of the trustees, etc., whereas in his evidence he had the hardihood to say that the testator was, for all practical purposes, unconscious when he signed the Will. Some stress was laid on the statement of Mr. Venkatasubba Rao in his evidence that the testator did not hear the Will, Exhibit A, read out before he signed it, though he had approved of the draft, Exhibit C. The judgment of Sir Arnold White, C. J., in *Venkata Rangavulu* v. *Baggiammal* (1) shows that if the testator had approved of the terms embodied by his legal adviser in the final Will, it is not necessary that those terms as so embodied in the final Will should even have been present in his mind when he signed the final Will. The *caveat* put in by the appellant was clearly frivolous and vexatious and I would dismiss the appeal with costs.

NAPIER, J.—I entirely agree. In my opinion when the case came on for trial it was found to be practically undefended. The defence there consisted in two allegations; one, that certain clauses were not known to the notice of or approved by the testator, and the other, that the testator was not of a sound and disposing mind. The caveator in his evidence as the 2nd witness for the defence made no attempt to support either of these allegations. The 3rd witness for the defence, who has been characterized as a perjured witness by my learned brother, endeavoured to support the second allegation, but his evidence was worthless.

The memorandum of appeal contains a fresh charge of fraud against the friends of the deceased and the legal gentlemen who prepared the Will. But this contention obviously could not be put forward at this stage.

The denial that the document was the Will of the testator in that some of its provisions were not known to him, was not pressed at the hearing for some reason which is not apparent to me. But the learned Vakil for the appellant sought to establish that the testator was not of a disposing mind by pointing out differences between the old draft Will, Exhibit B, given by the deceased to the Vakils as the basis to work on and the final draft, Exhibit C, and by arguing that the testator did not know of the alterations. I am clear that this argument is not open to the appellant on this plea. It raises an entirely different defence expressly abandoned. The question whether the testator was of a sound and disposing mind is one which goes to his capacity to understand, and not to the fact whether certain provisions were or were not assented to by him. In *Shunmugaroya Mudaliar* v. *Manikka Mudaliar* (2) Boddam, J., in a case where the defence was that the testator was not of a sound and disposing mind, stated the law as follows:—"In these circumstances I have to be satisfied that the state of mind of the deceased man at the time the Will was executed was such that he was capable of making the Will propounded." The case having gone to the Privy Council, the Board stated that the learned Judge correctly laid down for his own guidance the essentials of a sound and disposing mind. In Halsbury's Laws of England, Volume 28, paragraph 1047, the proposition is stated as follows:—"It is necessary for

(1) 14 Ind. Cas. 550; 23 M. L. J. 54.

(2) 32 M. 400; 3 Ind. Cas. 799; 11 Bom. L. R. 1206 (P. C.); 10 C. L. J. 276; 6 M. L. T. 304.

the validity of a Will that the testator should be of sound mind, memory and understanding, words which time out of mind have been held to mean sound, disposing mind and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature." Those are the limits within which the evidence on such an issue as this must be confined; and it was not, therefore, in my opinion, open to the appellant to criticize the evidence for the purpose of showing that in fact some provisions were not explained to the testator. The capacity of the testator's mind is amply established by the evidence of the plaintiffs' 1st witness, the Vakil who drew the Will; for he speaks to having discussed several provisions with the testator and having made several alterations at the testators's request. This evidence stands uncontradicted and is, in my opinion, conclusive.

I, therefore, agree with my learned brother that this appeal should be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 928 OF 1914.

March 8, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

GAJADHAR—DEFENDANT—APPELLANT

versus

KISHORI LAL—PLAINTIFF—RESPONDENT.

Easements Act (V of 1882), ss. 33, 35—Easement, disturbance of—Injunction — Damages — Disturbance, substantial or trivial—Construction completed pending suit, effect of.

In case of disturbance of an easement, ordinarily the plaintiff is entitled to an injunction rather than to damages. It is open to the plaintiff to be content with damages but under section 35 of the Easements Act he is not entitled to an injunction except in such cases where he would be entitled to recover damages under Chapter IX of the Act. [p. 965, col. 1.]

Section 33 of the Act allows compensation to be recovered for the disturbance of an easement provided that the disturbance has actually caused substantial damage to the plaintiff. [p. 965, col. 1.]

De Minimus non curat lex:—The law does not concern itself with a disturbance which is trivial or immaterial. [p. 965, col. 2.]

Where the plaintiff comes into Court at once when the disturbance of his easement is threatened and the defendant completes his construction pending the suit, he does so at his own peril. [p. 965, col. 2.]

Second appeal from a decree of the Second Additional Judge of Aligarh.

The Hon'ble Dr. *Sundar Lal*, for the Appellant.

Dr. *Satish Chandra Banerji* (with him The Hon'ble Mr. *Motilal Nehru*, Messrs. *Gulzari Lal*, *Sarat Chandra Chaudhri*, *Girdhari Lal* and *Peare Lal Banerji*), for the Respondent.

JUDGMENT.—The facts of this case are as follows:—The parties are next door neighbours, residing in two adjoining houses owned by them at Aligarh. They are of the same caste (Vaish Agarwal), the plaintiff being a member of the local Bar. Considering the trivial nature of the suit and the circumstances of the case it is evident that they are both obstinate, unreasonable men, for the matter in dispute is one that with the exercise of a little common sense and reason could and ought to be settled in a very few minutes. Their houses as pointed out adjoin. The ground level of the plaintiff's house is considerably higher than that of the defendant's. The former's house is to the west of that of the latter. Originally neither house had an upper storey.

The eastern portion of the plaintiff's house with which we are concerned consists of two parallel rooms with a double verandah on the western side. The eastern of the two rooms opens into the other room which in turn opens into the verandah.

The only apertures in the former of these two rooms, whereby light and air can be admitted to it, are (1) the doorway or doorways leading into the second room and two very narrow small slits (called *roshandans* and said to be 8 inches high by 4 inches wide) in the eastern wall, situated just below the roof and overlooking the roof of the defendant's house.

The room as a consequence is very dark, so dark that it is impossible to read. It has been used so far as a store-room for grain etc. The other room is used for the storing of the apparel, etc., of the ladies of the household. Sometimes in the hot weather the ladies use this second room for the purpose presumably of escaping from the glare and heat of the oriental sun. Furthermore the rain water, which falls on the plaintiff's roof, had a mode

of escape through two *parnalas* on the eastern side, *i. e.*, through two holes in the parapet and thence down the side of the wall apparently on to the defendant's roof.

About 14 years ago the defendant built an upper storey to his house and this led to a dispute, as the plaintiff naturally wished to retain his right to light and air through the two slits or *roshandans* and also his right to discharge the rain water through the *parnalas*. A suit was brought and a compromise effected. The compromise is on the record. It was agreed that the defendant should so build that the roof of his upper storey should be at least six inches below the bottom level of the two slits and that he should not build a "*madgari*" or parapet on his roof adjoining the plaintiff's wall (the word used in vernacular is "*mulhik*"). The object of these stipulations about the "*madgari*" and the level of the roof was obviously to prevent the two *roshandans* from being blocked up and to prevent the rain water, which flows off the plaintiff's roof on to that of the defendant, from going through the *roshandans* into the plaintiff's room.

The defendant has now done three things. (1) He has put a new window in the north wall of his upper storey.

(2) He has built a new room with a wall 17 feet high on the roof of his upper storey. The western wall of his room is parallel to the eastern wall of the plaintiff's house and at a distance of 10 feet from it. Both the eastern and western walls of this new room have large openings blocked with iron gratings.

(3) He has raised the roof of his upper storey about six inches between the plaintiff's wall and the western wall of his new room; so that it is now on the same level as the lower edges of the two *roshandans*; but he has left a small drain six inches deep up against the plaintiff's wall (and parallel to it) and this he has continued along the side of his own roof so as to lead the rain water away into his own compound. The present suit was brought by the plaintiff when the new constructions were commenced, and he sought for a mandatory injunction to restrain the defendant from carrying out his intentions. He also applied for a temporary injunction pending the decision of the suit.

Apparently the raising of the roof by six inches and the opening of the new window had been completed and the new room had risen a few feet only when the Munsif went to the spot and viewed it.

The Munsif allowed the defendant to continue the building of the east, north and south walls of the new room, but forbade the building of the western wall pending the decision of the suit. He visited and examined the plaintiff's eastern room.

During the course of the suit he again inspected the premises and to see what would be the effect of the building of the western wall of the new room, he had the space, which it would occupy, filled with a *darri* and then he examined the plaintiff's room.

He found that the interference caused thereby in the supply of light through the two slits or *roshandans* was very slight indeed, *i. e.*, he found that in so far as the right to light and air through the two slits was concerned there had been no material interference with the plaintiff's physical comfort or such as to prevent him using the room as beneficially as he had been using it in the past.

He found in regard to the window that there was no invasion of the plaintiff's right of privacy.

In regard to the raising of the roof he concluded that the drain was too narrow and that the roof had been raised improperly.

He decided

(1) That there was no necessity to restrain the defendant from completing his new room and that Rs. 10 was sufficient compensation for the very slight invasion of the right to light and air.

(2) He dismissed the claim in respect to the window, holding that it had been in existence for six years before suit.

(3) He granted an injunction directing the defendant to lower the roof six inches and in addition to make a drain six inches deep in the roof after it had been so lowered and at a distance of one foot from plaintiff's wall. He decreed accordingly.

The plaintiff appealed and urged that he was entitled to an injunction in regard to the new room and also the new window. He also objected to the order as to costs. The

defendant filed objections to the award of damages and the direction as to the roof and drain.

Pending the appeal the defendants finished the construction of the room. The lower Appellate Court held as follows :—

In regard to the window, that it had been made six years before suit and there had been no invasion of the plaintiff's privacy. It, therefore, disallowed the appeal on this point.

In regard to the question of light and air through the *roshandans* it seemed to be of opinion that the building of the western wall of the new room constituted a complete obstruction of both light and air, but did not base its decision on this. It held that the building of this room even at a distance of ten feet from the plaintiff's wall was a breach of the agreement between the parties in the former litigation, that the roof of the defendant's house was to be kept six inches below the level of the *roshandans*. That agreement or compromise was embodied in the decree in the former litigation. The Court, therefore, held that the defendant had no right to build a room anywhere on his roof at any distance whatsoever from the plaintiff's wall and as he had completed it during the suit, the plaintiff was entitled to a mandatory injunction for its demolition and the prevention of any such construction in the future.

In regard to the raising of the level of the roof between the new room and the plaintiff's wall, it held that the first Court's order was bad in so far as it ordered the making of so deep a drain (as it would amount to demolishing the roof) and also as to the position ordered for the drain, *i.e.*, one foot from the plaintiff's wall.

It directed that the drain should be two feet from this wall and that bricks should be put on both sides of it, but it did not lay down any depth for the drain nor can it be understood what it meant by saying that bricks should be put on both sides of the drain.

Plaintiff desires that the rain water from his roof shall be allowed to flow away on the defendant's roof in such a manner as to obviate any of it from finding its way through his wall into his room. The defendant appeals and the plaintiff has filed objections.

It is urged

(1) that the lower Appellate Court has completely misunderstood the former compromise ; that it was never intended thereby to prevent the defendant from building a second storey provided this can be done without invading the plaintiff's rights in regard to light, air and flow of water ;

(2) that there has clearly on the facts been no material invasion of any such right and the plaintiff has no cause of action ;

(3) that in any case the plaintiff is not entitled to the injunction granted and the defendant is ready to pay reasonable damages so as to enable the plaintiff to increase the area of the *roshandans* to the extent of one square foot each, as he is entitled to do under the compromise decree.

The plaintiff objects

(1) to the dismissal of his suit in regard to the window ;

(2) to the change in the order of the first Court as to the depth of the drain to be made in the defendant's roof to carry off the rain water.

Taking the objections first it, is clear that there is no force in the plea as to the window, there having been no invasion of privacy. In regard to the lower Courts' order regarding the drain, that order is not intelligible nor do we see the necessity of any drain. Under his former undertaking the defendant was not entitled to raise the roof and must maintain it at a level of six inches below the bottom level of the *roshandans*, otherwise an excessive rainfall might possibly result in water flowing through those *roshandans* into the plaintiff's room and the defendant cannot be allowed to obstruct the free flowing of the water from off his own roof in such a way as to cause or to make probable any damage to the plaintiff's house.

In regard to the appeal, we have examined the former compromise and we cannot agree that it was in the contemplation of the parties that the defendant should never at any time build on his roof at any point. The building of a second storey was not even in contemplation at that time. The defendant

was building his first storey and the agreement was that the roof thereof was to be kept six inches below the *roshandans* so as to allow the water to flow off and that no *madgari* or ridge should be built adjoining the plaintiff's wall so as to obstruct the two *roshandans*.

There is nothing to show that the defendant was to be precluded from building, provided he did not obstruct the light and air going through these two openings.

Further, to say that a wall built at a distance of 10 feet from the plaintiff's wall is a complete obstruction of these openings is absurd.

We have to see whether in the circumstances of the present case the plaintiff is entitled to an injunction and if so, to what injunction—(*a*) in regard to the right as to air and light ; (*b*) as to the flow of water.

At the commencement of the suit the plaintiff complained of a threatened disturbance only, but the defendant has since completed his constructions and it is now a case of actual disturbance or no disturbance at all.

Ordinarily the plaintiff in such cases, if he is entitled to relief, is entitled to an injunction rather than to damages. It is open to him, of course, to be content with damages, but section 35 of the Easements Act shows that he is not entitled to an injunction except in such cases where he would be entitled to recover damages under Chapter IX of the Act.

Section 33 of the Act allows compensation to be recovered for the disturbance of an easement provided that the disturbance has actually caused substantial damage to the plaintiffs. The Explanation to the section deals with the meaning of the words "substantial damage."

The Court below has not dealt with the question of substantial damage but the first Court did and the evidence is on record, and we to shorten the proceedings deal with the issue here as the evidence is on the record.

(*a*) We take first the question of light and air. We have already pointed out that the two *roshandans* are small slits which admit very small quantities of both light and air ; that the plaintiff's room has been used in the past only as a store-room being really far too dark for any other purpose. The Munsif's two inspections show that the construction of the defendant's room on the roof does not materially interfere with the plaintiff's physical comfort or prevent him using his room as beneficially as he has done in the past. As the Munsif has put it, the disturbance is "*very slight*," so slight that he thought the trivial sum of Rs. 10 would be ample compensation. We have no hesitation in holding on the evidence that the disturbance, if any, at all is trivial and not material.

"*De minimus non curat lex*." The law does not concern itself with a disturbance which is trivial or immaterial.

In regard to the easement of light and air we hold that the plaintiff is not entitled to either damages or injunction.

(*b*) In regard to the flow of water, however, the case is different. The defendant has raised the portion of his roof between the plaintiff's wall and the western wall of the new room so that it is on a level with the lower edges of the *roshandans*. It is true that he has made a drain six inches deep next to the plaintiff's wall, but it is extremely doubtful if this will suffice to carry off easily the result of an extra heavy storm. He has acted contrary to the former compromise and there is danger of some damage to the plaintiff. In our opinion there has, in this respect, been material invasion of the plaintiff's right and the appropriate relief is to grant an injunction directing the defendant to lower this portion of his roof to a level six inches below the bottom level of the *roshandans* and to so arrange that rain water falling thereon shall flow away easily through proper and adequate channels.

We have dealt with all the points in the case. It is not a case for damages, as the plaintiff came into Court at once when the disturbance was threatened and the defendant completed his structures pending the suit at his own peril.

The result is that we grant the plaintiff a mandatory injunction directing the lowering of the roof between his western wall of the new room and the plaintiff's eastern wall as laid down above.

SWAMINATHA PILLAI *v.* KRISHNA IYER.

The rest of the plaintiff's suit will stand dismissed. As he has failed in two-thirds of his suit and succeeded in one-third, the parties will receive and pay costs in all Courts in proportion to success and failure.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 426 OF 1912.

November 4, 1913.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

SWAMINATHA PILLAI—DEFENDANT No. 3—APPELLANT

versus

KRISHNA IYER AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1 AND 2—RESPONDENTS.

Mortgage—Subrogation—Earlier mortgage paid off partly by subsequent mortgagee's money and partly by mortgagor—Priority, right of, extent of.

It is not only when the person claiming subrogation discharges the entire debt that he is so entitled. [p. 966, col. 2.]

Therefore, where an earlier mortgage-debt was discharged partly by the money advanced by a subsequent mortgagee and partly by the mortgagor himself, the subsequent mortgagee is entitled to priority to the extent to which his money was applied to pay off the earlier debt. [p. 966, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 614 of 1910, preferred against that of the District Munsif of Trivadi, in Original Suit No. 65 of 1910.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.—The plaintiff sues to recover the money due under a mortgage instrument executed by the 1st defendant in 1905. The amount was advanced to discharge a mortgage-debt of Rs. 400 due to one Sivan Sivasami under a mortgage dated November 1901. The finding is that the mortgagor discharged that mortgage by paying the creditor Rs. 300 out of the amount received from the plaintiff and by the execution of a promissory note for Rs. 50 the balance, Rs. 50, having been given up by the mortgagee. The appellant claims under a mortgage dated October 1903 and contends that the plaintiff is not entitled to any priority on account of his discharge of the prior mortgage. His contention has been disallowed by the lower Courts.

It is argued before us in second appeal that though the entire mortgage-debt has been discharged, as only Rs. 300, a portion of the mortgage-debt was paid out of the money advanced by the plaintiff, and the balance Rs. 50 was paid by the mortgagor himself, he cannot claim a first charge to that extent. It is contended that it is only when the person claiming subrogation discharges the entire debt that he is so entitled. Reliance is placed in support of this contention on the cases reported in *Hanumantha Aiyan* v. *Meenatchi Naidu* (1) and *Gurudeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbehary Singh* (2).

It appears to us that this contention cannot be supported and the question is concluded by authority. In *Rupabai* v. *Audimulam* (3) the debt due to one Meenakshi Naik, the first mortgagee under a hypothecation deed (Exhibit VII), was discharged to the extent of Rs. 27,713 by the 4th defendant in that suit and the balance, which came to over a lac of rupees by the mortgagor himself, and it was argued that the 4th defendant had not, therefore, acquired any priority over an intermediate mortgagee. The learned Judges pointed out that if the whole amount lent by the 4th defendant had been applied to pay off the entire debt due under Exhibit VII, he would have priority of that charge to the full amount. Then they said: "But only Rs. 27,713 was so applied, and the question is, does that fact prevent the application of the rule above stated", and they replied: "We do not think it does." They pointed out that the hypothecation under Exhibit VII, *i.e.*, the whole charge, was released and the mortgagee after that has no hypothecation on the villages. The case according to them was, therefore, governed by the Privy Council judgment in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4) and the defendant No. 5 in that case, who had paid a part of the amount of the first charge, ranked to that extent and interest in the priority of that first charge.

(1) 12 Ind. Cas. 412; 35 M. 183; 10 M. L. T. 380; 22 M. L. J. 12; (1912) M. W. N. 158.

(2) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.

(3) 11 M. 345.

(4) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543.

The decision is thus directly in point and is not overruled by *Hanumantha Aiyan* v. *Meenatchi Naidu* (1). We see no reason to doubt its soundness. We accordingly dismiss the second appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL NO. 218 OF 1912.
January 8, 1915.
Present:—Mr. Justice Heaton and Mr. Justice Shah.
VITHAL RAMKRISHNA AND OTHERS—DEFENDANTS—APPELLANTS
versus
PRAHLAD RAMKRISHNA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—*Step-grandmother, whether entitled to share with grandsons on partition of family estate—Necessary party.*

Under the *Mitakshara* School of Hindu Law a step-grandmother is entitled to a share in the family estate on partition of the estate among her grandsons and is a necessary party to the partition suit. [p. 969, col. 2.]

First appeal from the decision of the first Class Subordinate Judge, Dhulia, in Suit No. 418 of 1909.

Mr. *Nadkarni* (with him Mr. *P. B. Shingne*), for the Appellants.

Mr. *Gadgil* (with him Mr. *B. V. Desai*), for the Respondents.

JUDGMENT.

SHAH, J.—The interesting question of Hindu Law argued in this appeal arises out of the following facts:—One Sitaram died leaving a son Ramkrishna and a widow Gangabai, the stepmother of Ramkrishna. Ramkrishna died in 1892 leaving three sons, Vithal, Vishnu and Pandharinath, by his first wife, who is dead, and two sons—Prahlad and Dinanath—by his second wife, Bai Parvati, who is alive. Prahlad and Dinanath with their mother Parvati sued the other three sons of Ramkrishna for a partition of the family estate. Among other things the defendants urged that Gangabai—their grandmother—was entitled to a share of the property, that she was a necessary party to the suit and that the property in suit was acquired by Sitaram.

The learned first Class Subordinate Judge of Dhulia held that the grandmother was not entitled to any share in the property according to Hindu Law and accordingly disallowed the objection. He decided the other issues in the suit, and passed a decree for the partition of the estate in favour of the plaintiffs. It was held that Bai Parvati was entitled to an equal share with the sons of Ramkrishna. The defendants have appealed against the decree and renewed their objection that Gangabai is a necessary party to the suit, as she is entitled to a share in the property in suit according to Hindu Law.

We have had the point argued without going into the other questions arising in this appeal. The argument has proceeded on the footing that the property in suit is ancestral family property (*i. e.*, it was ancestral in the hands of Ramkrishna), and I have considered the question of law on that basis. I say nothing as to whether the whole property in suit was ancestral in the hands of Ramkrishna in fact or not.

The question whether Gangabai is a necessary party or not depends upon the view we take of her right to a share in the family property. The point that arises is, whether a step-grandmother is entitled to a share in the family estate when it is to be partitioned among her grandsons. It is a point of first impression so far as Western India is concerned. The parties are governed by the *Mitakshara* Law.

Mr. Nadkarni, for the appellants, argues that the word *mata* used in Yajnavalkya's text (II, 123) is illustrative of a class and is not restricted to the natural mother according to its literal meaning. He relies upon the text of Vyasa, which is translated in Mandlik's Hindu Law, at page 44, as follows:—"The sonless wives of the father are declared equal sharers; and so are all paternal grandmothers declared equal to the mother." It is also urged by him that the author of the Vyavahara Mayukha is in favour of allowing a share to the grandmother in accordance with Vyasa's text, and that, in the absence of any indication to the contrary in the *Mitakshara*, the Vyavahara Mayukha should be read as supplementing the *Mitakshara* on the point.

VITHAL RAMKRISHNA *v.* PRAHLAD RAMKRISHNA.

On behalf of the respondents it is argued by Mr. Gadgil that there is no reason to attach any weight to Vyasa's text and that Nilakantha does not express any opinion in favour of that text in the Vyavahara Mayukha. He further relies upon the circumstance that there is no reported case in which the right of a grandmother to a share in the property on a partition among her grandsons is recognized in this Presidency, and argues that her right, if any, has been obsolete long since.

I have carefully considered these arguments, and though the point does not appear to me to be free from difficulty, I am of opinion that the grandmother is entitled to a share in the ancestral estate on a division thereof among her grandsons.

In the first place, Vijnaneshwara himself does not limit the word *mata* to a natural mother, but gives an extended meaning to it by including all the wives of father (*i. e.*, step-mothers also). This is clear from the words used by him in introducing this part of Yajnavalkya's text: see *Mitakshara*, Chapter I, Sec. VII, paragraph 1: Stokes' Hindu Law Books, page 397. That is how these words of Vijnaneshwara have been interpreted by this Court in determining the right of a step-mother to a share in the estate on a division thereof among the sons. I am not unmindful of the alternative reading, which substitutes the word *matuh* (of mother) for the word *patneenam* (of wives) in the latter part of the introductory words. But even the use of the word *matuh* there would make no difference in the meaning which Vijnaneshwara otherwise indicates fairly clearly.

Then comes the text of Vyasa the meaning of which is clear, and upon which the appellants naturally rely. The question is not about the meaning of the verse but about the effect to be given to it. Vijnaneshwara, in his commentary on Verses Nos. 4 and 5 of Yajnavalkya in the Achara Adhyaya, points out generally the authority of the Smriti writers, and says that as each of the Smritis is authoritative, the points not mentioned in one may be supplied from the others, but if one contradicts the other there is an option.

* * * * * *

I have stated the rule enunciated by Vijnaneshwara with the substance thereof in my own words. Yajnavalkya is silent as to the right of a grandmother, and it seems to me that Vyasa's text can be used to supplement Yajnavalkya's Smriti. Vyasa is unquestionably a Smriti-writer of authority and though we have not the advantage of reading his verse with reference to the context in the original Smriti, the full text of which is not available, there can be no doubt about the verse, which is quoted by other commentators. I do not consider it any strained application of the rule laid down by Vijnaneshwara to give effect to Vyasa's text as supplementing the rules laid down by Yajnavalkya. It seems to me that taking the *Mitakshara* by itself with the text of Vyasa, it is difficult to say that Vijnaneshwara would not allow a share to the grandmother.

This conclusion seems to fit in with the scheme of the Yajnavalkya Smriti on this point. The wives get shares if the division takes place during their husband's life-time, they become entitled to shares equally with their sons if the division takes place after their husband's death under verses 115 and 123 of the Vyavahara Adhyaya of Yajnavalkya, and there is nothing unreasonable or incongruous in their obtaining shares equally with their grandsons if the division happens to be effected by their grandsons.

It may be mentioned that the view, which I take of the *Mitakshara* on this point, is by no means singular. A commentator like Apararka on the Yajnavalkya Smriti comes to the conclusion that the word *mata* is to be taken as indicating step-mother and others and quotes Vyasa's text in support thereof; see Anandasharma, Sanskrit Series, Volume XLVI, page 730. In the Balambhatti, which is a commentary on the *Mitakshara*, the same view as to a grandmother's right to a share is accepted. I refer to these works as showing merely that the view I take of the *Mitakshara* is a reasonably possible view and not as suggesting that they ought to form a basis for adopting that view. In Bengal the same conclusion as to the right of the grandmother to a share under the *Mitakshara* is accepted: see *Badri Roy* v. *Bhugwat Narain Dobey* (1).

The fact, however, remains that Vijnaneshwara is silent as to the right of the grandmother. In such a case we can and must invoke the aid of the Vyavahara

(1) 8 C. 649; 11 C. L. R. 186; 6 Ind. Jur. 636.

Mayukha and try to harmonise it with the *Mitakshara* if and so far as it may be reasonably possible to do so.

This brings me to the Vyavahara Mayukha. On a careful perusal of Chapter IV, Sec. IV, paragraphs 18 and 19 (Stokes' Hindu Law Books at page 52 or Mandlik's Hindu Law at page 44), it is clear that Nilakantha brings in the step-mother and the grandmothers on the authority of Vyasa's text. I am unable to accept the suggestion made on behalf of the respondents that Nilakantha simply quotes the text of Vyasa but expresses no opinion of his own. The verse is introduced to point out the share of the step-mother and the grandmother, and at the end the author says that by the word *sarvah* (all) even paternal step-grandmothers are included. It is true that Nilakantha does not in terms indicate his approval of Vyasa's rule; but I think it is clear from the context that he favours Vyasa's view, and apparently quotes Vyasa to justify the inclusion of step-mothers and grandmothers. At least it is safe to say that Nilakantha does not bring in the step-mother except under the authority of Vyasa, and to that extent Nilakantha has been understood by this Court as confirming the *Mitakshara* view in the case of *Damodardas Maneklal* v. *Uttamram Maneklal* (2) I consider it reasonably possible to harmonise the Mayukha and the *Mitakshara* on this point and I think that ought to be done.

The only argument of some weight that remains to be noticed is that the right of the grandmother is obsolete. This argument is based upon the absence of any reported case recognising the right of the grandmother. This argument was used when the question as to the step-mother's right to an equal share with the sons came to be considered for the first time. Sir Charles Sargent, C. J., however, rejected it, and it seems to me that his observations on this point in the case of *Damodardas Maneklal* v. *Uttamram Maneklal* (2) apply with greater force to the case of a grandmother. In Western India the right of a mother to a share on a partition after the death of the father is not treated as obsolete, and I see no reason to suppose that the right of grandmother is any more obsolete than that of the mother. I am unable to see any valid reason for refusing to recognise the one while recognising the other.

Mr. Gadgil has relied upon the case of *Sheo Narain* v. *Janki Parshad* (3) in support of his argument. It is not necessary to examine the reasons given by the learned Judges in support of the conclusion they arrived at, as they expressly declined to consider such a case as we have to decide. They observed as follows after referring to the text of Vyasa:— "Therefore if in any case the grandmother would be given a share, it would be in the event of a partition between sons after the father's death. On this point we express no opinion as the case before us is not one of partition after the father's demise."

It follows, therefore, that Gangabai, the step-grandmother, is entitled to a share in the family estate with her grandsons and is a necessary party to the partition suit. The plaintiffs should be allowed to join her as a defendant now.

I do not wish to say anything as to the extent of her share, as the point is not argued, and as it is not desirable to deal with it in the absence of the grandmother. The determination of the extent of a grandmother's share may present difficulties, according to the varying conditions under which the partition may come to be effected. But, in my opinion, this is a simple case of its kind and need not present any difficulty.

The result, therefore, is that the decree of the lower Court is reversed and the case sent back to the lower Court for disposal according to law, after Gangabai has been joined as a defendant.

All costs to be costs in the suit.

HEATON, J.—I agree.

Decree reversed.

(2) 17 B. 271 at p. 281.

(3) 16 Ind. Cas. 88; 34 A. 505; 9 A. L. J. 749.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 146 OF 1914.

March 5, 1915.

Present:—Mr. Justice Piggot.

SHANKER SINGH—PLAINTIFF—APPLICANT

versus

Musammat REKHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 57—Suit for

money advanced in payment of goods to be delivered—No date fixed for delivery—Enquiry as to date of delivery—Limitation—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision.

In a suit for the balance of money advanced in payment of goods to be delivered where no time is fixed for delivery, the Court ought to consider whether, by reason of trade custom or some established usage well understood by both parties, any particular period can be laid down as the time when the goods required in the particular case ought to have been delivered, failing this, it should fix some reasonable time after the advance of the money, having regard to all the circumstances of the case.

Boiddo Nath Shah v. Lal-un-nissa Bibi, 7 W. R. 164, referred to.

If a Court without making such inquiry as to the time of delivery of goods dismisses the suit as barred by time holding that the date of payment must be taken to be the date of delivery of the goods, the High Court would interfere in revision under section 25 of the Small Cause Courts Act.

Civil revision from an order of the Judge of Small Cause Court of Bareilly.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Sham Nath Mushran* (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the Respondents.

JUDGMENT.—This is an application in revision by a plaintiff whose suit for the recovery of certain money has been dismissed by the Judge of the Court of Small Causes at Bareilly. The suit was on the face of it one for the balance of money advanced in payment of goods to be delivered, falling under Article 57 of the first Schedule to the Indian Limitation Act IX of 1908. The learned Judge of the Court below rightly appreciated this point, but went on to hold that, inasmuch as there was nothing in the plaint to show that any date was fixed for delivery of the goods, the date of payment must be taken to be the date for delivery of goods. The learned Judge was, in my opinion, palpably wrong. The circumstances of the transaction were such, according to the allegation in the plaint, that the date of the payment of the money could not possibly be the date for the delivery of the goods. The principles which should govern the decision of the Court when a question of this sort arises appear to have been correctly laid down in a very old ruling, that of *Boiddonath Shah* v. *Lal-un-nissa Bibi* (1). The learned Judge of the Court below ought either to have considered whether, by reason of trade custom or some established usage, well-understood by both parties, any particular period could be laid down as the time when the goods required in this particular case ought to have been delivered, or failing this, he should have fixed some reasonable time after the advance of the money, having regard to all the circumstances of the case. I note that, according to the findings of the Court below, an allowance of only thirty days for the delivery of the goods would be sufficient to bring this claim within limitation. In my opinion the suit has been thrown out in the Court below without adequate inquiry and on a misapprehension of the law applicable to the case. It has been contended on behalf of the defendants-opposite party that a wrong decision upon a question of limitation would not of itself justify interference of this Court under section 25 of Act IX of 1887 (the Provincial Small Cause Courts Act). It is not easy to lay down precise principles to govern the exercise of the very wide discretion which has, for obvious and necessary reasons, been conferred upon the High Court by the section above referred to. In the present case, however, I think it is apparent on the face of the judgment of the Court below that that Court would have done better to inquire into the facts of the case and to determine the case as a whole, including the question of limitation, when fully satisfied as to the facts. The application before me has been admitted by a learned Judge of this Court, and I am not prepared to say that the case is one in which in the exercise of its discretion it would be unreasonable for this Court to interfere in the interests of justice. I set aside the order and decree of the Court below and remand the case to that Court with orders to re-admit the same to its file of pending suits and to dispose of it with due regard to the remarks made above on the question of law involved. Costs of this application will be costs in the suit.

Application allowed.

(1) 7 W. R. 164.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 235 OF 1914.

March 9, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

BHEEMA VENKATARAMANA AND OTHERS—DEFENDANTS Nos. 1 TO 3—APPELLANTS

versus

BOMMINI GURAPPA—PLAINTIFF—RESPONDENT.

Compromise—Condition penal—Defendant, whether relieved.

BHEEMA VENKATARAMANA *v.* BOMMINI GURAPPA.

The plaintiff sued the defendant to recover certain property which was sold by the latter to the former. The suit was compromised on condition that the defendant should pay into Court a certain sum of money within a certain date and that he should get back the promissory notes exhibited in the suit and return them cancelled to the plaintiff within the said date. The defendant paid the money within the date, but took out the notes and deposited them after the date. On his applying for entering up satisfaction of the decree:

Held, that the provision regarding possession to be given to the plaintiff, if the conditions were not complied with within the time limited, was penal and the defendant could be relieved from the penalty. [p. 971, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Wallis, dated 13th March 1914, in Civil Miscellaneous Second Appeal No. 78 of 1913, against the order of the District Court of North Arcot in Appeal Suit No. 423 of 1913, preferred against that of the Court of the Disirict Munsif of Tirupati in Civil Miscellaneous Petition No. 155 of 1913, in Original Suit No. 357 of 1911.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.

Mr. *V. C. Seshachari*, for the Respondents.

JUDGMENT.—Plaintiff brought a suit against the defendant to recover the property which was sold by the latter to the former. The matter in suit was compromised; the terms of the compromise in so far as they are material to this appeal are that the defendant should pay into Court a certain sum of money within the 13th of January 1913, that he should get back the promissory notes exhibited in the suit and return them cancelled to the plaintiff within the said date. The defendant paid the money on the 7th January 1913, that is, within six days of the time fixed for payment. but he did not get back the notes from the Court within the time. He took them out subsequently and deposited them in Court on the 4th February, 16 days after the time given to him. On his applying for entering up satisfaction of the decree, the Courts below held that as the term of the consent decree relating to the promissory notes was not complied with in time, his application should be rejected.

It is contended before us that as the notes were in Court, the defendant committed no default in not having deposited them in time. We cannot accede to this argument. The order bound the defendant to get their return and to have them cancelled. He has undoubtedly disobeyed that clause in the compromise. The further question arises, whether such a failure disentitles him from asking that the Court should relieve him against the penal clause relating to the notes in question. This aspect of the question and the authorities bearing on it were apparently not placed before the learned Chief Justice, who rejected the appeal in the admission Court. If the learned Chief Justice had held that in the exercise of his discretion he was not prepared to give relief to the defendant who had undoubtedly committed a default we would not interfere in appeal. But the view taken by the learned Chief Justice apparently owing to the question not having been argued before him is, that Courts have no power to go behind the terms come to between the parties. We feel constrained to differ from this conclusion. It was held in *Nagappa* v. *Venkat Rao* (1) that the fact that a compromise is embodied in a decree of the Court is not a reason for holding that the ordinary incidents of a contract will not apply to it. In *Ana Sheikh Mohidin Tharagan* v. *Vadivalagianambia Pillai* (2), a case practically on all fours with the present one, the learned Judges held that a penalty in a contract of compromise will be relieved against. We regard the provision regarding possession to be given to the plaintiff, if the conditions are not complied with within the time limited, as penal, the object being to secure the prompt payment of the money by the defendant. The money itself was paid before the time fixed. The provision for the return of the promissory notes was intended to safeguard against their possible fraudulent negotiation. As they were in the custody of the Court, there was no possibility of the plaintiff suffering in this way from their non-return within the time limited. Time in such cases is not ordinarily of the essence of the contract and when the interests of third parties are not affected-justice will be defeated by a too strict adherence to the wording of the

(1) 24 M. 265.
(2) 22 Ind. Cas. 57; (1914) M. W. N. 92.

In the matter of AKHOY KUMARI DEBI.

compromise without regard to the object intended to be secured by it. In *Kumara Venkata Perumal* v. *Thatha Ramasawmy Chetty* (3) quoted by Mr. Seshachariar, the learned Judges held that a compromise, in addition to being a contract, has the further qualification of being an adjudication so as to attract the provisions relating to *res judicata*. That case does not affect the present question.

In this case, there is no allegation that the rights of the third parties have been prejudiced; the notes were in Court. We think that this is a fit case for relieving the defendant from the penalty; but we can only do so on conditions:—

(*a*) He must pay the sum of Rs. 792-6-0 with interest at 6 per cent. from 21st June 1911 to 13th January 1913 and with interest at 9 per cent. from that date to the date of payment within six weeks from the date of this order.

(*b*) He must pay all the costs incurred by the respondent in all the Courts.

(*c*) Satisfaction of the decree will be entered on his complying with the above conditions.

(*d*) If the money including interest and costs is not paid within the time mentioned, his application will be dismissed with costs in all the Courts.

(3) 9 Ind. Cas. 875; 35 M 75; (1911) M.W.N. 290; 9 M. L. T. 487; 21 M. L. J. 709.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL CIVIL ORDERS NOS. 9 AND 10 OF 1915.

February 23, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

In the matter of AKHOY KUMARI DEBI A MINOR.

Srimati SURALA SUNDARY DEBI—APPELLANT

versus

Srimati HAZARI DASSEE DEBI—RESPONDENT

AND

Srimati GOSSAIN DASSEE DEBI—APPELLANT

versus

Srimati HAZARI DASSEE DEBI—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 7 (3)—Guardian, appointment of—Minor, welfare of—Will to be considered independent of Probate.

There is no power in a Court to appoint a guardian, unless the Court is satisfied that it is for the welfare of the minor that the order should be passed, and that the appointment of the guardian will not infringe sub-section (3) of section 7 of the Guardians and Wards Act. [p. 972, col. 2; p. 973, col. 1.]

In such cases where a Will is set up a Judge has jurisdiction and is bound to consider that there is a Will although Probate has not been granted. [p. 973, col. 1.]

Sayad Shahu v. *Hapija Begam*, 17 B. 560, *Chinnasami* v. *Hariharabhadra*, 16 M. 380; 3 M. L. J. 121 and *Pathan Alikhan Badlukhan* v. *Bai Panibai*, 29 B. 832, referred.

Messrs. *Norton* and *Langford James*, for the Appellants.

Mr. *S. P. Sinha*, for the Respondent.

JUDGMENT.—There are two appeals from an order appointing a guardian of a Hindu widow aged 14. There is no power in the Court to appoint a guardian unless the Court is satisfied that it is for the welfare of the minor that the order should be passed. In support of the application there is no affidavit on which the Court can act. More than that, it seems to us that in the circumstances the case should have waited until the return of Maharaja Tagore, the head of the family, in order that it might be seen whether he was willing to accede to a course which was apparently acceptable to both parties and would have solved the present difficulty. As it is, we have the curious position that an order appointing a guardian has been made on materials which do not comply with the requirements of the law and at the same time a Rule has been issued on another application and is pending for the determination of the question whether some one else should not be appointed guardian.

The proper course now to follow is this. We set aside the order of Mr. Justice Imam and send back the case in order that it may be re-heard by him if the petitioner thinks fit to put in proper evidence in support of her application. Her application should be heard together with the application of Mr. Langford Jame's client and also of Mr. Norton's client, if she thinks fit to make an application; and in any case nothing should be done until the views of Maharaja Tagore have been ascertained. Finally we think before making any order

the Court must be satisfied that the application is for the welfare of the minor and that the appointment of the guardian will not infringe sub-section 3 of section 7 of the Act.

In our opinion the Judge had jurisdiction and was bound to consider that there was a Will although Probate had not been granted; and that appears to us to be the result of several authorities: *Sayad Shahu* v. *Hapija Begam* (1), *Chinnasami* v. *Harihara-bhadra* (2) and *Pathan Ali Khan Badlukhan* v. *Bai Pañibai* (3). The fact that there is a contest as to the validity of the Will may induce the Court to exercise its discretion one way or the other, as for instance, it may possibly defer deciding on the question of guardianship until the question of Probate has been determined. But it is not open to the Court to say that it will refuse to take notice of the Will.

We allow the appeals. The respondent will pay the costs of the appellant (Mr. Norton's client). We make no order as to the costs of Mr. James' client.

Appeal allowed.

(1) 17 B. 560.
(2) 16 M. 380; 3 M. L. J. 121.
(4) 19 B. 832.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 493 OF 1914.

March 8, 1915.

Present:—Mr. Justice Chamier and Mr. Jusitce Piggott.

BADAN—JUDGMENT-DEBTOR—APPELLANT

versus

MURARI LAL AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Mortgage—Mortgagor inheriting interest in prior mortgage—Extinguishment of prior mortgage—Merger—Subsequent mortgagee, right of.

Where a mortgagor inherits the interest of the mortgagee under a prior mortgage, the prior mortgage is extinguished, and the mortgagor cannot set it up against a subsequent mortgagee. [p. 974, col. 2.]

Acquisitions by a mortgagor enure as a rule for the benefit of his mortgagee, thereby increasing the value of his security. [p. 974, col, 2.]

Otter v. *Vaux*, 2 K. & J. 650, affirmed 43 E. R. 1383; 106 R. R. 235; 6 De G. M. & G. 638; 26 L. J. Ch. 128; 3 Jur. (N S.) 169; 5 W. R. 188; *Platt* v. *Mendel*, (1884) 27 Ch. D. 246; 54 L. J. Ch. 1145; 51 L. T. 424; 32 W. R. 918; *Bhaju Chaudhri* v. *Chuni Lal*, 5 C. L. J. 95; 11 C. W. N. 204, approved of.

Raja Kishen Dut v. *Raja Mumtaz Ali Khan*, 5 C. L. R. 213; 6 I. A. 145; 5 C. 198; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique and Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; *Ajudhia Prasad* v. *Man Singh*, 25 A. 46; A. W. N. (1902) 176; *Thorne* v. *Cann*, (1895) A. C. 11; 64 L. J. Ch. 1; 11 R. 67; 71 L. T. 852, *Johnson* v. *Webster*, (1854) 4 De. G. M. & G. 474; 3 Eq. R. 99; 24 L J. Ch. 300; 1 Jur. (N.S.) 145; 3 W. R. 84; 2 Sm. & G. 136·43 E. R. 592; 24 L. T. (o. s.) 178; 102 R. R. 225; *Mohesh Lal* v. *Mohant Bawan Das*, 10 I. A. 62; 9 C. 961; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; *Adams* v. *Angell*, 25 W. R. 139, affirmed 46 L. J. Ch. 352; 36 L. T. 334; 5 Ch. D. 634; *Gokaldas Gopaldas Purammal Premsukhdas*, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543, referred to

Second appeal from a decree of the District Judge of Meerut reversing that of the Additional Subordinate Judge, Meerut.

Mr. *Nihal Chand*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* and Mr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.—The question for decision in this appeal is whether the respondents are entitled, as held by the lower Appellate Court, in execution of a decree on a mortgage to bring the property to sale free from a prior mortgage. The appellant mortgaged the property first to Umrao Singh and afterwards to Bhup Singh. Umrao Singh sued on his mortgage without impleading Bhup Singh and obtained a decree for sale, which he transferred to the appellant's brother Bahal. Bhup Singh transferred his mortgage to the respondents, who obtained a decree for sale subject to the prior mortgage. Bahal died leaving the appellant as his sole heir. The respondents have now applied for execution of their decree, and they claim to be entitled to bring the property to sale free from the prior mortgage, on the ground that, when Bahal died and the benefit of the prior mortgage passed to the appellant, that mortgage merged in the appellant's proprietary right and was extinguished. The appellant on the other hand contends that no merger took place. The first Court held with the appellant, but the lower Appellate Court accepted the contention of the respondents. Hence this appeal.

Section 101 of the Transfer of Property Act was referred to in the course of the arguments, but that section appears to apply only to the converse case of the owner of an encumbrance becoming the absolute owner of the property, though it is not easy to see why the words "is or" were inserted in the

section. There being no legislative provision on the question for decision, the case must be decided according to broad principles of equity and good conscience, with such assistance as may be afforded by reported decisions of the Courts. We have not been referred to any case that is precisely in point, but there are several cases which bear more or less closely on the point now before us. The question whether an encumbrance acquired or paid off by the absolute owner of the property is to be considered extinguished or kept alive for his benefit is, according to a long line of authorities, generally one of intention. In the case of *Thorne* v. *Cann* (1) Lord Macnaghten said: "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." The decision in *Johnson* v. *Webster* (2) shows that the rule is the same where the owner of an estate inherits a charge thereon. In the absence of expressed intention to the contrary, it will be presumed that when a person claiming to be absolute owner of property acquires or pays off a mortgage thereon, and there is no subsequent encumbrance, he intends to extinguish the mortgage, but where there is an encumbrance intermediate between the mortgage paid off or acquired and the ownership of the property, the presumption is the other way [See *Johnson* v. *Webster* (2), *Mohesh Lal* v. *Mohant Bawan Das* (3), *Adams* v. *Angell* (4) and *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (5)]. It would be very much to the advantage of the appellant to keep the first mortgage alive, and in various ways which need not be detailed he has shown that he wishes to keep it alive. The question is whether the rule stated above, which is founded on the clearest equity and has, as we have shown, been applied by their Lordships of the Privy Council to Indian cases, applies to the case before us in which both mortgages were made by the owner of the property, who however wishes to hold one up against the other. In England and also in India it has been held that if the owner of an estate creates and pays off a mortgage, the mortgage merges in the owner's estate, and that an owner who has paid off a prior encumbrance cannot set it up against his own mortgage [See *Otter* v. *Vaux* (6), the dictum of Chitty, J., in *Platt* v. *Mendel* (7) and *Bhaju Chaudhri* v. *Chuni Lal* (8)]. Like the general rule, this exeeption to it seems to us to be founded on the plainest equity. Does the fact that the appellant inherited the prior mortgage furnish any ground for distinguishing the present case from the cases last referred to? We think not. Indeed we are inclined to think that the fact that the appellant acquired the rights of the prior mortgagee without having to pay for them, makes the case somewhat stronger against him than it would have been if he had paid for them. It seems to us that it would be inequitable to allow the appellant to set up a mortgage which he himself created, but on which he has had to pay nothing, against a subsequent mortgage which he undertook personally to discharge. Acquisitions by a mortgagor enure as a rule for the benefit of his mortgagee, thereby increasing the value of his security, see *Raja Kishen Datt* v. *Raja Mumtaz Ali Khan* (9) and *Ajudhia Prasad* v. *Man Singh* (10). On the whole we are of opinion that the decision of the lower Appellate Court is correct. To avoid misapprehension we may add that it has not been shown that the appellant's brother left any debts. The prior mortgage would, of course, be liable in the hands of the appellants for the

(1) (1895) A. C. 11; 64 L. J. Ch. 1; 11 R. 67; 71 L. T. 852.

(2) (1854) 4 De G. M. & G. 474; 3 Eq. R. 99; 24 L. J. Ch. 309; 1 Jur. (N. S.) 145; 3 W. R. 84; 2 Sm. & G. 136; 43 E. R. 592; 24 L. T. (O. S.) 178; 102 R. R. 225.

(3) 10 I. A. 62; 9 C. 961; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424.

(4) 25 W. R. 139, affirmed 5 Ch. D. 634; 46 L. J. Ch. 352; 36 L. T. 334.

(5) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543.

(6) (1856) 2 K. & J. 650, affirmed, 43 E. R. 1881; 106 R. R. 235; 6 De. G. M. & G. 638; 26 L. J. Ch. 128; 3 Jur. (N. S.) 169; 5 W. R. 188.

(7) (1884) 27 Ch. D. 246; 54 L. J. Ch. 1145; 51 L. T. 424; 32 W. R. 918.

(8) 11 C. W. N. 284; 5 C. L. J. 95.

(9) 5 C. 198 at p. 210; 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 7 Suth. P. C. J. 637, Rafique & Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1.

(10) 25 A. 46; A. W. N. (1902) 176.

debts of his brother. There could be no question of merger to the prejudice of the brother's creditors.

The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 728 OF 1915.

March 29, 1915.

Present:—Mr. Justice Rattigan and Mr. Justice Shadi Lal.

MEHR CHAND—DEFENDANT—APPELLANT

versus

THE AMRITSAR BANK IN LIQUIDATION—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VIII, r. 6—Suit by Official Liquidator for recovery of money due to Company—Defendant having money in fixed deposit with Company—Set-off—Companies Act (VI of 1882), ss. 147, 150.

A debtor to a Company who is not a member of the Company is entitled, in an action by the Liquidators to recover the amount due from him, to plead by way of set-off that an ascertained sum of money is then due to him from the Company and to claim that only such balance (if any) as is due to the Company is recoverable from him. [p. 976, col. 2.]

Anderson's case, 3 Eq. Cas. 337, referred to.

Where, therefore, in a suit by the Official Liquidators of a Banking Company in liquidation for recovery of money due to the Company, the defendant claimed to set off a sum of money due to him from the Company on account of his fixed deposit:

Held, (1) that the suit was an ordinary suit for recovery of money not brought under any special provisions of the Indian Companies Act 1882, and on general principles it was open to the defendant to claim a set-off under the provisions of Order VIII, rule 6, of the Civil Procedure Code; [p. 977, col. 2.]

(2) that in order to find out whether the amount due to the defendant was "ascertained" or not, the date to be taken into consideration under the rule was not the date of the winding up, but the date of the institution of the suit. [p. 978, col. 1.]

Sovereign Life Assurance Company v. *Dodd*, (1892) 2 Q. B. 573; 62 L. J. Q. B. 19; 67 L. T. 396; 41 W. R. 4; *Reference under Presidency Small Cause Courts Act*, s. 69, 28 M. 240, followed.

In re Whitehouse & Co., (1878) 9 Ch. D. 595; 47 L. J. Ch. 801; 39 L. T. 415; 27 W. R. 818, distinguished.

Second appeal from the decree of the District Judge, Lahore, dated the 8th March 1915, reversing that of the Senior Subordinate Judge, Lahore, dated the 4th March 1915, dismissing plaintiff's claim.

Lala *Dhanpat Rai* and Sardar *Kharak Singh*, for the Appellant.

Mr. *Herbert*, for the Respondent.

JUDGMENT.—The Amritsar Bank, Limited, which is at present being wound up under the orders of the District Judge, has, through the Official Liquidators appointed by the Court, brought the present suit for recovery of the sum of Rs. 1,087 due from the defendant, Diwan Mehr Chand, to the Company. Defendant admits that the said sum is due from him, but in answer to the plaint claims to set-off, under Order VIII, rule 6, of the Civil Procedure Code, a sum of money due to him from the Company. It is admitted that defendant, prior to the date when the winding-up commenced, had in fixed deposit with the Company a sum of money which more than covered the amount of his debt to the Company; that at the date aforesaid this deposit had not matured; but that prior to the date of suit, the fixed period had elapsed and in the ordinary course of things the amount would have been payable to defendant.

There is no dispute about the facts, and it is frankly admitted that the present suit has been brought in order to obtain a definite ruling from this Court whether upon the facts as above stated, the defendant, who represents a class of persons who are in no way members of the Company but are at one and the same time both debtors to and creditors of the Company, has the right when sued by the Liquidators for recovery of the sum due from him to plead, as a set-off to the claim, the amount which under ordinary circumstances would be payable to him at the date of suit from the Company.

The Subordinate Judge held that defendant had the right to claim this set-off and upon this finding dismissed plaintiff's suit, with costs to be paid from the estate. The learned District Judge, upon appeal, was of a contrary opinion, and reversing the decree of the Subordinate Judge, granted plaintiff the decree prayed for, but directed that the costs of all parties throughout should be borne by the Company in liquidation.

From this latter decree a second appeal has been preferred to this Court and we

have heard the question of law argued very fully and ably by the learned gentlemen who respectively represented the appellant and the Liquidators, respondents.

In our opinion, there can be no doubt that the Subordinate Judge was right in allowing the set-off and in dismissing the claim. The suit as laid was an ordinary suit for recovery of money; it was not brought under any special provision of the Indian Companies Act, 1882, and unless there is some peculiar provision in that Act to the contrary, the defendant would be entitled, under Order VIII, rule 6, of the Civil Procedure Code, to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, provided that the sum in question did not exceed the pecuniary limits of the jurisdiction of the Court and that both parties filled the same character as they did in the plaintiff's suit.

Section 4 of the Civil Procedure Code provides, however, that in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force.

The question then is whether there is anything in the Indian Companies Act, 1882, (the only special Act which can possibly affect the question before us) which expressly or by necessary implication deprives defendant of the right which he claims?

Admittedly there is no such express provision in the Act, for section 150, which alone deals with the question of set-off, is concerned solely with the rights and liabilities of contributories. It is urged, however, that the concluding sentence of section 147 of the Act, which directs the Court to "cause the assets of the Company to be collected and applied in discharge of its liabilities" existing at the date of the winding-up order, necessarily negatives the possibility of a debtor to the Company being able to claim a set-off. We are unable to accept this contention. In the *first* place, if stress is laid upon the word "assets", it is merely begging the question to argue that assets must mean assets without any deduction. In the *next* place, it is to be remembered that the Indian Companies Act of 1882 is closely modelled upon the English Companies Act of 1862, and that at the time when it was enacted, the Legislature must have been well aware of [*e. g.*, *Anderson's* case (1)] the rulings of the English Courts to the effect that a debtor to the Company, who was not a member of the Company, was entitled, in an action by the Liquidators to recover the amount due from him, to plead by way of set-off that an ascertained sum of money was then due to him from the Company, and to claim that only such balance (if any) as was due to the Company was recoverable from him. The Legislature was also, of course, well aware that apart from any special provisions to the contrary in the Act, the debtor would be entitled, under the general provisions of section 121 of the Civil Procedure Code of 1859 and of section 111 of the Code of 1882, to claim the right of set-off. In the circumstances, and having regard to the fact that the question of set-off so far as it concerned the right of contributories was not overlooked, we may safely assume that it was not the intention of the Legislature by implication to deprive debtors of rights to which they would be entitled under similar circumstances in England, and to which they are entitled under the general procedure law of this country.

The rule in England is well-established; in actions by the Company on the one hand and non-members on the other, the ordinary rules of set-off are applicable, with this exception that since the Judicature Act, 1876, the rules in bankruptcy apply if the Company is insolvent [see Lindley on Companies, Volume I, page 387, Volume II, page 1025; Halsbury's Laws of England, Volume 5, page 877; Buckley's Companies Act, 1862, (8th Edition), page 409; Stiebel's Company Law, pages 1234-1237, and authorities cited.]

The same rule has been applied in this country [*Ahmedabad Advance Spinning and Weaving Company* v. *Lakshmi Shankar* (2), a case of a Company being wound-up compulsorily, and *Reference under Presidency Small Cause Courts Act*, *s.* 69 (3), a case of a voluntary

(1) 3 Eq. 337; 36 L. J. Ch. 73; 15 W. R. 246.
(2) 30 B. 173; 7 Bom. L. R. 246.
(3) 28 M. 240.

winding-up) and in Russell's Indian Companies Act, 3rd Edition, at page 469, there is the following passage:

"There is nothing in the Act which expressly relates to set-off between a Company and non-contributories, but it has long been established that when a Company is being wound up, whether an action is brought by the Company or a proof is carried in by a creditor of the Company in the winding-up, a set-off of a liquidated sum is admissible."

It is urged, however, that this rule is inequitable and in effect amounts to an undue preference of a debtor-creditor over mere creditors, inasmuch as the former by means of this rule practically succeeds, or may in certain cases succeed, in getting the full value of the debt owed to him by the Company, whereas ordinary creditors of the same Company can get payment only *pro rata*. But there is a distinction between the case of a creditor demanding his money from a Company in liquidation and the case of a debtor-creditor resisting a claim made upon him for payment of his debt to such Company, and in this connection we would refer to the judgments of Lord Esher, M. R., and Bowen, L. J., in *Sovereign Life Assurance Company* v. *Dodd* (4). Apart, however, from this, we obviously cannot refuse to recognize a claim by way of set-off if it is authorized by law and not opposed to any provisions of the Indian Companies Act, 1882. As a matter of fact, however, the privilege is recognized as a provision of law in the Indian Insolvency Act (11 and 12 Vict., c. 21, s. 39), the Presidency Towns Insolvency Act, 1909, (section 47) and the Indian Provincial Insolvency Act, 1909, (section 30) and in each of these cases the very same objection, grounded upon undue preference, might equally well be urged. We may take it, therefore, that the Legislature has deliberately decided that this objection has not, in insolvency cases at all events, such force as to deprive a debtor-creditor of his ordinary rights.

Another objection to the rule is that it is likely to encourage illicit trafficking in claims against a Company which is being wound-up. For example, *A* owes Rs. 20,000 to a Company which is being wound up. *B* owes the said Company Rs. 1,000, and the Company owes him Rs. 20,000. *A*, in order to get rid of his liability, buys from *B* for some practically nominal sum (say Rs. 5,000) the latter's claim against the Company, and thereafter, when sued for his debt of Rs. 20,000, sets off the claim for Rs. 20,000 which he has purchased from *B*. This no doubt will be a danger, and though the legality of the practice has been doubted [*Smith, Fleming and Company's* case (5)] the learned editor of Lindley's work questions "whether the language of the Act is sufficiently clear to defeat the practice" (Vol. 2, page 1026). This difficulty was referred to in *Anderson's* case (1) and as the learned Judge there remarked: "if a case had actually occurred of persons going about and buying up debts at under values, different considerations might arise." *Anderson's* case (1) was decided in 1866 and from the fact that since then there appears to be no decision of the English Courts directly dealing with this aspect of the question, we may safely infer that risky speculations of this kind have not commended themselves to even unscrupulous creditors of Companies in liquidation. The point is not before us in the present case and upon it, therefore, we need say no more than that, as at present advised, we have grave doubts whether the Courts would in any circumstances recognize the validity of any such assignment of a debt made after a petition had been presented for the winding-up of the Company by which such debt was payable.

On general grounds, therefore, we must hold that it was open to the defendant in this case to claim a set-off under the provisions of Order VIII, rule 6, of the Civil Procedure Code. We have now to consider whether upon the facts of the present case the defendant is debarred from relying upon these provisions.

Mr. Herbert argued that the rule in question is not applicable, inasmuch as (*a*) at the date of the winding-up of the Company

(4) (1892) 2 Q. B. 573; 62 L. J. Q. B. 19; 67 L. T. 396; 41 W. R. 4.

(5) 1 Ch. App. 538; 36 L. J. Ch. 333; 12 Jur. (N. S.) 806; 15 L. T. 148; 15 W. R. 78.

the time for payment of defendant's fixed deposit had not matured, and as a result the amount of such deposit was, in any event, not then recoverable by law; (*b*) at the said date and even at the date of suit, the amount due to defendant was not "ascertained" as defendant could not claim payment of his debt in full and the amount due to him could not be ascertained until the Liquidators were in a position to pay off all the Company's creditors *pro rata*, and that it might conceivably happen that the available assets of the Company would prove insufficient to enable the Liquidators to pay the creditors even a proportionate amount of their respective claims, and (*c*) that as between the Liquidators and the defendant the parties did not "fill the same character" within the meaning of the rule.

These objections were considered by the Bombay High Court in the case to which reference has been made above and were held, for reasons which appear to us conclusive, to be without force. As regards the first objection, we might, however, add that under the rule the date to which we have to look is not the date of the winding-up but the date of institution of the suit [*Sovereign Life Assurance Company* v. *Dodd* (4) and *Reference under Presidency Small Cause Courts Act, section* 69 (3)]. It is conceded that under normal circumstances defendant would have been entitled at the date of suit to claim payment of his deposit which had then become payable, and in the circumstances we must hold that the first objection fails.

The second objection is equally untenable and with regard to it we need only refer to the case of the *Sovereign Life Assurance Company* (4) and the decision of the Bombay High Court in the case cited above.

In support of the third objection (which is also disposed of in the Bombay High Court case), Mr. Herbert relied upon certain observations of Jessell, M. R., in the case of *In re Whitehouse & Co.* (6). But that case dealt with the position of a contributory to the Company and the *ratio decidendi* was that a contributory was not entitled to set off a debt owed to him by the Company against a call upon him made by the Liquidator because while it was the Company that owed him the debt, it was the Liquidator who was enforcing the call, the debt of the contributory in the latter event being due not to the Company but to the Liquidator. Some doubts have been thrown upon the correctness of this distinction by the decision of the Court of Appeal in *Pyle Works* case (7), but the remarks of the Master of the Rolls can in any case have no relevancy to a claim of set-off preferred by a non-member of the Company. As a result we are of opinion that it was competent to defendant to claim the set-off preferred by him in answer to the plaintiff's suit, and as the amount of the set-off admittedly was in excess of the sum claimed by plaintiff, we hold that the Subordinate Judge was right in dismissing the suit. We accordingly accept the appeal and dismiss plaintiff's suit with costs throughout. The costs will be paid by the estate of the Company in liquidation.

Appeal allowed.

(6) (1878) 9 Ch. D. 595; 47 L. J. Ch. 801; 39 L. T. 415; 27 W. R. 181.

(7) 44 Ch. D. 534; 59 L. J. Ch. 489; 62 L. T. 887; 38 W. R. 674; 2 Meg. C. R. 83.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 652 OF 1913.

January 18, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

GAJANAN BALKRISHNA DESHPANDE —PLAINTIFF—APPELLANT

versus

KASHINATH NARAYAN DESHPANDE —DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Step-brother, whether can be legally adopted—Nanda Pandita, opinion of, value of.

Under Hindu Law the adoption of a step-brother is not invalid. [p. 980, col. 2.]

The opinions of Nanda Pandita, when they are not supported by any text of the *Smriti* writers, are generally speaking recommendatory and not mandatory. [p. 980, col. 1.]

Second appeal from the decision of the District Judge, Thana, in Appeal No. 298 of 1911, reversing the decree passed by the Subordinate Judge of Mahad, in Civil Suit No. 297 of 1900.

Mr. *Setlur* (with him Mr. S. S. *Patkar*), for the Appellant.

GAJANAN BALKRISHNA v. KASHINATH NARAYAN.

Mr. *Jayakar* (with him Mr. *W. B. Pradhan*), for the Respondent.

JUDGMENT.—Two questions of law have been argued in this appeal—one relating to the validity of an adoption, the other relating to estoppel. The facts which give rise to the question of adoption are not in dispute now and may be briefly stated. One Yeshawant died leaving four sons—Venkatesh by one wife, and Ganpat, Madhav and Narayan by another wife. Venkatesh died many years ago after adopting his step-brother, Narayan. Narayan died leaving a son—Kashinath, who was the defendant in the trial Court and is the respondent here. There was a division among the brothers, whether during or after the life-time of Venkatesh does not appear to be clear and is not material. Ganpat died sonless, leaving a widow, who died in 1903. Madhav had a son, Balkrishna, who died leaving a son, Gajanan, who was the plaintiff in the Court below and is the appellant here. The dispute relates to Ganpat's share in a certain allowance, which, the plaintiff says, he is entitled to share equally with the defendant, the latter contending that he is the exclusive owner of Ganpat's interest in the allowance. The parties are Prabhus by caste. It is common ground now that if the adoption of Narayan by Venkatesh be valid, the plaintiff must succeed.

In the lower Courts the defendant urged that the adoption by Venkatesh of his younger half-brother, Narayan, was invalid. The lower Courts have differed as to the validity of the adoption, the trial Court holding it to be valid, the Appellate Court holding it to be invalid.

In the second appeal before us, the same question has been raised. Mr. Setlur, for the appellant, contends that the adoption of a half-brother is not invalid according to Hindu Law, that the long course of decisions of this Court is in favour of the view that the restrictions recommended by Nanda Pandita are not really binding, and that the doctrine of *niyoga*, upon which the lower Appellate Court has relied in deference to the opinion expressed by Dr. Bhattacharya in his treatise on Hindu Law, affords no basis for invalidating an adoption, which is otherwise valid—at least so far as this Presidency is concerned. Mr. Jayakar, for the respondent, strongly relies upon the opinion of Nanda Pandita expressed in the Dattaka Mimansa in his commentary on the expression 'bearing the reflection of a son' (*putrachhyayavaham*) in Caunaka's text, in paragraphs 16 to 20, particularly paragraphs 17 and 19 in Chap. V. It is argued that the *Mitakshara* and the *Vyavahara Mayukha* do not afford any assistance on this point, and that in matters of adoption the opinions of Nanda Pandita are entitled to great weight and ought to be given effect to. Mr. Jayakar concedes that the restrictions arising out of the necessity of a valid marriage between the natural mother and the adoptive father being possible are merely recommendatory, except as to the three specified cases of a daughter's son, sister's son and mother's sister's son mentioned in Cakala's text. But his argument is that the test of a valid marriage being possible between the natural mother and the adoptive father is quite distinct from that based on the doctrine of *niyoga* or of incestuous connection (*viruddhasambandha*) and that though the restrictions arising from one are held to be recommendatory, the restrictions arising from the other two tests are not so held. He does not lay any stress on the restrictions based upon the rules connected with the practice as *niyoga*. But he maintains that the restrictions based upon the prohibition of incestuous connection (*viruddhasambandha*) have nowhere been held to be merely recommendatory, and ought to be held mandatory. The adoption in question is vitiated, it is argued, as any connection between the step-mother and the step-son would be incestuous. It is also argued that the sentiment of the community favours such restrictions and that the sentiment is clearly expressed by Nanda Pandita.

We have given our best consideration to these arguments, particularly as Mr. Jayakar has insisted that in none of the decided cases has this point been considered and decided, and that in none of the cases except one it was necessary to consider it. We are, however, unable to accept the suggestion that the argument is new or that it has not been considered, or that it was not

necessary to consider it on previous occasions; and quite apart from the previous decisions we are unable to think that the argument is sound.

It has been held by this Court in a number of cases that the opinions of Nanda Pandita, when they are not supported by any text of the *Smriti* writers, are generally speaking recommendatory and not mandatory: see *Bai Nani* v. *Chunilal* (1), *Vyas Chimanlal* v. *Vyas Ramchandra* (2), *Ramachandra Krishna Joshi* v. *Gopal Dhondo Joshi* (3), *Yamnava Govind Appaji* v. *Laxuman Bhimrao* (4) and *Ramkrishna* v. *Chimnaji* (5). Their Lordships of the Privy Council have indicated substantially the same view as to certain opinions of Nanda Pandita in *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra*(6) and *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (7). It is quite true that in some of these cases the opinions of Nanda Pandita that were under consideration were not the same as those with which we are concerned now. But it is difficult to say that of the last three cases of this Court above referred to. In the case of *Yamnava Govind Appaji* v. *Laxuman Bhimrao* (4) Sir N. Chandavarkar, J., after considering these very opinions of Nanda Pandita (in paragrphs 16 to 19 of section V of the Dattaka Mimansa), expressed his conclusion in the following clear and definite terms:—"It is a reasonable inference to draw from the whole of the Dattaka Mimansa that Nanda Pandita intended that anybody could be adopted, so long as he was not within the cases specified as prohibited, so long as, that is, he was not the sister's son, or the daughter's son or the mother's sister's son." This decision was followed in the case of *Ramkrishna* v. *Chimnaji* (5). It is difficult to see how the argument based on the test of *viruddhasambandha* could have been passed over in *Ramkrishna's* case (5) without consideration when the decision of the District Judge in that case, which was reversed by the High Court, was based substantially on that ground. We have heard nothing in the course of an interesting argument from Mr. Jayakar, which can induce us to think that there is anything in the decisions of this Court bearing on this point which requires to be reconsidered.

Apart from the decisions, we would find no serious difficulty in arriving at the same conclusion and in holding that the opinions expressed by Nanda Pandita in his commentary on the expression *putrachhyayavaham* are merely recommendatory and not mandatory in the absence of any support from any *Smriti* writer. It is not suggested that the particular opinions expressed in paragraphs 17 and 19 of section V are supported by any such authority.

We have considered the dictum of Muttusami Ayyar, J., in *Sriramulu* v. *Ramayya* (8) that the adoption of a half-brother is invalid, and the decision of the Sadar Diwani Adalat of Bengal in *Baboo Runjeet Singh* v. *Baboo Obhye Narain Sing* (9) that the adoption of an elder brother by a younger brother is invalid. We are not sure that the Madras High Court would now accept the dictum of the learned Judge as finally decisive of the point. But apart from that, in determining the weight to be attached to the opinions of Nanda Pandita on this point in Western India, we must prefer to be guided by the decisions of our Court.

The learned District Judge might well have paused before setting aside an adoption made more than fifty years ago, acquiesced in by all the parties concerned during this long period and questioned for the first time by the present defendant apparently under the inducement of resisting the plaintiff's claim, and might have scrutinized the opinion of Dr. Bhattacharya more closley, particularly when the learned author himself expresses a doubt as to the applicability of the restrictions based on the rules of *niyoga* to this Presidency: see Bhattacharya's Hindu Law, 3rd Edition, pages 169-170.

We, therefore, hold that the adoption of Narayan by Venkatesh is valid. Having regard to the view we take of the adoption, it is not necessary to decide the question of estoppel which has been argued in this appeal.

The result is that the decree of the lower

(1) 22 B 973 at pp. 978, 979.
(2) 24 B. 473 at p. 481; 2 Bom. L. R. 163.
(3) 32 B. 619 at p. 633; 10 Bom. L. R. 948.
(4) 16 Ind. Cas. 180; 36 B. 533; 14 Bom. L. R. 543.
(5) 21 Ind. Cas. 34; 15 Bom. L. R. 824.
(6) 5 I. A. 40.
(7) 26 I. A. 113; 22 M. 398; 3 C. W. N. 427.
(8) 3 M. 15.
(9) (1817) 2 Sel. Rep. 315; 6 Ind. Dec. (o. s.) 597.

Appellate Court is reversed and that of the trial Court restored, with costs of this and the lower Appellate Court on the defendant.

Decree reversed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2574 AND 3795 TO 3797 OF 1910.

November 28, 1912.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

SASHI BHUSAN HAZRA—DEFENDANT—APPELLANT (IN ALL)

versus

IN No. 2574

ASWINI COMAR SAMANTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN No. 3795

KALI DAS SAMANTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN No. 3796

HARADHAN PAL—PLAINTIFF—RESPONDENT

IN No. 3797

JOGENDRA NATH SAMANTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 109—*Statutory bar—Settling rent—Settlement Officer's decision, finality of—Remand, if necessary—Appeal, second—Tenants of fixed rents, status of.*

It is impossible to get behind the statutory bar raised by section 109 to the rent fixed in proceedings under section 105 so far as the proceedings have been properly conducted. [p. 981, col. 2.]

Pandab Dowari Das v. *Ananda Kishun Chakravarti*, 7 Ind. Cas. 102; 12 C. L. J. 195; 14 C. W. N. 897 and *Shambu Chandra Hazra* v. *Purna Chandra Pal*, 35 C. 176; 7 C. L. J. 103; 12 C. W. N. 122, referred to.

Where a Settlement Officer goes wrong in deciding the question under section 106 which does not arise, his decision, so far as it is a decision settling rent, cannot be interfered with and on such a point no second appeal can lie, and also no remand is necessary, the question of rent being finally settled. [p. 981, col.2.]

The tenants whose rents cannot be enhanced are at liberty to call themselves anything they like, whether settled *raiyats* or *raiyats* at fixed rates or any other class of *raiyats*. [p. 981, col. 2.]

Appeals against the decrees of the Subordinate Judge, third Court of Hughly, dated the 29th of July 1910, reversing that of the Munsif, second Court at Uluberia, dated the 1st of February 1910, and remanding the suit to that Court to decide on its merits and the question of limitation.

Dr. *Rash Behary Ghose*, Babus *Sarat Chandra Roy Chowdhury* and *Charu Chandra Bhattacharyya*, for the Appellant.

Babu *Nagendra Nath Ghose*, for the Respondents.

JUDGMENT.—We are of opinion that these appeals must succeed, on the simple ground that it is impossible to get behind the statutory bar raised by section 109 to the rent fixed in proceedings under section 105 so far as these proceedings have been properly conducted. Even if we accept the contention raised before this Court in the case of *Pandab Dowari Das* v. *Ananda Kishun Chakravarti* (1), there is nothing in that decision which militates against the decision of the Chief Justice and Mr. Justice Giedit in this very Court reported as *Shambu Chandra Hazra* v. *Purna Chandra Pal* (2). In that case the Chief Justice laid down very clearly that even if the Settlement Officer had gone wrong in deciding the question under section 106 which did not arise, his decision, so far as it was a decision settling rent could not be interfered with, and on such a point no second appeal can lie. The Court followed this up by reversing the erroneous and incompetent decision of the Settlement Officer under section 106 or which purported to be under section 105, but it declined to interfere with the rent fixed and that rent, which was then fixed, is the very subject of this appeal, so that the learned Doctor who appeared for the appellant says that it is immaterial to him whether the tenants chose to call themselves settled *raiyats* or *raiyats* at fixed rates or by any other name they choose. All he wants is his Rs. 113 and odd of rent, and that he must have.

The learned Subordinate Judge has gone behind the decision under section 105 and so far as he has done so, his judgment and decree cannot be supported. We see that the Appellate order was that the entire decree of the Munsif was set aside and the suits were remanded to the Court below for decision on the merits along with the question of limitation. But it appears to us that the question of rent being finally settled no remand is necessary, inasmuch as we

(1) 7 Ind. Cas. 102; 14 C. W. N. 897; 12 C. L. J. 195.

(2) 35 C. 176; 7 C. L. J. 103; 12 C. W. N. 122.

have already said that the parties are agreed that the plaintiffs-respondents can call themselves by any name they please. It does not seem, therefore, necessary to further waste the time of the Courts in arguing what their particular status is. It has already been held by this Court that their rent cannot be enhanced and, therefore, they are at liberty to call themselves anything they like.

There is no substantial question remaining to be decided and the appeals are, therefore, decreed; the rent as fixed by the Settlement Officer is upheld and the Munsif's decision that the suits are incompetent by reason of section 109 is restored. The suits will, therefore, stand dismissed.

The appellant is entitled to his costs in this Court. Both the parties will bear their own costs in the lower Courts.

Appeals allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 307 OF 1914.

March 2, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

T. K. PARASU PATTAR AND ANOTHER—DEFENDANTS Nos. 1 AND 2—APPELLANTS

versus

T. K. VENKATACHALA PATTAR—PLAINTIFF—RESPONDENT.

Practice—Appellate Court, pronouncement of—Subordinate Court, duty of, to follow—Subordinate Court acting otherwise—Procedure, legality of.

It is the duty of a Subordinate Court to accept a pronouncement made by an Appellate Court which the parties have chosen not to appeal against and have acted upon. [p. 982, col. 2]

A Judge acts illegally in acting upon documents which have been pronounced by the Court to which he is subordinate as not binding on the parties. [p. 983, col. 1.]

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Palghat in Miscellaneous Petition No. 1662 of 1914 in Original Suit No. 23 of 1909.

Messrs. *T. R. Ramachandra Aiyar* and *N. Narayana Sarma*, for the Appellants.

Mr. *A. Sundaram*, for the Respondent.

JUDGMENT.—A suit was filed for partition of the family properties. In the course of the suit, the matters in dispute were referred to an arbitrator. While the proceedings were pending before him, the parties filed two statements which are marked as Exhibits A and B, by which they agreed to a particular mode of division regarding some of the properties in suit. The partition of the other properties was to be made by the arbitrator and an award dealing with all the properties was to be passed. The arbitrator presented his award to the Court. It was objected to on the ground that the arbitrator acted partially and was induced by corrupt and improper motives in his decision. The defendants asked that the award be set aside. In their petition they stated that they had no objection to the division of the properties as proposed by the parties in Exhibits A and B. But the Subordinate Judge set aside the whole award, on the ground of the misconduct of the arbitrator and directed the suit to be posted for disposal before him. Against this order, a revision petition was filed. One of the grounds taken was that the lower Court should have upheld the award in so far as it dealt with the properties covered by Exhibits A and B. Mr. Justice Oldfield held that the order superseding the arbitration was not perverse and with reference to the contention that the Subordinate Judge should not have set aside the award in its entirety, the learned Judge pointed out that Exhibits A and B were only given conditionally. We understand the learned Judge to mean that the agreements were intended to assist the arbitrator and were not binding and final contracts as between the parties. There was no appeal against the judgment of Mr. Justice Oldfield. When the case came on for trial, the Subordinate Judge criticised the judgment of the learned Judge of this Court and refused to act upon his conclusion. We are surprised at the attitude of the Subordinate Judge. It was his duty to have accepted a pronouncement which the parties have chosen not to appeal against and to have acted upon it. The Subordinate Judge's order passing a decree in terms of Exhibits A and B must be set aside, as these documents have been held not to bind the parties in the suit. Mr. Sundaram argues that the statements in the judgment of Mr. Justice Oldfield regarding Exhibits A and B are only *obiter* and are not binding on the lower Court or on the parties. We cannot

accede to the contention. That statement was necessary for the conclusion come to by the learned Judge; if wrong the order should have been appealed against. We must reverse the order of the Subordinate Judge, as he acted illegally in acting upon documents which have been pronounced by a Court to which he is subordinate as not binding on the parties. Each party to bear his or their own costs.

Appeal allowed.

BOMBAY HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL NO. 50 OF 1914.

February 18, 1915.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Davar.

In re THE INDIAN SPECIE BANK, LTD.

S. N. POCHKHANAWALLA—APPLICANT

versus

C. A. PATVARDHAN AND OTHERS—RESPONDENTS.

Companies Act (VI of 1882), s. 58—Share-holder—Transfer of share—Transferee's name not registered—Winding-up of Company—Liquidation proceeding—Share-holder, right of, to have transferee's name entered as contributory—Sufficient cause—Default—Delay.

Where a share-holder having sold his shares in a Company applied to the Company for registration but before registration the Company went into liquidation, the share-holder is entitled, under section 58 of the Companies Act, to have the names of his transferees entered in his place as contributories only if he shows absence of sufficient cause or default or unnecessary delay in entering that fact in the register on the part of the company. [p. 992, col. 1.]

FACTS of the case appear from the following order of Macleod, J.—These are four summonses issued at the instance of S. N. Pochkhanawalla (hereinafter called the applicant) which were cansolidated and adjourned into Court under the following circumstances.

The applicant had been placed by the Liquidator on the list of contributories in Schedule A for a very large number of shares which stood in his name on the register of share-holders on the 29th November 1913 when the winding-up of the Company commenced.

On the day fixed for the settling of the list of contributories, a great many persons appeared in answer to notices served upon them by the applicant, who wished to have their names substituted for his in Schedule A in respect of various lists of shares sold to them. The four persons above-named appeared by Counsel and as they were prepared to proceed with the hearing of the question in dispute, although the applicant should have taken out summonses according to the regular procedure, I commenced the hearing and directed the applicant to remedy the defect by applying for summonses, which has now been done.

The applicant, before the winding-up commenced, sold 384 shares to Patvardhan, 25 to Damodar Hemandas, 30 to Girdharlal Harilal and 5 to Jagjiwandas Kahandas; the transfers had been executed by the transferor and his transferees and had been lodged with the Company for registration, but they have not been initialled by any of the Directors to show they have been approved of by the Board and consequently the names of the transferees do not appear on the register of share-holders. The applicant now contends that the names of those transferees should be entered in place of his name in Schedule A in respect of the shares so transferred by him, his name being relegated to Schedule B. In the same way, the applicant had sold a number of shares to a number of other persons against whom summonses have been granted, and the decision in the present summonses will govern the result of those summonses.

The following Articles of Association are relevant for the purpose of this case:

"45. Every such intrument of transfer shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register of share-holders in respect thereof and a fee of such amount, as the Directors may from time to time direct not exceeding four annas per share, shall be payable by the transferor in respect of every share transferred.

"46. The Board may decline to register any transfer of shares in respect whereof any share-holder is indebted to the Company for calls, interest or otherwise or whilst any sum of money is due from such share-holder

to the Company, either solely or jointly, on any account whatsoever.

"47. The Board may also decline to register any transfer of shares if the Board shall not approve of the proposed transferee and the Board shall not be obliged to give any reason for declining to do so. The member desiring to sell his share shall, in every case, submit a writing in the following form for the approval by the Directors of the intended transferee if the Directors require to do so. The registration of a transfer shall be conclusive evidence of the approval by the Directors of the transferee being a member of the Company."

Under section 147 of the Indian Companies Act, 1882, which governs these proceedings, the Court has power when settling the list of contributories to rectify the register of members in all cases where such rectification is required in pursuance of section 58.

Section 58 is as follows:—

"58. If the name of any person is fraudulently or without sufficient cause entered in, or omitted from, the register of members kept by any Company under this Act, or if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the Company, the person or member aggrieved, or any member of the Company, or the Company itself, may, by application to the principal Court of original civil jurisdiction in the district or place in which the registered office of the Company is situate, apply for an order of the Court that the register may be rectified; and the Court may either refuse such application, with or without costs to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the Company to pay all the costs of such application and any damages the party aggrieved may have sustained.

"The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceeding to have his name entered in, or omitted from, the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the Company, and whether there has or has not geen default on the part of the Company; and benerally the Court may, in any such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register: Provided that the Court may direct an issue to be tried in which any question of law may be raised; and an appeal in the manner directed by the Code of Civil Procedure shall lie."

This section does not appear to have been the subject of any reported decision of the Indian Courts, but the corresponding section 35 of the English Companies Act, 1862, has been a constant source of difference of opinion amongst the learned Judges in decided English cases. The word 'fraudulently' appears to have been inserted in section 58 in consequence of the decision in *Ex parte Kintrea* (1), but it hardly appears necessary. The words in the second part 'whether there has or has not been default on the part of the Company' appear to have been inserted as the result of the decision in *Ex parte Shaw* (2), but it does not seem that any importance need be attached to them as they have been omitted in the corresponding section 38 of the Indian Companies Act, 1913.

The section runs as follows:—

"38. (1) If—

"(*a*) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a Company; or

"(*b*) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member; the person aggrieved, or any member of the Company, or the Company, may apply to the Court for rectification of the register.

"(2) The Court may either refuse the application, or may order rectification of the register and payment by the Company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.

"(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members, or alleged members, or between members or alleged members on the one hand and the Company on the other hand;

(1) (1869) 5 Ch. App. 95; 18 W. R. 197; 39 L. J. Ch. 193; 21 L. T. 688.

(2) (1877) 2 Q. B. D. 463; 46 L. J. Q. B. 394; 36 L. T. 573; 25 W. R. 569.

and generally may decide any question necessary or expedient to be decided for rectification of the register:

"Provided that the Court may direct an issue to be tried in which any question of law may be raised; and an appeal from the decision on such an issue shall lie in the manner directed by the Code of Civil Procedure, 1908, on the grounds mentioned in section 100 of that Code."

This section, which has been re-drafted to correspond with section 32 of the English Companies Act, 1908, shows how the first paragraph, of section 58, should be read, *viz.*, "If—

"(*a*) the name of any person is fraudulently or without sufficient cause entered in, or omitted from, the register of members kept by the Company under this Act, or

"(*b*) if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the Company..."

The word 'entered,' according to its ordinary grammatical construction, must refer to an original entry of a person on the register in respect of one or more shares and it is to the original entry that objection must be taken, and not to the fact that although the original entry is unimpeachable, circumstances have occurred which require the objector's name to be removed. So the word 'omitted' must refer to an act of omission by the Company either by refusing or neglecting to place a certain name on the register. But it may be said that a person rightly entered on the register who has sold his shares may complain that his transferee's name has been omitted without sufficient cause, in which case he could apply under the first part of the section as well under the second, and that is in accord with the judgment of Brett, L. J., in *Ex parte Shaw* (2), where he says: "It seems to me that no case can be within the section which is not within the first part of it; but there may be cases within the first part that are not within the second." The decision in that case seems to set at rest the question whether in order to give jurisdiction to the Court to order rectification of the register under section 35, it was necessary that there should be actual default or unnecessary delay by the Company. Shaw instructed Smith to purchase for him 40 shares in the Diamond Rock Boring Company. Smith arranged with Sir E. Piers to sell 40 shares of which he was the registered owner. Piers executed the transfer and sent it with the scrip to the Company for the transfer to be certified. Piers then sent the transfer to Shaw who returned it executed to Smith. Smith then disappeared with the transfer and the Company declined to register Shaw as the owner of the shares. There was no question of any default on the part of the Company which submitted itself to the Court. It was held the case came within the first part of the section which moreover, later on, gave the Court jurisdiction to decide in any such proceeding any question of title between members or alleged members or between members and alleged members on the one hand and the Company on the other hand.

It must be noted that in *Shaw's* case (2) the Company had refused to register Shaw as the owner of the 40 shares, that the Company was not in liquidation and that there was a question in dispute between Shaw and Piers as to who was the owner of the shares. In the present case there is no dispute regarding title between the applicant and his opponents. No doubt when the bargain was completed and the transfers executed, the transferees became the equitable owners of the shares and the question is whether the register, which did not contain their names when the winding-up commenced, should be rectified by their names being entered.

Mr. Setalvad contended that this should be done irrespective of the question whether there was default or unnecessary delay on the part of the Company. He relied on the decision of Malins V. C., in *Ward and Garfit's* case (3). On the 3rd May 1866, Garfit executed a transfer of 40 shares in Overend, Gurney & Co., to Ward who executed the transfer, on or before the 9th May, when the transfer was lodged for registration with the Company. The Company stopped business on the 10th May and a petition for winding-up was presented on the 11th. Thereafter a voluntary winding-

(3) (1867) 4 Eq. 189.

up was determined on by the share-holders and an order for continuing the winding-up under the supervision of the Court was made on the 17th June. The Liquidators registered all the transfers lying at the Company's office at the time of the stoppage including the transfer to Ward. The Articles of Association contained Articles similar to Articles 45-48 of the Company in this case. The Vice-Chancellor said (page 196):—

"The terms of the 35th section are very extensive, and give a general power, of which there are numerous instances; and the Court may, either with or without costs, if it is satisfied of the justice of the case, make an order to rectify the register generlly. That is an absolute power, where the circumstances are such as, in the opinion of the Court, called for its exercise. The Court is armed with power (which is the important part of the section) to decide any question 'necessary or expedient' for the rectification of the register; and I am now called on to decide whether the equitable title, which is clearly vested in Mr. Ward, must not be completed by making it legal, and whether he must not fulfil all the obligations which such legal title would throw upon him. I am of opinion that I am armed with this power, and that Mr. Ward's name and not Mr. Garfit's ought to be put on the register."

In *Musgrave and Hart's* case (4) Malins, V. C., expressed the same opinion as in *Ward and Garfit's* case (3), but refused to rectify the register on the ground that the purchaser had not executed the transfer before the winding-up order was made. But the Vice-Chancellor expressed the opinion that he would have done so but for the recent decision of the Appeal Court in *Marino's* case (5). In that case the transfer had been sent to the Company for registration without being executed by the transferee. It was proved that it had been the uniform usage for the Company to require the transfer to be executed by both transferor and transferee although the Company had not adopted the Schedule in the Act which made that imperative. The Vice-Chancellor quoted the following passage from the judgment of Turner, L. J., whose liberal interpretaion of section 35 met with the approval of the Appeal Court in *Ex parte Shaw* (2) :—

"The respondent has to make out *that the Company was guilty of default* in not taking his name off the register, although, according to their ordinary practice, his name could not be taken off except upon production of a deed executed, not only by himself as the transferor of the shares, but by the person to whom he transferred them."

In *Shepherd's* case (6) Shepherd sold five shares in the Joint Stock Discount Company to Higgs, both parties executing the transfer which was lodged on or before the 3rd March 1866 for registration with the Company. On the 3rd March at a special meeting, the Directors resolved that no transfer of shares now in the office be registered without express sanction of the Board except to new Directors. A petition for winding-up the Company was presented on the 7th March and a winding-up order was made. It seems that Higgs had no objection to being put on the register. Romilly, M. R., said: [*Shepherd's* case (7).]

"I think I cannot put Mr. Higgs upon the register I am of opinion that the Directors had the power, if they exercised it *bona fide*, and considered it to be for the benefit of the Company, to refuse to make the transfer...That being so, I am of opinion that the Official Liquidator had no power afterwards to put any one else upon the list of share-holders."

In the Appeal Court Turner, L. J., said after quoting section 35:

"According to this section, in order to maintain Mr. Shepherd's case, it is necessary for him to show that there was default or unnecessary delay on the part of the Company in entering on the register the transfer of his shares to Mr. Higgs. But how do the facts stand? The transaction between Shepherd and Higgs takes place in the month of December, the transfer is completed as between the parties, but nothing is done as between either party and the Company until the 3rd of March. According

(4) (1867) 5 Eq. 193; 37 L. J. Ch. 161; 16 W. R. 247.

(5) (1867) 2 Ch. App. 596; 36 L. J. Ch. 468; 16 L. T. 361; 15 W. R. 683.

(6) (1866) 2 Ch. App. 16; 36 L. J. Ch. 32; 15 L. T. 198; 15 W. R. 26

(7) (1866) 2 Eq 564 at p. 566.

to the course of practice of this Company, the ordinary meetings of the Directors were held once a week, and their last weekly meeting was on the 1st of March. It was not, therefore, until the 8th of March that, in the ordinary course of business of the Company, the consideration of this transfer could come under the notice of the Directors. But before the 8th of March arrived, the petition, on which the winding-up order was afterwards made, had been presented...I think, therefore, this is not a case in which it can be said that there was any default, or any unnecessary delay, on the part of the Company in entering the name of Higgs on the register."

It seems in this particular case, when the transfer was not lodged in time to give the Directors an opportunity of considering whether it should be sanctioned or not, the order of the Master of the Rolls was right, and Cairns, L. J., says at page 21:

"It seems to me impossible to say, in the words of the Act of Parliament, that on the 7th, the day on which the winding-up commenced, and after which nothing could be done, unnecessary delay had taken place in entering upon the register the fact of Mr. Shepherd's having ceased to be a member."

Malins, V. C., in *Ward and Garfit's* case (3) says at page 196 with reference to this case:

"*Shepherd's* case (6) turned on the fact that the Directors had exercised their discretion as to approving of a transferee; and the Master of the Rolls and the Court of Appeal proceeded on this ground, that the exercise of discretion could not be altered by the Court."

With due respect it seems impossible to reconcile the Vice-Chancellor's method of disposing of the decision in *Shepherd's* case (6) either with the facts of the case or with the passages above quoted from the judgments of the Appeal Court. Moreover, the learned Vice-Chancellor appears to have overlooked the fact that jurisdiction can only be exercised under the section where, without sufficient reason, a person's name has been entered or omitted and it could not be said that a transferee's name had been omitted without sufficient reason when the Directors had had no opportunity of exercising their discretion or where, as in *Musgrave and Hart's* case (4), the transferor had not even executed the transfer.

The wide jurisdiction given by the second part of the section can only be exercised when grounds have been established under the first part for exercising such jurisdiction. If two parties are disputing as regards the ownership of a share, the Company would be justified in declining to do anything until the dispute was settled and in such a case the Courts may exercise their discretion in deciding the dispute in a summary way under section 58, though they will probably decline if the matter is in any way complicated. But the mere fact that a share-holder has made a contract with another party to sell his share cannot by itself bring about an omission by the Company without sufficient cause to enter the purchaser's name on the register of share-holders. If the Vice-Chancellor's view was the right one, Higgs was the equitable owner on the 3rd March and, therefore, Higgs' name had been omitted without sufficient cause. Then again the facts, as stated in the report, show that the Directors did not exercise any discretion as to approving the transferees on the 3rd March, they passed a resolution which, in the words of Cairns, L. J., amounted to saying: "We reserve to ourselves the sole exercise of the right to look into the circumstances of each transfer, and we give notice to our officer that, until we have pronounced an opinion upon the transfers, he is not to register them."

There can be little doubt that if *Ward and Garfit's* case (3) had come before the same Bench they would have refused to put Ward's name on the register.

In *Nation's* case (8), which also arose out of the winding-up of the Joint Stock Discount Co., the transfer by Nation in favour of Binney was lodged with the Company for registration on the 17th February. On the 28th February in consequence of a resolution passed at a general meeting of the Company, nearly all the Directors resigned and new Directors were elected. On the 1st March an ordinary meeting of Directors was held but no transfers were brought before the Directors at that meeting. Nation

(8) (1866) 3 Eq. 77; 36 L. J. Ch. 112.

having been placed on the list of contributories applied that the list might be varied by excluding his name and substituting Binney. Lord Romilly, M. R., allowed the application on the ground that there had been unnecessary delay, because the transfer was not confirmed at the meeting of the Directors on the 1st March at which, in the ordinary course of business, it would have been confirmed.

In *Walker's* case (9) the contract to sell certain shares was made after the winding-up commenced, but before the winding-up order was made the transferee did not execute the transfer. The transferor applied to have the purchaser registered as the owner of the shares. Kindersley, V. C., in refusing the application, said:

"It has been contended that the parties may supersede the necessity of bringing the matter before the Board of Directors; but the Board of Directors had the right to determine whether they would accept the transferee or not, and this Court has no power to deprive them of that right, or to substitute its own discretion for theirs, and to direct that the transferee shall be registered as a share-holder."

It seems, however that, in the opinion of Romilly, M. R., and Turner, L. J., if the Directors have had an opportunity of exercising their discretion before the winding-up and have not exercised it, that amounts to delay which entitles the Court to act as if they had exercised their discretion. In *Fyfe, Ex parte, Joint Stock Discount Co., In re* (10) Giffard, L. J., followed the decisions in *Nation's* case (8) and in *Shepherd's* case (6), removing the applicant's name from the register on the ground that there had been delay and neglect on the part of the Company in not registering the transfer on the 1st March.

In *Marshall* v. *Glamorgan Iron and Coal Co.* (11) Giffard, V. C., said:

"Again, if a man being a share-holder has sold his shares, he is not relieved from being a contributory, if, owing either to his own neglect or that of his transferee, or if, in fact, owing to any cause except the neglect of the Company, his transferee's name has not been substituted for his at the date of the winding-up. If the omission to substitute the name of the transferee is owing entirely to the neglect and default of the Company he will be relieved."

In *Ward and Henry's* case (12) the facts were that Ward sold shares to Stafford through a broker Henry and executed a transfer which Stafford did not register. Stafford agreed to sell the shares to Henry but refused to execute a transfer. Henry then persuaded Ward to execute a fresh transfer to him which Henry took in for registration, but the Directors in consequence of a notice from Stafford refused to register it. Henry filed a bill against Stafford for specific performance to which Stafford put in an answer. Ten days later a petition for winding-up was presented on which a winding-up order was made. The Master of the Rolls put Henry on the list of contributories. On appeal, Turner, L. J., held that the Court had jurisdiction under section 35 but the case was one in which the jurisdiction should not be exercised. Cairns, L. J., held that there had been no default on the part of the Company and there was, therefore, no case for the rectification of the register. Though it must now be taken as settled law that under section 35 of the English Companies Act, 1862, the Courts had, and under section 32 of the Indian Companies Act, 1908, the Courts have, jurisdiction to decide questions in dispute between members and alleged members whether or not there has been default on the part of the Company, still that jurisdiction will not be exercised after winding-up has commenced unless there has been default or unnecessary delay on the part of the Company. Even if there has been such default or delay, the Court will not rectify the register at the instance of the Liquidator: *Sichell's* case (13); see Buckley, page 86, and Halsbury's Laws of England, Volume 5, page 498. If it was not for the decision of Malins, V. C., in *Ward and Garfit's* case (3) the applicant's contention would be unarguable,

(9) (1866) 2 Eq. 554; 35 L. J. Ch. 826; 14 L. T. 32; 14 W. R. 1068.

(10) (1869) 4 Ch. App. 768; 21 L. T. 151; 17 W. R. 978.

(11) (1868) 7 Eq. 129 at p. 137; 38 L. J. Ch. 69; 19 L. T. 632; 17 W. R. 435.

(12) (1867) 2 Ch. App. 431; 36 L. J. Ch. 462; 16 L. T. 254; 15 W. R. 569.

(13) (1881) 3 Ch. App. 119; 37 L. J. Ch. 373; 17 L. T. 363; 16 W. R. 292.

but both the learned authors above-mentioned, while ignoring that decision, rely on the higher authority of *Shepherd's* case (6) for the proposition they lay down, which has never been considered as having been overruled by the decision in *Shaw's* case (2), in which there was a question of disputed ownership of shares in a going concern, which the Directors left to be decided by the Court. In the case of the register of a Company being wound-up, it has been said that as the tree falls so it must lie. The register must be correct unless there has been default or delay on the part of the Company. In other words, the applicant must show sufficient reason for the omission of the respondent's name on the register and there can be no sufficient reason unless there has been default or delay on the part of the Company. Evidence has been given on affidavit and *viva voce* regarding the practice of this Company in registering transfers. On behalf of the applicant it is alleged that the practice was for all transfers received up to the day before a Directors' meeting to be placed before the Board; on behalf of the respondents, that only transfers lodged up to the end of the previous week were placed before the Board at their meeting in the following week.

The usual day for Board Meetings was Tuesday. On the 25th November, there was no meeting as the Manager was too busy engaged in certain Court matters. The Board did not meet until Friday, the 28th, when it seems that transfers lodged up to Saturday the 22nd were placed before them. At least one transfer lodged after the 22nd was placed before them especially for disapproval as the transferee was a minor.

The transfers signed by Patvardhan were lodged with the Company as follows: —

1	Tr. 65 Shares	...	On the 25th November.
2	Tr. 95	,, ...	Do.
3	Tr. 5	,, ...	Do.
4	Tr. 5	,, ...	Do.
5	Tr. 5	,, ...	Do.
6	Tr. 10	,, ...	On the 26th November.
7	Tr. 10	,, ...	On the 27th November.
8	Tr. 10	,, ...	Do.
9	Tr. 10	,, ...	Do.
10	Tr. 159	,, ...	Undated but from its serial number lodged presumably on the 28th November.

The transfer signed by D. Harnamdas was lodged on the 27th November.

The transfer signed by Girdharlal H. Mehta was lodged on 27th or 28th.

And the transfer signed by Jagjivandas K. Shah was lodged on the 27th. Obviously if the meeting had been held on the usual day, all these transfers were lodged too late to be placed before the Board.

The only Director who was called to give evidence was Sir Jugmohandas Varjivandas. He said the usual practice was for transfers completed in the previous week to be put before the Board at their meeting in the following week. The transfers were initialled by the Manager, Chunilal, or his assistant, Vithaldas, to show there was no objection to the transfer and when so initialled, they were approved by the Board without further inquiry. The Directors initialled the transfers, if approved. They might initial them before the actual business of the meeting commenced. The minutes of Directors' meetings do not show the serial numbers of the transfers which were approved of by the Directors, but only the numbers of those transfers which were not approved. It has been argued that because the transfer of share No. 56342 which was lodged on the 26th November 1913 was rejected, all transfers lodged up to the 26th November were placed before the Board and approved, but it is quite clear that no transfer which has not been initialled by the Directors can be said to have been approved by the Board. The above-mentioned transfer was brought before the Board at once to be rejected, so that the vendor and the purchaser might know as soon as possible that the transfer would not be allowed. In re-examination Sir Jugmohandas said that there was nothing to prevent Chunilal and Vithaldas placing before the Board transfers lodged on the day previous to the meeting. None of the other Directors have come forward to depose that the practice was otherwise than as stated by Sir Jugmohandas. I do not attach much importance to the evidence of Hiralal Motiram, who does not seem to have been actually attached to the Share Department. Parashram Vasudev was the counter-clerk in the Share Department. It was his duty to receive transfers and see that the signatures were in order. If they were, he

took the transfer to the clerk in charge of the Department for him to initial it. In the evening receipts were made out for the shares lodged for transfers during the day. The following day, the transfers with the shares and receipt-forms were sent to the Managing Director, and would come back within an hour or so. The witness kept a rough register book in which transfers were entered, but I could not get from him a satisfactory answer to the question when this register was made up. He first said: "On the evening of the day on which an application was received it was entered on the rough register." Then he said, "the rough register was made up from the receipt-book when the application was received back from the Managing Director." Finally he said, "I entered the particulars on the rough register the day I received the application." The witness also said that Board Meetings were generally held on a Tuesday. Transfer forms received from the last Tuesday up to the Monday before the meeting were placed before the Board. He used to make the transfers into a bundle and put them the same day on the desk of the clerk in charge, who sent them to the Directors. Before the 28th November work had fallen into arrears and, therefore, all the transfers could not be sent up as usual. He said the practice was not to send up transfers to the Board before they were entered in the rough register; but this statement was not quite correct, or, at any rate, the practice was not observed during the last week. At the last meeting transfers received before the 23rd November were placed before the Board and a great many of them had not been entered in the rough register. It must be noted that this witness, whatever the actual practice was, had nothing whatever to do with the decision as to what forms should be placed before the Board: that was the duty of the clerk in charge of the Share Department. Mathuradas was the clerk in charge from 1907 until May 1913, when he was appointed the Manager of the Poona Branch. He used to send the transfers up to the Board Meetings. He was very positive that his practice was to send up transfers which had beed lodged up to the Saturday previous to the day on which the Board Meeting was held. There was nothing unreasonable in such a practice nor was there any reason why the witness, who appeared to me to be a most respectable man, should say that he did not send up forms lodged on a Monday if, as a matter of fact, he usually did so. When he took charge of the Department he found there was no settled practice and so he instituted the practice he deposed to. If there was any doubt about a transfer form or if there were reasons for objecting to it, it might be placed before the Board at once in order that the purchaser might have notice as soon as possible.

It was the duty of the witness to make inquiries about the purchasers and report to the Managing Director.

It certainly does appear from the records that at the Board Meetings held after the transfer books were re-opened after being closed for issue of dividend warrants, transfers lodged on the previous day may have been placed before the Board for approval, but there is no certainty about that since the minutes do not give particulars of transfers approved, but only of transfers rejected. Mathuradas did say that on such occasions such applications as were complete could be placed before the Board, but that would not be possible with applications lodged the day before. The fact that a transfer lodged on the previous day was rejected by the Board the next day does not prove, as I have already shown, that all the other transfers lodged that day were placed before the Board and approved. After Mathuradas left, one Khandwalla took his place, but he frankly admitted he knew nothing about the business and did not know up to what day transfers submitted to a Board Meeting had been lodged.

Vithaldas Parekh was assistant to the Managing Director and used to initial transfers from August 1913. He said, as far as he knew, applications received up to the day previous to the Board Meeting were presented to the Board, but he had to admit it was not a part of his duty to see which forms were submitted to the Directors and he could not say what was the practice of the Head of the Share Department when putting transfer forms before the Board. He was directly interested in these proceedings as he had sold fifty shares and lodged the transfer on the 25th November. Pereira, the ledger-clerk, said that transfer forms lodged prior to the day of the Directors'

meeting generally came to him to be posted, after having been approved by the Board, but all the witness had to do was to post the transfers in the ledger, and in cross-examination he said it was generally a week before the Directors approved a transfer after it was lodged. The witness seemed to me to have been brought to depose to a practice about which he knew nothing. I asked him whether it was his business to consider how many days had elapsed between the date on which the transfer had been lodged and the date of the Directors' meeting at which it was approved, and he said no.

It is impossible, therefore, on this evidence, to come to the conclusion that, according to the usual practice, transfers lodged up to the day before a Directors' meeting were placed before the Board. It is not even certain that the transfers were entered in the rough register before they were initialled by the Managing Director, and if they were entered after being so initialled they could not, in the ordinary course, have been placed before the Board until the second day at the earliest. Even by the 28th November all the transfers lodged up to the 22nd had not been registered, while those lodged up to the 27th November had been initialled by Vithaldas. But even assuming that in the ordinary course of business transfers lodged the day before the meeting were placed before the Board, it cannot be said under the particular circumstance of this case that there was any unnecessary delay in not approving on the 28th transfers lodged on the 25th and after. A petition to wind up the Company had been admitted on the 19th, with the result that a very large number of share-holders came out to sell their shares. The staff of the Bank was quite unable to cope with the rush of transfers, so that on the 28th November even those which had been lodged up to the 22nd November had not been regularly dealt with. Therefore, it was quite impossible to deal with transfers lodged after the 22nd, except in the most cursory fashion for the purpose of seeing whether there was any objection on the face of the transfers which would necessarily lead to their rejection. Considering the allegations made in the petition of the 19th regarding the affairs of the Company, the Directors would only have been doing their duty if they had refused to deal with any further transfers until they had satisfied themselves that those allegations had no foundations in fact, but it seems that without making any inquiries they were prepared to go on approving as many transfers as were placed before them. The fact that practically all the transfers lodged up to the 22nd November were placed before the Board, although in consequence of their number they had not all been entered in the rough register, adds considerable support to the evidence of Mathuradas. Therefore, I find that the usual practice was to collect transfers up to a Saturday and put only those before the Board at their meeting in the week following, whether it was held on Tuesday or on a later day in the week. Even assuming that transfers lodged up to the day before the meeting were placed before the Board, it was impossible to do this at the meeting of the 28th owing to the enormous number of transfers. Therefore, in no case was there default or unnecessary delay in dealing with the transfers in these summonses.

In particular the applicant can have no case as regards the transfers out of those for 159 shares evidently lodged on the 28th November which were incomplete, owing to alterations not having been initialled by both parties, and which would not, in any event, have been placed before the Board.

The Liquidator has rightly taken no part in these proceedings except to assist the Court when required.

Messrs. *Setalvad* and *Kanga*, for the Appellant.

Mr. *Strangman*, Advocate-General, and Mr. *Inverarity*, for Respondent No. 1.

Messrs. *Jinnah* and *Desai*, for Respondents Nos. 2, 3 and 4.

Mr. *Campbell*, for Respondent No. 5.

JUDGMENT.—This appeal arises out of a decision of the learned Chamber Judge upon four summonses taken out in the matter of the liquidation of the Indian Specie Bank. In those summonses the applicant, Sorabji Nusserwanji Pochkhanawalla, calls upon the opposing parties, C. A. Patwardhan, Damodardas Hemandas, Girdharlal, Harilal Mehta

KRISHNASAMI AIYAR v. SUNDARAM AIYAR.

and Jagjiwanadas Kahandas Shah, to show cause why the list of contributories should not be amended by substituting their names in place of the name of the applicant in regard to the shares specified in the summonses. The application is made under section 58 of the Indian Companies Act (VI of 1882) and the Court is asked to make an order upon the summonses, on the ground that it has the power under section 147 of settling the list and rectifying the register in cases in which such rectification is required in pursuance of section 58. Section 58 provides that if the name of any person is fraudulently or without sufficient cause entered in, or omitted from, the register of members kept by any Company, or if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the Company, the person or member aggrieved, or any member of the Copmany, or the Company itself, may make an application for the rectification of the register.

Cases in which an application may be made concern, therefore, the acts or omissions of the Company keeping the register. In the case of an omission appearing by reason of the fact of a person having ceased to be a member not being entered in the register, it is necessary to show that default has been made or unnecessary delay has taken place on the part of the Company keeping the register. In all other cases, it is enough to show that the name of some person is fraudulently or without sufficient cause entered in, or omitted from, the register kept by the Company. Thus the evidence in every case must be directed to the acts or omissions of the Company.

In the present case, the grievance is that the applicant, having sold his share to the opponents on the summonses before the order for winding-up was made, has not been entered on the register as having ceased to be a member and it would, therefore, seem that it is necessary to show default or unnecessary delay in entering that fact in the register on the part of the Company. But even if we assume that, as argued on behalf of the applicant, the case may be treated as a case of omission from the register of a person who is not complaining of the omission, still an absence of sufficient cause has to be shown, and we are of opinion that, upon the evidence, no absence of sufficient cause, no default and no unnecessary delay is proved.

For these reasons we think that the learned Judge was right in the order passed by him which we now affirm, and we dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1171 OF 1913.

February 5, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

T. R. SUNDARAM AIYAR—PLAINTIFF—APPELLANT

versus

KRISHNASAMI AIYAR—DEFENDANT—RESPONDENT.

Hindu Law—Gift of family property to son-in-law, legality of.

A gift of family property to a son-in-law is not necessarily invalid.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 266 of 1912, preferred against that of the District Munsif of Ambasamudram, in Original Suit No. 51 of 1911.

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellant.

Mr. *A. Swaminatha Aiyar*, for the Respondent.

JUDGMENT.—We must hold, following *Ramasami Ayyar* v. *Vengidusami Ayyar* (1), that a gift of family property to a son-in-law is not necessarily invalid: and the lower Appellate Court appears to have found that in this case the amount of the gift was not unreasonable or excessive in proportion to the amount of the family property. Mr. Anantha Krishna Aiyar has argued that Exhibit II is not a gift-deed but only a contract to give: but reading the document as a whole we have no hesitation in holding it to be a gift deed, subject only to the antecedent condition that the donee's marriage to the donor's granddaughter should take place.

The second appeal is dismissed with costs.

Appeal dismissed.

(1) 22 M. 113.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 251 OF 1914.

December 11, 1914.

Present:—Mr. Batten, A. J. C.

THE LOCAL GOVERNMENT—APPLICANT

versus

MULLU—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), ss. 337, 339—Tender of pardon, object of—Approver resiling from his evidence in Sessions Court—Forfeiture of pardon —Trial—Defence—Evidence before Committing Magistrate, relevancy of—Statement, meaning of—Procedure —Evidence Act (I of 1872), s. 24.

The object of tendering a pardon is to obtain the evidence of the person to whom the pardon is tendered and the "full and true disclosure" in section 337 (1), Criminal Procedure Code, refers to a full and true disclosure in the evidence which the approver is required to give. [p. 994, col. 2.]

Where the evidence of an approver in the Sessions Court is not a compliance with the conditions of his pardon, the fact that he gave evidence in accordance with those conditions before the Committing Magistrate does not save him from being treated as a person who has forfeited his pardon within the meaning of section 339, Criminal Procedure Code. Such a person cannot plead the pardon as a bar to his trial. [p. 996, col 1.]

The evidence of an approver in the committal proceedings is a statement within the meaning of section 339 (2) of the Criminal Procedure Code and is not governed by section 24 of the Evidence Act and can be used against him in evidence when the pardon has been forfeited. [p. 996, cols. 1 & 2.]

The proper procedure in such cases indicated. [p. 996, col. 2.]

Criminal revision against an order of the Additional Sessions Judge, Saugor, dated the 30th July 1914.

Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—In this case this Court is moved by the learned Government Advocate to revise the order of the Additional Sessions Judge, Saugor, discharging Mullu Chamar, who had been committed to his Court on a charge of abetment of murder. The following is the history of the case. Two persons, Manju and Mullu, were 'challaned' by the Police before the Sub-Divisional Magistrate, Rehli, for the murder of Hiralal. At the first hearing, on the 26th November 1913, the Prosecuting Inspector requested that Mullu should be given a pardon and made an approver. On the 27th November the Superintendent of Police made a written request to the Magistrate that he should "take Mullu's statement in due form," as it was proposed to make him an approver.—The Magistrate recorded the following order: "It is urged that Mullu, though an accomplice, is the only eye-witness to the murder and Manju is the principal offender, so it is necessary that Mullu be made an approver. I tender the following conditional pardon to Mullu son of Bukhey Chamar, accused No. 2:

"'Whereas you are supposed to have been directly or indirectly concerned in the offence of the murder of Hiralal Chamar and whereas you are likely to give material evidence in the case against Manju, accused No. 1, I hereby tender you a pardon under section 337, Criminal Procedure Code, on condition of your making a full and true disclosure of the whole of the circumstances within your knowledge relative to the offence of the above said murder by Manju and relative to any other person concerned whether as principal or abettor in the commission of the above murder."

"The above conditional order was interpreted to Mullu Chamar, accused No. 2, and he accepts the conditional pardon. I accordingly grant pardon to him under section 337, Criminal Procedure Code, and proceed to examine him as a witness in the case." Mullu was at once examined as the first prosecution witness in the case against Manju, this evidence being the only statement of his that was recorded. His evidence was to the effect that Manju, who was his maternal uncle, asked Mullu to accompany him for the purpose of killing Hiralal, that Manju concealed himself in a bush, and Mullu by allowing himself to be seen and walking away led Hiralal into the ambush laid for him, when Manju rose and killed Hiralal with his axe.

Manju was charged with murder and committed to the Court of Session. In the Sessions Court Mullu retracted his former evidence and said he knew nothing of the murder. He alleged, as he now alleges in this Court, that all he did in the Court of the Committing Magistrate was to stand and weep without saying anything.

The learned Sessions Judge treated Mullu's deposition before the Committing Magistrate as evidence under section 288,

Criminal Procedure Code, and relied upon it in convicting Manju of murder. Manju was sentenced to death. A Bench of this Court confirmed the conviction and sentence in Criminal Appeal No. 15 of 1914 and Criminal Reference No. 6 of 1914, and in so doing took into consideration the evidence of Mullu before the Committing Magistrate.

On the 27th January 1914, the date on which he pronounced judgment convicting Manju, the Sessions Judge recorded the following order:—

"Whereas Mullu Chamar was tendered conditional pardon by the Committing Magistrate in the course of the inquiry, under section 337 of the Criminal Procedure Code, and Mullu Chamar aforesaid has by repudiating his statement before the Magistrate and asserting ignorance of the crime concealed facts and has thereby forfeited the pardon, it is directed that he be detained in Jail custody till the District Magistrate, after the final disposal of the case against Manju Chamar, on submission to the High Court, decides to prosecute him for abetment of this murder."

On the 6th August 1914 the District Magistrate 'sanctioned,' that is to say ordered, the prosecution of Mullu for abetment of murder, and he was again placed before the Sub-Divisional Magistrate, who recorded evidence, framed a charge against Mullu under section 302/109 of the Indian Penal Code and committed him for trial. The statement which Mullu made before the Committing Magistrate in the case against Manju was not formally proved, but the record was before the Magistrate, and the following question and answer appear in the examination of the accused:—

"*Question*—Did you make the statement taken down before?

Answer—I did not make it, the Police made me do so."

The Magistrate's note of the answer is somewhat fuller being: "The statement which I made before this Court on 27th November 1913 as explained to me was not made by me, but the Police induced me to make it."

The Sessions Judge transferred the case against Mullu to the Additional Sessions Judge, Saugor, for trial. The Additional Sessions Judge discharged the accused on the ground "that the pardon duly earned by the accused is still in force and effect and this trial cannot be proceeded with." It is this order of discharge that I am now asked to set aside in revision.

The accused pleaded the pardon as a bar to th trial, and the Additional Sessions Judge was right in inquiring into the validity of the plea, vide *Emperor* v. *Musammat Kachri* (1). The finding of the Sessions Judge in his order of the 27th January 1914 that the pardon had been forfeited, did not prevent the accused pleading that it had not been forfeited. As proof that the pardon had been forfeited the prosecution relied on Mullu's deposition in the Sessions Court, read with his previous deposition before the Committing Magistrate.

The learned Additional Sessions Judge has held that because before the Committing Magistrate the approver fully complied with the conditions of his pardon by giving what the prosecution regard to be true evidence regarding the offence, he has not forfeited his pardon, within the meaning of section 339 (2), Criminal Procedure Code, merely because he withdrew that evidence in the Sessions Court. He says: "the approver does not by the conditions of his pardon, in my opinion, guarantee that he would make the same statement throughout." Such a view appears to me contrary to the whole spirit of the provisions regarding pardon contained in sections 338 to 339 of the Criminal Procedure Code. It is clear from the first sub-section of section 337, Criminal Procedure Code, that the object of tendering a pardon is to obtain the evidence of the person to whom the pardon is tendered and the "full and true disclosure" in the same sub-section must be held to refer to a full and true disclosure in the evidence which the approver is required to give by sub-section (2). In *Queen-Empress* v. *Ramasami* (2) it was held that the words "in the case" in sub-section (2) of section 337 refer to the preliminary inquiry as well to the trial. That they include the trial cannot possibly be doubted. The condition of the approver's pardon in this case, as in all cases where the proper

(1) 10 Ind. Cas. 622; 7 N. L. R. 65; 12 Cr. L. J. 326.
(2) 24 M. 321; 2 Weir 396.

procedure in tendering pardon has been followed, was that he should make a full and true disclosure in his evidence in the case, and he cannot be said to have complied with the condition by making such disclosure in his evidence in part of the case only, namely, in the inquiry, but withdrawing that evidence in the Sessions Court and saying it was false. In *Kullan* v. *Emperor* (3) it was remarked by Wallis and Pinhey, JJ., that "it is not enough for the approver to make such disclosure before the Committing Magistrate if he withdraws it in the Sessions Court or to make it in examination-in-chief if he withdraws it in cross-examination." The Additional Sessions Judge declines to be guided by this remark because it is an *obiter dictum*. It is, nevertheless, a weighty expression of opinion. The Additional Sessions Judge seems to have misunderstood the observations of the learned Judges in *Emperor* v. *Kothia* (4), in which he appears to find some justification for his opinion. The main point decided in that case was that when an approver is put up on his trial for the offence in respect of which the pardon was tendered, it is for the Sessions Court in the new trial to decide the question whether or not the pardon has been forfeited. The ruling on this point was followed by Skinner, A. J. C., in *Emperor* v. *Musammat Kachri* (1), and the same view as to the correct procedure was expressed in *Kullan* v. *Emperor* (3). The Additional Sessions Judge seems to rely upon these words of Aston, J., in the Bombay case which he quotes: "It will be seen that this section does not enact, that a person who has accepted a tender of pardon renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence. What the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made." But these words must be read with the fuller remarks on the same subject of Beaman, J., from which it is quite clear that evidence which is false in not making a true disclosure in regard to the offence in respect of which pardon was tendered, is what is meant by false evidence in sub-section (1) of section 339, Criminal Procedure Code. The Additional Sessions Judge appears to concede that the evidence given in the Sessions Court must have been false if that gaven before the Committing Magistrate was true, but his view is that if he give true evidence at one stage in a case, that is quite sufficient. In the Bombay case the approver in his evidence before the Committing Magistrate made what the prosecution accepted as a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence; he repeated this in his examination-in-chief before the Sessions Judge, but resiled from his statements in cross-examination. Both Judges held that the question whether the accused had forfeited his pardon was one to be decided at the trial of the approver; Aston, J., expressed no opinion as to whether the pardon had or had not been forfeited, and Beaman, J., though he too said he did not feel called upon to express an opinion, did make some remarks indicating that in his opinion there was some doubt as to whether, in the special circumstances of the case, the recantation of the evidence in cross-examination necessarily resulted in a forfeiture of the pardon.

In *Aligiriswami Naicken, In re* (5), which was a case in which the approver made a full and true disclosure as a witness before the inquiring Magistrate but retracted from his evidence on being further examined before the same Magistrate, the learned Judges, who referred to and accepted the ruling in *Emperor* v. *Kothia* (4), remarked: "It has nowhere been laid down that if a witness first makes a full and true disclosure, he is then at liberty to contradict his statement or deny its truth without any fear of forfeiting his pardon. Such an interpretation of section 339 would, we think, be unreasonable, and would render nugatory the provisions of the law which aim at obtaining true evidence of offences by the grant of pardon to accomplices."

(3) 2 Ind. Cas. 343; 32 M. 173; 9 Cr. L. J. 571.
(4) 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346.
(5) 5 Ind. Cas 831; 33 M. 514; 7 M. L. T. 121; 11 Cr. L. J. 254; (1910) M. W. N. 5.

In the matter of AMBA PRASAD.

I have no hesitation in holding that if Mullu's evidence in the Sessions Court was not a compliance with the conditions of his pardon, the fact that he gave evidence in accordance with those conditions before the Committing Magistrate does not save him from being treated as a person who has forfeited his pardon within the meaning of section 339, Criminal Procedure Code.

As pointed out in *Queen-Empress* v. *Brij Narain Man* (6), the question whether or not, in his evidence at the trial, Mullu made a full and true disclosure of all he knew regarding the murder, is clearly a question of fact. But the question presents no difficulty. It is the case of the Crown that Mullu's evidence before the Committing Magistrate was substantially a true statement, and the crime for which he has been prosecuted is the crime disclosed in that evidence. That evidence was undoubtedly given in compliance with the conditions of his pardon, so that the pardon was for the crime disclosed in that evidence. By resiling from that evidence in the Sessions Court Mullu has clearly forfeited the pardon for the crime of which he is accused. If his evidence in the Sessions Court is true, he has not committed the crime and needs no pardon, but if he committed the crime, he has forfeited the pardon tendered in respect of it, and cannot plead the pardon as a bar to his trial.

The only other questions before me are wheth r his evidence before the Committing Magistrate is the 'statement' referred to in sub-section (2) of section 339, Criminal Procedure Code, and whether it is admissible in evidence against Mullu. As to the first question, according to the view of Ismay, J. C., in *Empress* v. *Bodhan* (7) the Committing Magistrate inquiring into the offence adopted the correct procedure in recording the approver's statement as evidence in the case; with the question whether a statement can be properly recorded otherwise than as evidence in the case I am not now concerned. In more than one of the reported cases, the evidence of the approver in the committal proceedings has been used against him in his trial for the offence in respect of which he was tendered a pardon.

The second question is best answered in the words of the judgment in *Sultan Khan* v. *Emperor* (8): "It is clear to us that the argument based upon the provisions of section 24 of Act 1 of 1872 is not entitled to weight in the present case. Clause 2 was no doubt introduced into section 339 of the Code in order to make it clear that a statement made by a person who accepted an offer of pardon is not governed by section 24 of Act I of 1872, and can be used against him in evidence when that pardon has been forfeited."

The question of the value or sufficiency of the evidence, including his own statement, against Mullu, is not before me. The Additional Sessions Judge has discharged him on the sole ground that his pardon has not been forfeited; as I have found the pardon to be forfeited, I set aside the order of discharge and direct that the trial be proceeded with according to law. He should also consider the question whether the charge needs amendment. The accused Mullu will be sent in custody to the Additional Sessions Judge, Saugor.

The attention of the learned Sessions Judge is invited to those of the above cited rulings which show the uselessness of his declaring the pardon to be forfeited, and to the impropriety of his having kept the approver in custody after the termination of the trial. The correct procedure is indicated in *Emperor* v. *Kothia* (4).

Order of discharge set aside.

(6) 20 A. 529; A. W. N. (1898) 152.
(7) 13 C. P. L. R. 7.
(8) 5 A. L. J. 691; A. W. N. (1908) 259; 8 Cr. L. J. 445.

ALLAHABAD HIGH COURT.
FULL BENCH.

CIVIL MISCELLANEOUS APPEAL No. 98 OF 1915.
March 29, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir George Knox, KT., and Justice Sir P. C. Banerji, KT.

In the matter of AMBA PRASAD, MUKHTAR OF MORADABAD.

Legal practitioner changing sides in connected cases—Professional misconduct—Practice.

A professional gentleman should as far as possible stick to the side who first employed him. It might be a very good practice if when gentlemen were offered instructions by the opposite side in any connected case that they should at least in the first place inform their first clients. [p. 997, col. 1.]

Report made by the District Judge of Moradabad as per his letter No. 88/IV, dated 22nd January 1915.

Mr. *Dillon* (with him Mr. *P. L. Banerji*), for the Mukhtar.

Mr. *Ryves*, for the Crown.

JUDGMENT.—This matter is connected with a report against a certain Mukhtar. It is said that he has changed sides in the course of different legal proceedings. In what is admitted to be the strongest case against him the charge is as follows :—

Certain persons were accused of an assault upon the servant of a *zemindar*. The Mukhtar appeared on behalf of one or more of the accused persons in the Appellate Court. Later on the *zemindars* brought proceedings under section 145 of the Code of Criminal Procedure. The property the subject-matter of this application by the *zemindars*, is said to have been the same property a dispute about which led to the alleged assault. It is, therefore, said that the Mukhtar "changed sides" and was thereby guilty of unprofessional conduct. It must be borne in mind. in the first place, that when the Mukhtar first appeared it was merely to argue an appeal upon the evidence that was on the record. The question in dispute in the proceedings under section 145 would be as to who was in possession of the property. It does not necessarily follow that the Mukhtar received any information from his first clients when he was appearing for them which could be used to their prejudice when he appeared for the *zemindars* in the proceedings under section 145. There is nothing on the record to show that the Mukhtar's first clients offered to employ him in the second case or that they took any exception to his appearing in the case until the case was actually at hearing. Speaking generally, it is quite clear that a professional gentleman should as far as possible stick to the side who first employed him. It might be a very good practice if when gentlemen were offered instructions in any connected case that they should at least in the first place inform their first clients. In the present case it has not been proved to our satisfaction that the Mukhtar has been guilty of any professional misconduct.

The Rule is discharged.

Rule discharged.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 691 OF 1914.
October 15, 1914.

Present:—Sir G. W. Shaw, KT., J. C.

EMPEROR—PROSECUTOR

versus

NGA NYAN U—ACCUSED.

Penal Code Act (XLV of 1860), s. 215, applicability of—Thief himself taking gratification to restore stolen property—Conviction, legality of.

Section 215, Indian Penal Code, is not intended to apply to the thief himself, and, therefore, where a man is convicted of theft, he ought not to be also convicted under section 215 of taking a gratification to restore the stolen property. [p. 997, col. 2]

Mr. *H. M. Lutter*, Government Prosecutor, for the Crown.

JUDGMENT.—The Sub-Divisional Magistrate convicted the accused, Nyan U, under section 379, Indian Penal Code, of the theft of a bull and sentenced him to two years' rigorous imprisonment for that offence, and at the same time convicted him under section 215 and sentenced him to two years' further rigorous imprisonment under that section for having agreed to accept a gratification of Rs. 30 for the return of the bull to the owners.

On appeal the Sessions Court upheld the double conviction, but reduced the sentence under section 215 to one year. The Sessions Judge overlocked the Lower Burma Ruling in *Twet Pe* v. *Emperor* (1) while referring to the previous Lower Burma decisions on the subject.

The Government Prosecutor has now been heard. In addition to the decisions mentioned in the Lower Burma case, he has drawn my attention to the case of the accused *Kudumbam* (2), where a Bench of the Madras High Court came to the same conclusion as that afterwards arrived at in *Queen-Empress* v. *Muhammad Ali* (3) and in *Twet Pe* v. *Emperor* (1) already cited, namely, that section 215, Indian Penal Code, is not intended to apply to the thief himself, and that where a man is convicted of the theft, he ought not to be also convicted under section 215 of taking a gratification to restore the stolen property.

(1) 4 L. B. R. 199; 14 Bur. L. R. 67; 7 Cr. L. J. 464.
(2) 1 Weir 196.
(3) 23 A. 81.

It is a remarkable fact that there should have been so few decisions on the subject, since it must have been a very common practice both in England and in this country for thieves to take money for restoring stolen property. But according to the learned Chief Judge of the Chief Court "the English decisions . . . . . are all in cases in which a person other than the actual thief was prosecuted for taking a gratification." This is the more remarkable because in *Reg.* v. *Edward* (4), the judgment of the Chief Justice in which is quoted Russell on Crimes, 5th Edition, Volume II, page 492, it would appear that the English Law does not really exempt from liability the actual thief.

On the face of section 215, Indian Penal Code, I should have been disposed to say that the object of the Legislature in the clause "unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence" was to exempt from liability to punishment a person who is acting honestly and not to exempt the thief. But I do not feel justified in going against the weight of authority embodied in the decisions above cited.

I must, therefore, hold that the double conviction of Nyan U was wrong. I set aside the conviction and sentence under section 215, Indian Penal Code.

Conviction set aside.

(4) 1 Cox. C. C. 32.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 587 OF 1914.

December 1, 1914.

Present:—Sir G. W. Shaw, KT., J. C.

NGA SHWE MYO—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Restrictions and limitations on sureties—Magistrate, duty of.

In proceedings under section 110 of the Criminal Procedure Code, Magistrates must not act arbitrarily, and any restrictions or limitations that they impose on sureties must be reasonable. [p. 999, col. 1.]

Mr. *L. K. Mitter*, for the Applicant.

Mr. *H. M. Lutter*, Government Prosecutor, for the Crown.

JUDGMENT.—Applicant, Shwe Myo, has been ordered to be bound over under section 17 of the Gambling Act, read with section 110 of the Code of Criminal Procedure, for one year in Rs. 100 with two sureties in the like amount, the sureties being respectable house-owners of Tebingan.

The applicant offered one surety, Po Min, who lived at Migyaungye, and another surety, Nga Tun, his brother-in-law. The Magistrate rejected the first because he did not live at Tebingan, and the second because he was applicant's brother-in-law.

The applicant seeks the intervention of this Court in revision on two grounds, *first*, that the evidence recorded was inadmissible, and, *secondly*, that the limitations and restrictions imposed on the sureties and the reasons assigned for rejecting the sureties offered were unauthorized and improper.

On the first point, the Magistrate undoubtedly recorded some evidence that was inadmissible. He has not paid due attention to the distinction explained in *Nga Hok* v. *King-Emperor* (1) and the Calcutta case there cited. But there was ample admissible evidence on the record to justify an order requiring security.

On the second point, the question whether Magistrates are authorised to impose restrictions and limitations on sureties offered under sections 107, 109 and 110, Code of Criminal Procedure, has formed the subject of several decisions of the Indian High Courts. They are not all quite in agreement on the surface. In some it has been held that it is not improper to specify the place of residence of the sureties, *e.g.*, *Queen-Empress* v. *Rahim Bakhsh* (2) where Sir John Edge, C. J., said: "It seems to me to be reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety," adding, however, "of course Magistrates must not act arbitrarily in these cases; they must be guided in each case by the facts of the case." In others

(1) U. B. R. (1897—0), I, 228.
(2) 20 A. 206; A. W. N. (1898) 21.

it has been held that a Magistrate was not justified in refusing the sureties because they lived at a great distance and, therefore, could not be able to exercise due supervision, *e.g.*, *Abinash Malakar* v. *Empress* (3), where Justices Prinsep and Stanley said: "Cases may constantly occur in which a person who is in a position to give security to any amount on behalf of another may live at a considerable distance and yet he may be prepared to pledge his property on some assurance received from that other person. It is not necessary that he should live in the neighbourhood and always keep his eye on the principal."

On consideration my opinion is that there is no real conflict.

There is a general consensus that, as Sir John Edge said in the case just quoted, Magistrates must not act arbitrarily, as for example, by requiring sureties to live within one mile of the residence of the person for whom they are to stand surety or that they are to be landholders or that they are not to be relations. The circumstances of each case must be considered, and any restrictions or limitations must be reasonable.

As it has been said in connection with the amount of security, "the imprisonment is provided as a protection to society against the perpetration of crime by the individual, and not as a punishment for a crime committed, and being made conditional on default of finding security, it is only just and reasonable that the individual should be afforded a fair chance at least of complying with the required condition of security" [*see Barkat* v. *Empress* (4)].

In the present case, I do not think that the Magistrate was justified in requiring that the sureties must be residents of Tebingan, and I also consider that he ought not to have refused to accept either of the two sureties on the grounds stated.

So much of the order as restricts the sureties to residents of Tebingan is set aside, and the order rejecting the sureties above-named is also set aside. The Magistrate is directed to accept them and cause a bond to be signed, and the applicant released.

(3) 4 C. W. N 797.

(4) 24 P. R. 1900 Cr. 24 P. L. R. 1901.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 580 OF 1914.

CRIMINAL REVISION PETITION No. 490 OF 1914.

January 21, 1915.

Present:—Mr. Justice Spencer.

SOLAIMUTHU PILLAI—COMPLAINANT—PETITIONER

versus

MURUGAIH MOOPAN—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 182, 211—*"Charge", what amounts to—Prosecution for giving false information, where can be instituted—Criminal Procedure Code (Act V of 1898), ss.* 195, 203—*Right of complainant to produce witnesses.*

A mere suggestion to the Police that certain houses should be searched because there is reason to suspect the conduct of the owners of those houses does not amount to a "charge" within the meaning of section 211 of the Indian Penal Code. [p. 999, col 2.]

A prosecution under section 182 of the Indian Penal Code can be instituted only after sanction has been obtained under section 195 of the Criminal Procedure Code or on the complaint of the public servant to whom the false information is given. [p 1000, col 2.]

A Magistrate should not dismiss a complaint under section 203 of the Criminal Procedure Code without giving the complainant an opportunity of proving his complaint. [p. 1000, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Tanjore, in D. Dis. 436A Magisterial of 1914, preferred against that of the Court of the first Class Sub-Divisional Magistrate of Kumbakonam in Calendar Case No. 38 of 1914.

Mr. *S. Muthia Mudaliar*, for the Petitioner.

Mr. *T. Narasimha Aiyangar*, for the Respondent.

ORDER.—The complaint was that the accused committed offences under sections 182 and 211 of the Indian Penal Code.

As regards the latter offence the Sub-Divisional Magistrate rightly observed that there was no "charge" of theft. The charge to the Police was against persons unknown.

The suggestion made to the Police, which the inquiry under section 202 of the Code of Criminal Procedure shows to have been made, that the Police should search certain houses, because there was reason to suspect the conduct of the owners of those houses was not a "charge" within the meaning of section 211 of the Indian Penal Code, [see

Rayan Kutti v. *Emperor* (1)]. As regards the offence under section 182 of the Indian Penal Code the reasons given by the Magistrate for dismissing the complaint under section 203 of the Code of Criminal Procedure were not sound. The complainant stated: "I have witnesses to prove that the case is false." The Sub-Magistrate to whom the complaint was referred for investigation under section 202 appears to have examined no witnesses. Then the Sub-Divisional Magistrate observes: "From the records I do not consider that there will be satisfactory evidence that he deliberately gave false information to the Police." This is mere speculation as to the evidence that might be forthcoming at the trial. I think the Magistrate ought to have given the complainant an opportunity of proving his complaint. But there was another ground for not proceeding. It is conceded that no sanction to prosecute was produced and it is clear from section 195 of the Code of Criminal Procedure that prosecutions under section 182 of the Indian Penal Code must be instituted on the sanction or the complaint of the public servant to whom the false information is given.

I, therefore, must decline to interfere.

This petition is dismissed.

Petition dismissed.

(1) 26 M. 640; 1 Weir 190.

CALCUTTA HIGH COURT.
CRIMINAL REVISION PETITION No. 1274 OF 1914.
September 7, 1914.
Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.
H. MEREDITH—ACCUSED—PETITIONER
versus
SANJIBANI DASSI—COMPLAINANT—OPPOSITE PARTY.

Writ of possession, execution of—Presidency Small Cause Courts Act (XV of 1882), ss. 41, 43—Forcible removal, bailiff's power of—Civil Procedure Code (Act V of 1908), O. XXI, r. 35—Hurt—Findings, nature of—Graver charges failing, smaller ones how far sustainable.

Under the provisions of either the English Common Law or the Code of Civil Procedure a reasonable degree of force may be used in the execution of a writ of possession in order to the removal of persons bound by the decree and refusing to vacate. [p 1003, col. 1.]

In a writ of possession the order to "give possession" authorises and requires the removal by bailiff of all persons from off the premises by force if need be. [p. 1003, col. 1.]

A Magistrate should come to a definite finding free from ambiguity and he should omit from his judgment what is mere conjecture following the principle that to say that a thing may possibly have happened is not to find that it did happen. [p. 1003, col. 1.]

In a criminal case the witnesses having been disbelieved with regard to the graver charges brought against the accused, cannot be safely believed with regard to the small residuum of what the Magistrate conceives to be truth. [p. 1004, col. 2.]

The procedure followed in the Small Cause Court and in the Courts of the Presidency Magistrates commented upon. [p. 1004, col. 2 p. 1005, col. 1.]

Rule issued by this Court against the conviction and sentence of the accused by the Chief Presidency Magistrate, Calcutta, under section 323 of the Indian Penal Code, to pay a fine of Rs. 50, dated the 20th of May 1914.

The *Advocate-General* and Mr. *P. L. Roy*, Counsel, and Mr. *J. W. Chippendale*, for the Petitioner.

Babus *Manmatha Nath Mukherjee*, *Heramba Chandra Guha* and *Satindra Nath Mukherjee*, for the Opposite Party.

JUDGMENT.—In this case the accused, petitioner one H. Meredith, a bailiff of the Small Cause Court, has been convicted under section 323 of the Indian Penal Code and sentenced to pay a fine of Rs. 50.

It appears that at about 4 P. M. on the 31st of January 1913, he was entrusted with a writ or warrant (Exhibit M) which required and authorised him "to give possession" to the decree-holder Kali Charan Pal, of certain premises then in the occupation of the judgment-debtor, Purna Chandra Pal. As the warrant was to be executed that very day, he forthwith proceeded on his errand, reached the premises (No. 4, Jagannath Suri's Lane) at or about 4-30 to 1-45, and, as he reported on the 21st, succeeded "after considerable difficulty" in giving vacant possession to the decree-holder at five minutes after 6.

At 11-45 P. M. a complaint was lodged against him and his companion, one Bomswitch at the neighbouring *thana*. The complaint was made by the judgment-

debtor, Purna Chandra Pal, or by the judgment-debtor's wife, one Sanjibani Dasi, and was summarised in the *thana* 'Daily Register of Cases' as follows:

"Assault (*i.e.*, on Sanjibani), abrasion marks (*chila dag*) on both elbows, abrasion mark on right knee, and pain all over the body complained (or spoken) of: (she) does not want to go to hospital."

On the following day, the 1st of February the woman Sanjibani presented a complaint before the Chief Presidency Magistrate. The complaint recites that when required by the bailiffs (Bomswitch was then supposed to be a bailiff or assistant bailiff) to leave, the husband represented that having had no previous notice he was not prepared to move out immediately, and prayed for 24 hours' time. It then proceeds to say that being thereby enraged the two accused (1) threw out the household articles with the help of coolies, (2) broke the kitchen utensils and destroyed the food then under preparation, (3) had the complainant's child removed from her arms and carried out by a peon, (4) that the accused Meredith next caught hold of her by the hand, forcibly dragged her out of the house, and pushed her, and (5) that, when (in consequence of the push) she fell, both accused kicked her.

The complaint next refers to a medical examination by a Doctor, and a certificate furnished by him and also to an information "sent after some time to the local *thana*." It may be here observed that to the charges made in the complaint the husband and other prosecution witnesses at the trial added the further charge that at the time in question both accused were drunk.

The accused Meredith's defence is to be found in the report submitted to the clerk of the Small Cause Court on the 3rd of February. It may conveniently be mentioned here that on the 1st of February Meredith had reported verbally to the clerk, Mr. Nuttall, and, on his orders, had submitted a written report which cannot now be found. That such a report was, however, submitted is clear from the evidence of Nuttall and also from the evidence of Mr. J. G. Gupta, now an Additional Judge and at that time Registrar of the Court. Mr. Gupta, being of opinion that the report was lacking in detail, required the submission of a further report and this order resulted in the submission of the report of the 3rd February, Exhibit N. That the report of the 1st February should be missing is much to be regretted, but for present purposes it is sufficient to say that it does not appear that the accused Meredith is in any way responsible for the loss.

In the report of the 3rd February the bailiff states that the judgment-debtor did ask for time, that the decree-holder refused to listen, that while coolies were removing the household properties, a Pleader named K. D. Mitter appeared, said that 24 hours' notice should have been given and directed the woman not to leave. The bailiff proceeds to say that he then sent four messengers one after the other to the local *thana* for assistance, proceeded with the removal of the properties, and had a *gharry* fetched for the women of the house. On the arrival of the *gharry* the complainant went to the door, whereupon the bailiff stepped behind her. He continues that at the instance of the Pleader already mentioned first the woman and then the judgment-debtor, her husband, tried to push past him, and that when he turned to shut the door he was struck two blows on the head from behind.

In the report no reference is made it may be observed, to the incident of the child.

The case came on for trial before Mr. Keays, the 2nd Presidency Magistrate, who on the 3rd of May 1913 delivered judgment acquitting the accused. For the purpose of completing this narrative it may be mentioned that his findings were (1) that the allegation that the accused were drunk had no foundation in fact, (2) that the bailiff sent at least three messengers to the local *thana* for assistance, (3) that the evidence regarding the alleged kicking could not be accepted and (4) that he, therefore, could not act on the evidence to the effect that the accused bailiff had given the complainant a push. In fact he appears to have been of the opinion that the defence was true and that the trifling injuries sustained by the complainant were sustained in her efforts to push her way into the house which she had left.

Against Mr. Keays' order of acquittal the

complainant moved this Court, which on the 23rd of October set aside the order of acquittal as against Meredith and directed his re trial mainly on the ground that the trying Magistrate had not inquired into the authenticity of a certain letter of complaint (now marked Exhibit 1) said to have been written by Purno, signed by Sanjibani and taken to the *thana* by Purno at 7 to 7-30 on the evening in question.

The case against Meredith accordingly came on for re-trial before the Chief Presidency Magistrate, Mr. Swinhoe, who on the 20th of May 1914 delivered judgment convicting the accused and sentencing him as we have already stated.

Mr. Swinhoe's findings are to the effect (1) that the prosecution story as to the letter, Exhibit 1, is substantially true, (2) that the accused bailiff was not drunk or under the influence of liquor, (3) that the bailiff experienced considerable difficulty in ejecting the women of the house, more particularly the complainant, and accordingly sent three or four messengers to the *thana* for assistance, (4) that in the hope of inducing the mother to go quietly the bailiff first had the child taken out, (5) that this device failing he became exasperated and pulled or dragged the woman out of the house and lastly (6) pushed or jerked her from him in such a manner as to cause her to fall and so receive the injuries found on her elbows and knee.

He further found that the accused did not deliberately kick the complainant, but having come to this distinct finding he went on to say. "I think it quite possible that on seeing her fall he went up to ascertain what had happened to her and pushed her more than once with his foot to make her rise."

Against the conviction and sentence based on these findings, the accused moved this Court on the 24th July and being dissatisfied with the manner in which the case had been tried, we issued the present Rule in order to our examination of the evidence and our consideration of the question whether the accused had in fact exceeded his lawful authority in the execution of the warrant entrusted to him.

We have now been taken over the whole of the evidence and have had the advantage of hearing the learned Advocate General for the petitioner, and Babu Manmatha Nath Mukerji on behalf of the complainant, opposite party.

The warrant of possession, it is to be premised, was one issued under the provisions of sections 41 to 43 of the Presidency Small Cause Courts Act XV of 1882, is in the English Common Law form, and "requires and authorises" the bailiff "to give possession."

The contentions of the learned Advocate-General are:— (1) that to the execution of this warrant in the Presidency town of Calcutta the provisions of the English Common Law are applicable, (2) that on the refusal of the complainant to vacate, the accused bailiff was justified, and indeed, in order to complete the execution of the warrant, was required to remove the complainant from off the premises by the use of such force as might be found necessary, (3) that in dragging or pulling the complainant out of the house and pushing or jerking her so as to cause her to fall, the bailiff did not in fact use excessive or unnecessary violence, (4) that the passage in the judgment regarding the touch or push with the foot does not embody a finding and lastly (5) that the more serious allegations of the prosecution having been disbelieved, no findings adverse to the petitioner should have been arrived at.

On the other hand on behalf of the complainant, opposite party, it is contended (1) that by reason of the provisions of section 48 of the Presidency Small Cause Courts Act, the provisions of the Code of Civil Procedure (that is Order XXI, rule 34) are applicable to a writ or warrant such as that now in question, (2) that by reason of the omission from the writ or warrant of the words "and you are hereby authorised to remove any person bound by the decree who may refuse to vacate the same," being the words used in warrant issued under Order XXI, rule 35 (*vide* Form No. 11, first Schedule, Appendix E), the accused bailiff was not justified in using force, and on show of opposition or resistance should have proceeded in the manner indicated in Order XXI,

rule 97, (3) that in any view of the case in "pushing or jerking the complainant from him in such a manner as to cause her to fall" and thereafter "in pushing her with his foot to make her rise," he used unnecessary and improper violence.

Whether the provisions of the English Common Law or of the Code of Civil Procedure are applicable to the writ or warrant now in question need not, we think, be decided in the present case. Under the provisions of either law in the execution of a writ of possession a reasonable degree of force may be used in order to the removal of persons bound by the decree and refusing to vacate. That the complainant, a dependent of the judgmant-debtor and asserting no independent right to the premises was bound by the decree is not questioned. In a writ of possession issued under the English Common Law words expressly authorising forcible removal are not inserted, but it is settled law that the order to "give possession" authorises and requires the removal of all persons from off the premises by force, if need be. In the Small Cause Court it appears this form is followed and even if the Civil Procedure Code be applicable. the omission of the words expressly authorising removal is, in our opinion, immaterial. Order XXI, rule 97, merely provides an additional or alternative remedy.

We are then unable to accede to the complainant's contention that the trying Magistrate has found as a fact that after the complainant had fallen the accused touched or pushed her with his foot. To say that a thing may possibly have happened is not to find that it did happen. The Magistrate, who was evidently not prepared to come to a definite finding that the accused touched the complainant with his foot, should have said so without ambiguity, and should have omitted from the judgment what is mere conjecture.

We are then left with the finding that "on pulling or dragging the complainant out, the accused pushed or jerked her from him in such a manner as to cause her to fall and receive the injuries found on her knee and elbows."

The complainant having obstinately refused to leave, and the hour being late, it has not been contended before us that in pulling her out of the house by her hand, the bailiff, in the view of the law we have taken did more than he was justified in doing. But it is contended and no doubt properly contended that, the woman being once on the roadway, it was highly improper for the accused to proceed further to "push or jerk her" so as to cause her to fall. It is, however, not disputed that between the dragging and the so-called jerk there was no interval and that the whole represented one continuous act. In effect then it comes to this that when the accused let go his hold, the force used for the purpose of pulling out the resisting complainant was sufficient to cause her to fall. In cases such as this it is impossible to calculate and apply with the utmost nicety the degree of force necessary and yet not more than sufficient. Even, therefore, on the Magistrate's own findings we think that the accused should not have been convicted.

But we should further say that we are not satisfied that the Magistrate's findings are correct. We need not discuss the evidence at great length, but we may observe that the Mag'strate has accepted the prosecution story with regard to Exhibit 1, the letter of complaint said to have been taken to the *thana* at 7 or 7-30. That letter is of importance mainly from the point of view of the charges of drunkenness and kicking, but the Magistrate's estimate of the value of this letter has doubtless largely coloured his view of the rest of the evidence.

We are of opinion that he should not have relied upon this letter. It is not referred to in the complaint of the 1st of February. It was not put to the prosecution witnesses in their examination-in-chief. It was mentioned for the first time on the 4th of April in a volunteered statement made by Purno during his cross-examination at the 8th hearing before Mr. Keays, and was not produced before the 10th hearing on the 10th of April.

In the *Thana* Case Register there is no independent entry of the letter and of its receipt at 7 or 7-30. No doubt in the "*Thana* Bengali Case Register" against the entry of Sanjibani's complaint at 11-45 in the column intended for the signature of complainant, above the signature of Purno Chandra Pal appears the word "*chithi*" (letter), but in the English register submitted to the Deputy Commissioner at

midnight, the entry in the corresponding column is merely a reference to the Bengali register implying that the signature would there be found. There is no reference to any letter, though according to the correct practice, no doubt not invariably followed, the word "*chithi*" or letter should have been reproduced in the English register. Moreover the signature of Sanjibani on the letter is much more regular and more formed than that on the complaint, though in the agitation following upon the occurrences of the evening, the reverse was to be expected. No doubt the *thana* Sub-Inspector has supported the prosecution in respect of the letter, but it is to be observed that by reason of a stormy interview between him and Meredith, who went to the *thana* at about 6-30 to complain of the Sub Inspector's failure to send assistance, the Sub-Inspector has obviously reasons for irritation against the accused and it is on his evidence and on a belated entry relating to Meredith's visit that the discredited charge of drunkenness largely rests.

There has also been some controversy as to the medical certificate spoken to by the Medical Practitioner (L.M.S.) Phanindra Kumar Gupta. Such certificates, when filed with complaints in the Chief Presidency Magistrate's Court, it appears, are stamped and then returned for production at the trial. In the present case the certificate, Exhibit 3, was not produced at the trial before Mr. Keays until the 29th of March and it is suggested that it is not the certificate first granted and referred to in the complaint. As, however, it is not disputed that there were scratches on the complainant's elbows and one knee, the certificate is of importance only in so far as the reference therein to "contusions on the back and loins" (reduced in the Doctor's deposition to an "oval contusion an inch in size below the right shoulder") supports the discredited charge of kicking; we need not enter into this question. We may, however, take the opportunity of deprecating the return of such documents when once filed.

We may next observe that the trying Magistrate has apparently overlooked the fact that a sanction for the prosecution of the witness Krishna Dhan Mitter had been granted by the Chief Judge of the Small Cause Court and that this witness and the other witnesses concerned in him cannot, therefore, be regarded as wholly disinterested.

Lastly we have to say that the witnesses having been disbelieved with regard to the graver charges brought against the accused, for instance, the charges that he was drunk in the execution of his duty and that having thrown the woman down, he deliberately stamped upon and kicked her, we are of opinion that they cannot be safely believed with regard to the small residum of what the Magistrate has conceived to be truth.

For these reasons we make this Rule absolute, acquit the petitioner and direct that the fine, if paid, be refunded.

We might end our judgment here, but we are of opinion that in the public interests it is our duty to comment on the facts, brought to our notice in this case, in connection with the procedure followed both in the Small Cause Court and in the Courts of the Presidency Magistrates.

The arrangements which in the Small Cause Court permit of the disappearance of papers and do not permit of their being traced to some officer or person who can be held responsible must, in our opinion, be defective.

We have next to observe that in taking with him as an assistant one Bomswitch who, it appears, is not a bailiff or assistant bailiff or other Court or Government officer, Meredith's conduct, if not permitted by the rules, of the Court, was reprehensible. If permitted by the rules of the Court, the practice, if it be practice, should, we think, be strictly forbidden.

Lastly, the evidence shows that in this case the writ of possession, to be executed on the 31st January, was not handed over to the bailiff until at or about 4 P. M. of that day. The bailiff, it appears, protested but the Clerk of the Court insisted upon immediate execution. It would seem to be obvious that a writ of this nature, involving in many cases, as in this case, the ejectment without notice of persons in peaceful possession of their houses should be put into execution at a much earlier hour. To do otherwise is unfair to the bailiff, must necessarily

cause much gratuitous hardship, and so bring the Court into disrepute.

Turning now to the Courts of the Presidency Magistrate we have to say that we view with grave concern the procedure that has been followed in this case. In the Court of the second Presidency Magistrate the trial began on the 12th of March 1913 and did not close till the 3rd of May. In the course of this one month and 22 days there were so many as 17 hearings for the examination of witnesses, on each occasion 1, 2 or at most 3 witnesses being examined or cross-examined either in whole or in part.

In the Court of the Chief Presidency Magistrate the re-trial opened on the 5th December 1913 and judgment was not delivered until the 20th of May 1914. The trial then extended over a period of 5½ months, and in the course of the 5½ months the case was put down for hearing on as many as 38 days. At 25 hearings, lasting on many occasions apparently for not more than 10 or 15 minutes, one or more witnesses were examined or cross-examined mostly only in part. Arguments similarly were spread over portions of six days.

We are aware that the Presidency Magistrates have much to do, and it is possibly for this reason that the procedure we have illustrated has been adopted. We cannot, however, too strongly condem this piecemeal method of dealing with cases. So far from economising time, by necessitating the preparation of an unnecessarily voluminous record, by giving to parties and witnesses opportunities for consultation and for the connection and fabrication of evidence, and otherwise, the system must necessarily result in much waste of public time, while entailing upon parties intolerable inconvenience, loss of time and expense.

The procedure is further prejudicial to the course of justice, inasmuch as the excessive and in many cases impossible cost involved must necessarily deter parties from seeking the best legal advice and assistance. Moreover it impairs the value of the findings ultimately arrived at, inasmuch as in a case dealt with in this manner and proceeding *pari passu* with a large number of cases similarly treated it cannot be expected that when proceeding to judgment the Magistrate will have that lively recollection of the evidence so essential to a just conclusion.

We trust that the Presidency Magistrates will now abandon a procedure so calculated to bring odium upon their Courts and will so arrange their business as to enable them to set apart for lengthy cases certain specified days in each week. A trial once opened should then proceed throughout the day and, as far as possible, from day to day until completed. If so dealt with the present case, which is essentially a simple case of hurt, should have been disposed of, and satisfactorily disposed of, in two or at most three hearings.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 8 OF 1915.

March 29, 1915.

Present:—Mr. Justice Piggott.

Rana DHARAM SINGH AND ANOTHER—APPLICANTS

versus

JOTI PRASAD—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 209, 210, 213—*Inquiry before commitment—Discretion of Magistrate to discharge accused.*

When a Magistrate has heard the evidence for the prosecution with entire disbelief, where he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* where, after examining certain witnesses named on behalf of the accused, he comes to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses he is well within his discretion in discharging the accused and not committing him to the Sessions. [p. 1006, col. 2; p. 1007, col. 1.]

Criminal revision against an order of the Magistrate of Saharanpur.

Mr. *C. Dillon* (with him Messrs. *Boys* and *Nihal Chand*), for the Applicants.

Messrs. *W. Wallach* and *Satya Chandra Mukerjee*, for the Opposite Party.

Mr. *Ryves* (Government Advocate), for the Crown.

JUDGMENT.—As long ago as the 27th of January 1914 a serious riot, accompanied with loss of life, took place at a certain village in the Saharanpur District. A number of persons were put on their trial and convicted of offences punishable under sections 148

and 304/149, Indian Penal Code. They appealed to this Court and their appeals were disposed of by an order dated the 27th July 1914, by which the appeals of three of the appellants were allowed and those of the remaining appellants dismissed, subject to some modification of the sentences passed. In the course of the inquiry and trial ending with the Appellate judgment of this Court above referred to, a question arose as to whether there was not reason to suppose that the persons put on their trial in that case had been acting under the instigation of other and more influential persons, who, though not present at the riot themselves, had been guilty of abetment of the same within the meaning of the Indian Penal Code. An inquiry was ordered against two persons, Rana Dharam Singh and Durga Prasad, and one might have hoped that this inquiry would long since have been terminated in the conviction of these persons, or in their acquittal, or in their final discharge. The proceedings were unfortunately delayed by an application for transfer made to this Court, the groundlessness of which has been sufficiently exposed by the actual result of the subsequent proceedings. This Court having refused to interfere, the inquiry against these two persons came before a joint Magistrate of ability and experience, who had not long previously been exercising the powers of a Sessions Judge. He recorded the evidence for the prosecution, examined the accused persons and at their request, exercised the discretion conferred upon him by section 212 of the Code of Criminal Procedure to summon and examine some of the witnesses named in the list given to him on behalf of the said accused. As the result of his inquiry he discharged both the accused. An application was thereupon filed in the Court of the District Magistrate of Saharanpur by a gentleman of the name of Rai Bahadur Lala Jyoti Prasad, who appears to have some interest in the success of this prosecution, asking the District Magistrate to exercise the powers conferred upon him by section 436 of the Code of Criminal Procedure to order Rana Dharam Singh and Durga Prased to be committed for trial before the Court of Session. The matter was again brought before this Court on an application for transfer. Unfortunately the proceedings in this Court were delayed by various accidental circumstances, and it became a question whether this proceeding could be allowed to drag its course much longer without scandal to administration of justice. I finally called for the record of the proceedings in the Joint Magistrate's Court and gave notice both to the prosecution and to the defence that I proposed to take the whole matter up in the exercise of the revisional jurisdiction of this Court. I have to-day examined the record, considered the evidence in detail and heard the arguments addressed to me on both sides. There has been some discussion also on a point of law which is supposed to arise with regard to the discretion of a Magistrate in conducting an inquiry preliminary to commitment. The law, so far as this Court is concerned, seems to have been definitely laid down in the case of *Fattu* v. *Fattu* (1), where some older cases of this Court are referred to and considered It has been urged upon me in argument that the learned Judges of the Calcutta High Court, as for instance in the case of *Sheobux Ram* v. *Emperor* (2), have taken a somewhat different view regarding the discretion of a Magistrate under the circumstrnces stated. One learned Judge of that Court laid it down in effect that a Magistrate conducting such preliminary inquiry had only to consider whether there was evidence against the accused persons upon which a Jury could lawfully convict them of the offence alleged against them, and if he found that this was so, had no discretion but to commit the accused for trial. This does not seem to me to follow from the provisions of sections 209 or 210 of the Code of Criminal Procedure, and seems scarcely consistent with the provisions of the second clause of section 213 of the same Code. The Bombay High Court in *In re Bai Parvati* (3) has held in express terms that, where a Committing Magistrate finds that there is no evidence whatever, or that the evidence tendered for the prosecution is totally unworthy of credit, it is his duty under section 209 of the Criminal Procedure Code to discharge the accused. In my opinion when a Magistrate has heard the

(1) 26 A. 564; A. W. N. (1904) 125; 1 A. L. J. 292; 1 Cr. L. J. 519.
(2) 9 C. W. N. 829; 2 Cr. L. J. 534
(3) 8 Ind. Cas 631; 35 B. 163; 12 Bom. L. R. 923; 11 Cr. L. J. 692.

evidence for the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses, he is well within his discretion in discharging the accused. The question then before me is merely whether there has been a wrong exercise of this discretion in the present case. By calling up the matter in revision I have virtually taken upon myself the exercise of the discretion conferred by law on a District Magistrate or a Court of Session. My reasons for doing this I have already explained. I think it is expedient that this matter should be disposed of once for all, either by my directing the commitment of Rana Dharam Singh and Durga Prasad to the Court of Session or by an order dismissing the application of Rai Bahadur Lala Joti Prasad against the order of discharge. In my opinion the reasons given by the Magistrate in the present case for discrediting the prosecution evidence are sound and convincing. As regards some of the witnesses, incidents had occurred in the course of the inquiry by which their evidence was thoroughly discredited, and it would have been something of a scandal to the administration of justice to permit the same witnesses to repeat their false evidence, with necessary corrections and amendments, in the presence of the Sessions Court. The witness Harbans was asked in cross-examination a question so entirely relevant and proper that, after perusal of his evidence-in-chief, this was the very first question which presented itself to my mind and I enquired whether it had not been put to the witness. After fencing with it for a while, the witness ended by refusing to answer it at all. It would have been most improper to have allowed this witness to appear again as a prosecution witness against these accused persons, and the Joint Magistrate would have exercised a sound discretion in taking immediate notice of the gross contempt of Court committed by him. During the examination of another witness an episode occurred from which the Joint Magistrate inferred, and in my opinion rightly inferred, that the prosecution witnesses were being improperly coached outside the Court-room with reference to what was going on inside. These are sufficiently weighty circumstances for consideration. Apart from them I am satisfied that the evidence which the Joint Magistrate declined to believe is unworthy of credit. The witnesses are not speaking of anything which actually occurred in their presence. Whether there was or was not a gathering at the building which they speak of as the *zemindar's dera* on the night to which their evidence refers, I am confident that these witnesses were not present at that gathering and did not see or hear what they profess to have done. The order of discharge in this case is a very proper one and is not to be interfered with. It may be taken that I have exercised the powers of this Court under section 526, clause (3), and also under section 439 of the Code of Criminal Procedure to call up the pending application of Rai Bahadur Lala Joti Prasad from the Court of the District Magistrate of Saharanpur to this Court, and my order thereon is that this application be, and it is hereby, dismissed.

Application for prosecution dismissed.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 86 OF 1914.

October 10, 1914.

Present:—Sir G. W. Shaw, J. C.

NGA TUNE—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 322, 325—Voluntarily causing grievous hurt—Magistrate, duty of.

A Magistrate or Court dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has been caused, but if it has been caused, whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under section 325. [p. 1008, col. 2.]

Mr. *J. C. Chatterjee*, for the Applicant.

JUDGMENT.—Applicant, Tun E, was convicted under section 325 of the Indian Penal Code of voluntarily causing grievous

hurt to one Ba Gyaw and was sentenced to six months' rigorous imprisonment and a fine of Rs. 50, or, in default, two months' further rigorous imprisonment. The Sessions Court on appeal confirmed the conviction and sentence.

I think the Magistrate was right in finding that applicant struck Ba Gyaw. Two independent witnesses corroborated Ba Gyaw to that extent, and although their statements in some respects were not satisfactory, there was actually no credible evidence to the contrary. The other witnesses, who were present and were related to the applicant took care not to say how Ba Gyaw came to fall. They must have seen what happened and the only explanation is that applicant, struck Ba Gyaw.

The witnesses for the defence were not worthy of credit and it was doubtful whether they were present at all.

The medical witness, the Sub-Assistant Surgeon, stated that the injuries might have been caused by a fall, but he was not questioned precisely as to whether all the injuries could have been caused by one fall. There were actually two contused wounds and one contusion on the back of the head behind the left ear. Assuming it to be possible for all these injuries to have been caused by one fall, this possibility does not nullify the evidence that applicant struck with a stick.

As regards the weapon used, Ba Gyaw said that it was the Exhibit I, a "washing-bat" 21½ inches long and from 1 inch to 2 inches wide, weighing 50 tolas. A Policeman's truncheon weighs 36 tolas. The stick belonged to the house where the assault took place, but there was no evidence besides Ba Gyaw's own statement to show that applicant used this stick.

Mi Thet Su said that applicant struck with a stick, but she could not say what stick it was.

Mi Shwe Mi also implied that stick was used, but did not say what stick it was.

I do not consider, therefore, that the Magistrate and the Sessions Court were justified in finding that the weapon which the applicant used was the Exhibit I. But if it was used, I still do not consider that it necessarily followed that applicant was liable to punishment under section 325.

The Magistrate said that the hurt was grievous because the injuries, endangered Ba Gyaw's life. But there was no evidence whatever to show that Ba Gyaw's life was endangered. The Magistrate examined the medical witness very imperfectly; he allowed him to say that slight bleeding from the left ear, the left nostril and the mouth and deafness and a discharge of air from the left ear *might* be due to fracture of the base of the skull. He did not ask him whether such symptoms necessarily implied a fracture of the skull or could be explained otherwise. If the Sub-Assistant Surgeon was unable to express an opinion on this point, the Magistrate ought to have examined the Civil Surgeon who had inspected the injuries and, any how, could have given an expert opinion on the point whether there was or was not a fracture of the base of the skull. Actually there was no evidence that a fracture was caused and the Sessions Court was not justified in finding that there was a fracture.

Again, assuming that there was a fracture of the skull, this was not sufficient in itself to constitute an offence under section 325. As I have to point out almost every day to Magistrates and even to Sessions Judges, the provisions of section 322, Indian Penal Code, are very precise and incapable of misconstruction. A Magistrate or Court dealing with a charge of voluntarily causing grievous hurt must consider and decide not only whether grievous hurt has been caused, but if it has been caused, whether the accused intended or knew himself to be likely to cause grievous hurt. If he intended or knew himself to be likely to cause simple hurt only, he cannot be convicted under section 325. There is nothing to show that the applicant intended to cause grievous hurt, and I do not think that there is sufficient material to justify a finding that he knew himself to be likely to cause grievous hurt even if he used the stick, Exhibit I, which, as I have said already, is in my opinion open to doubt.

The conviction is altered to one of voluntarily causing hurt, section 323, Indian Penal Code.

The applicant suffered two months imprisonment before he was released on bail. The sentence of imprisonment is reduced to the imprisonment already undergone.

END OF VOLUME XXVIII.

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